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A TREATISE  
ON THE  
LAW OF CORPORATIONS

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VOLUME THREE







A TREATISE  
ON THE LAW OF  
CORPORATIONS  
HAVING A  
CAPITAL STOCK

BY  
WILLIAM W. COOK  
OF THE NEW YORK BAR

SEVENTH EDITION

IN FIVE VOLUMES

VOL. III

BOSTON  
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1913



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## PART IV.

### FRAUDS—ULTRA VIRES ACTS—INTRA VIRES ACTS— NEGLIGENCE AND IRREGULAR CONTRACTS OF DI- RECTORS, STOCKHOLDERS, PROMOTERS, AND AGENTS.

#### CHAPTER XXXIX.

#### FRAUDULENT ACTS OF DIRECTORS, MAJORITY OF STOCK- HOLDERS, AND THIRD PERSONS.

- A. THE OCCASION, SCOPE, AND PURPOSE  
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## A. THE OCCASION, SCOPE, AND PURPOSE OF THE SUBJECT HEREIN.

§ 643. *The cause and occasion of this subject.* — Perhaps the most striking feature of the modern era of industrial development is the growth, wealth, and power of corporations. They have built the railways, dug the canals, established the factories, carried the ocean commerce, and assumed control of the industries of Europe as well as of America. They have absorbed a large part of the surplus wealth of the world, and have been the means of making great profits. But these gains and profits have not always been honestly preserved and administered for the benefit of those who are entitled thereto — the stockholders of the company. Corporations, with their vast capital stock and their great income, have proved to be a temptation to corporate officers. These companies have been found to be efficient instruments of fraud and illegal gain. Corporations have become insolvent, and stockholders have lost their investments, while individuals have become millionaires.

The expense, difficulty, and delays of litigation; the power and wealth of the guilty parties; the secrecy and skill of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all tend to discourage the stockholders, and to encourage and protect the guilty parties.

In England, ever since the year 1720, when the "South Sea Bubble" exploded and unsettled the finances of the kingdom, there have been many instances of "bubble companies" and dishonest promoters.

In America the cases involving a breach of trust by the directors arise generally out of the management of corporations, and not in their formation.

It is the purpose of this part of this work to explain, so far as is possible, the methods of those frauds, and to point out the remedy for the wrong.

§ 644. *The three classes of stockholders' wrongs herein* — *The corporation is ordinarily the party to remedy these wrongs.* — Stockholders' wrongs, arising from a breach of trust by directors or a majority of the stockholders or third persons, are clearly divisible into three classes. They are: first, fraudulent acts;<sup>1</sup> second, *ultra vires* acts;<sup>2</sup> third, negligence of corporate directors.<sup>3</sup>

There is another class of grievances — that of internal dissensions in the corporation and dissatisfaction with its policy and acts. These, however, are *intra vires* of the directors or majority of the stockholders. The law gives no remedy for such dissensions since the stockholder has

<sup>1</sup> This is the subject of this chapter.

<sup>3</sup> See ch. XLII, *infra*.

<sup>2</sup> See ch. XL, *infra*.



the corporate elections as a remedy. The majority are to rule so long as they do so without fraud and within the powers of the corporation.<sup>1</sup> So also the decision of the board of directors is binding as regards the usual suits which a corporation might bring against third persons.<sup>2</sup>

It is to be borne in mind that frauds, *ultra vires* acts, and acts of negligence are injuries to the corporation; and the corporation is naturally the party to bring suit to rectify them. These frauds, *ultra vires* acts, and negligence of directors do not affect the stockholders directly; but they affect the stockholders indirectly by decreasing the corporate assets, and thereby affecting the value of the stock. Accordingly it is the duty of the corporation to bring suit to remedy these wrongs, just as it is the duty and right of the corporation to bring suit to remedy an ordinary trespass, conversion, or fraud, whereby third parties injure the corporate property and interests. That a corporation may bring suit to remedy the frauds, *ultra vires* acts or negligence of its trustees or directors was the decision of Lord Chancellor Hardwicke, in 1742, in the case of *The Charitable Corporation against Sutton*.<sup>3</sup>

§ 645. *But, the corporation failing to do so, a stockholder may bring the action — Libel.* — Notwithstanding this fact, however, that it was the duty and right of the corporation to bring suit to remedy these wrongs, it gradually became apparent that frequently the corporation was helpless and unable to institute the suit. It was found where the guilty parties themselves controlled the directors and also a majority of the stock, that the corporation was in their power, was unable to institute suit, and that the minority of the stockholders were being defrauded of their rights and were without remedy; and it became apparent that there was a wrong which had no remedy. The time came when the minority of the stockholders of a defrauded corporation — the corporation itself being controlled by the guilty parties — were given a standing in court for the purpose of taking up the cause of the corporation, and, in its name and stead, of bringing the guilty parties to an account. Accordingly, in 1843, in the leading case of *Foss v. Harbottle*,<sup>4</sup> a stockholder brought suit in the name of himself and other defrauded stockholders, and for the benefit of the corporation, against the directors, for a breach of their duty to the corporation. This case was decided against the complaining stockholders on the ground that the complainant had not proved that the corporation itself was under

<sup>1</sup> See ch. XLI, *infra*.

<sup>2</sup> See § 750, *infra*.

<sup>3</sup> 2 Atk. 400. In this case the court said: "Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person

be guilty of it either in a private or public capacity." As to the power of the state to remedy such abuses, see § 635, *supra*.

<sup>4</sup> 2 Hare, 461.



the control of the guilty parties, and had not proved that it was unable to institute the suit. The court, however, broadly intimated that a case *might* arise when a suit instituted by the defrauded stockholders would be entertained by the court and redress given. Acting upon this suggestion, and impelled by the utter inadequacy of suits instituted by the corporation, defrauded stockholders continue to institute these suits and to urge the courts of equity to grant relief.<sup>1</sup> These efforts were unsuccessful in clearly establishing the rights of stockholders herein until the cases of *Atwool* against *Merryweather*, in England, in 1867,<sup>2</sup> and of *Dodge v. Woolsey*, in this country, in 1855.<sup>3</sup> These two great and leading cases have firmly established the law for both England and America, that where corporate directors have committed a breach of trust either by their frauds, *ultra vires* acts, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to all the stockholders.<sup>4</sup> The rule as formulated therein has been repeated, applied, explained, and extended by subsequent cases and by text-books until a system of jurisprudence may be said to be based upon it.

In bringing that class of suits stockholders are not liable for libel and slander by reason of allegations in their suit against directors for fraud. Not even a director who was not a party can sue them for libel.<sup>5</sup> Nor

<sup>1</sup> *Mozley v. Alston*, 1 Phil. Ch. 790 (1847); s. c., 16 L. J. (Ch.) 217, where the court said there was no reason assigned "why the corporation does not put itself in motion to seek a remedy;" *Lord v. Copper Miners*, 2 Phil. Ch. 740 (1848), where the court refused relief because the acts were capable of confirmation and had been confirmed by the majority; *Gray v. Lewis*, L. R. 8 Ch. App. 1035, 1050 (1873). See also *McDougall v. Gardiner*, L. R. 1 Ch. D. 13 (1875), in regard to the principle of law decided by these cases.

<sup>2</sup> L. R. 5 Eq. 464, n.

<sup>3</sup> 18 How. 331. The case *Hawes v. Oakland*, 104 U. S. 450 (1881), is perhaps of even greater importance than *Dodge v. Woolsey*, and may take the place of the latter. See also *Dickerman v. Northern T. Co.*, 176 U. S. 181, 188 (1900), where the above section is cited.

<sup>4</sup> It is to be noticed that long prior to these cases it had been held by the courts in various cases that a stockholder's action herein would lie, but the principle was not clearly established until the foregoing decisions were made. Thus, in New York, as early as 1832, in the case *Robinson v. Smith*, 3 Paige, 222 (1832), the remedy was declared to exist. In the early case *Preston v. Grand Collier Dock Co.*, 11 Sim. 327 (1840), a bill by a stockholder in behalf of himself and others to render certain persons liable as stockholders, they having subscribed in order to get a charter, and then declared that they subscribed as trustees for the corporation, was sustained.

<sup>5</sup> *Runge v. Franklin*, 72 Tex. 585 (1889).



does a suit by a stockholder against the corporation for an injunction and a receiver on the ground that the corporation is insolvent render the stockholder liable to a suit for malicious prosecution, even if his suit failed, there having been no arrest of the person or seizure of property.<sup>1</sup> But where in a suit against a corporation to foreclose a mortgage, the president swears to an answer, charging outside parties with dishonestly trying to deprive some of the stockholders of their interest in the property, such outside parties may maintain a suit for libel against the president, such answer being irrelevant, malicious, and not privileged.<sup>2</sup> While a stockholder at a meeting of a private corporation may charge fraud against another stockholder or officer in connection with the corporate affairs, yet a newspaper has no right to report such charge and may be held liable for libel in doing so.<sup>3</sup> A stockholder in telegraphing to another stockholder, in regard to a contested corporate election, is not liable for libel, even though he reflects on the competency of the former manager. Both parties being interested in the communication, it is privileged, where it is in good faith.<sup>4</sup> The court said "That presumptively the defendant's telegram was privileged is entirely clear, and the question was one for determination by the court as the circumstances were not in dispute. . . . The defendant's telegram thus being presumptively privileged, to render it actionable it was incumbent on the plaintiff to prove that it was false and that the defendant was actuated by express malice or actual ill-will."<sup>5</sup>

§§ 646, 647. *The facts and conditions which allow and sustain a stockholder's suit herein.* — Before a stockholder can sustain a suit to remedy the frauds, *ultra vires* acts, or negligence of directors, he should be certain that three distinct facts or conditions exist in his favor. These are: first, that the acts complained of are such as amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone;<sup>6</sup> second, that the complaining stockholder himself is free from laches, acquiescence, or ratification of the acts to remedy which the suit is brought;<sup>7</sup> third, that the corporation has been requested and has neglected or refused to institute

<sup>1</sup> Cincinnati, etc. Co. v. Bruck, 61 Ohio St. 489 (1900).

<sup>2</sup> Potter v. Troy, 175 Fed. Rep. 128 (1909).

<sup>3</sup> Kimball v. Post Pub. Co., 199 Mass. 248 (1908), the court saying: "No doubt a stockholder at such a meeting speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and with-

out malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest."

<sup>4</sup> Ashcroft v. Hammond, 197 N. Y. 488 (1910).

<sup>5</sup> Ashcroft v. Hammond, 197 N. Y. 488, 494, 495 (1910).

<sup>6</sup> This subject is treated in the remainder of this chapter and in chapter XL, *infra*. See also, as to such ratification, § 740, *infra*.

<sup>7</sup> See ch. XLIV, *infra*.



the suit; that the suit is instituted by *bona fide* stockholders as complainants, and that the corporation and the guilty parties and other proper parties have been made defendants.<sup>1</sup>

B. FRAUDS OF CORPORATE DIRECTORS, OF A MAJORITY OF THE STOCKHOLDERS, OR OF THIRD PERSONS, TO REMEDY WHICH A STOCKHOLDER MAY BRING SUIT.

§ 648. *Directors as trustees.*—It is frequently said, both in the cases and in the text-books, that the directors of a corporation are practically trustees, with the whole body of the stockholders as *cestuis que trust*.<sup>2</sup> The New York court of appeals, however, has said that directors are trustees in their relations towards the corporation, but not in their relations towards the stockholders.<sup>3</sup> And again, that “while courts of law generally treat the directors as agents, courts of equity treat them as trustees and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct.”<sup>4</sup> The obligation of this trusteeship, whether to the corporation or to the stockholders, has been the basis of ascertaining what acts of directors constitute a fraud, and what remedies may be applied. Even though the agent of a stockholder is elected a director to protect the latter’s

<sup>1</sup> See ch. XLV, *infra*.

<sup>2</sup> That directors occupy the position of trustees towards the stockholders, see *European, etc. Ry. v. Poor*, 59 Me. 277 (1871); *Koehler v. Black River, etc. Co.*, 2 Black, 715 (1862). *Thoman v. Mills*, 159 Mich. 402 (1909). See also *Green’s Brice’s Ultra Vires* (2d ed.), p. 478, citing many cases. *Cf. Smith v. Anderson*, L. R. 15 Ch. D. 247 (1880); *Imperial Hotel Co. v. Hampson*, L. R. 23 Ch. D. 1 (1882); *Angell & A. Corp.*, § 312, etc.; *Pierce, Railroads*, 36–44; *Wickersham v. Crittenden*, 93 Cal. 17 (1892). In *Wasatch Min. Co. v. Jennings*, 5 Utah, 243 (1887), the court well said in reference to corporate directors: “Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded.” The corporation, however, stands in no fiduciary relation towards its stockholders. *Karnes v. Rochester, etc. R. R.*, 4 Abb. Pr. (N. S.) 107 (1867). As stated in *Hoyle v. Plattsburgh, etc. R. R.*, 54 N. Y. 314 (1873),

whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary.

<sup>3</sup> *Bloom v. National United, etc. Co.*, 152 N. Y. 114 (1897), aff’g 81 Hun, 120. “The individual defendants as directors occupied the relation of trustees to the corporation and its stockholders.” *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1913). A director is not a trustee in his private dealings with one who is a stockholder. *Bacon v. Soule*, 126 Pac. Rep. 384 (Cal. 1912).

<sup>4</sup> *Bosworth v. Allen*, 168 N. Y. 157 (1901). Directors are not technically trustees, and hence the statute of limitations relative to trustees is not applicable to a suit by a receiver against them for misfeasance. *Boyd v. Mutual Fire Assoc.*, 116 Wis. 155 (1903). A receiver may bring a suit in equity to hold a director liable for misconduct where particular property or the proceeds thereof are involved; otherwise his remedy is at law. *Mabon v. Miller*, 81 N. Y. App. Div. 10 (1903).



interest, yet that duty must be subordinate to his independent and impartial judgment as a director, and any contract to the contrary is void.<sup>1</sup> A corporation may enjoin its president and manager from divulging or selling secret formulas, even though he had taken part in inventing them, the corporation being the owner.<sup>2</sup> A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account.<sup>3</sup> A stockholder may, of course, contract with the corporation the same as a stranger.<sup>4</sup>

§ 649. *Director or other corporate officer interested in construction company — Contracts between a director and his company.* — It has been held that a director cannot, as against the dissent of a single stockholder, become a contractor with the corporation, nor can he have any personal and pecuniary interest in a contract between a third person and the company of which he is a director.<sup>5</sup> “Constituted as humanity

<sup>1</sup> *Singers-Bigger v. Young*, 166 Fed. Rep. 82 (1908).

<sup>2</sup> *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293 (1910). If a director acquires knowledge of a secret process and then enters the employ of another company and uses it for the latter company he may be enjoined. *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387 (1907).

<sup>3</sup> *Consolidated, etc. Works v. Brew*, 112 Wis. 610 (1902). A treasurer sued by the corporation for money held by him as treasurer cannot offset a debt due from the corporation to him individually. *Oregon, etc. Co. v. Schmidt*, 60 S. W. Rep. 530 (Ky. 1901). A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity. *Hunter v. Robbins*, 117 Fed. Rep. 920 (1902). The decision in *American, etc. Co. v. Easton*, 120 Fed. Rep. 440 (1903), that a suit by the corporation itself to recover secret profits made by a director in purchasing property for the corporation could not be maintained in equity, the remedy at law being sufficient, was reversed in 129 Fed. Rep. 1004.

<sup>4</sup> *Bramblet v. Commonwealth, etc. Co.*, 83 S. W. Rep. 599 (Ky. 1904). See also § 11, *supra*.

<sup>5</sup> *Port v. Russell*, 36 Ind. 60 (1871), where an injunction was granted

against the payment by a plank-road company of money to a construction company of which a director of the former was a member. The court said that the three leading American cases on the subject of frauds by directors are *Michoud v. Girod*, 4 How. 503 (1846); *Cumberland, etc. Co. v. Sherman*, 30 Barb. 553 (1859); and s. c., 20 Md. 117 (1863); and *Hoffman Steam Coal Co. v. Cumberland, etc. Co.*, 16 Md. 456 (1860); and in England the case *Aberdeen Ry. v. Blakie*, 1 Macq. 461 (1854). Where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two, by means of “dummy” intermediaries, at an improvident price, one of the contractors cannot compel the other to divide the profits. *Jackson v. McLean*, 36 Fed. Rep. 213 (1888). A president is personally liable on loans by his bank to an insolvent person with whom he has other interests. *First Nat. Bank v. Reed*, 36 Mich. 263 (1877). A waiver of the statute of limitations by the board of directors is illegal where the party benefited was a director and was present when the resolution was passed. *Lowndes v. Garnett, etc. Co.*, 33 L. J. (Ch.) 418 (1864). Although the of-



is, in the majority of cases duty would be overborne in the struggle." Where a construction company contracts with a corporation, the director cannot be interested in the construction company at the time the contract is made, nor subsequently; and it is immaterial that the contract was fair, or even to the advantage of the corporation. The corporation, upon discovering the fact that the director is interested in the construction company, may compel him to pay over to the corporation all profits that he has derived from the construction contract.<sup>1</sup> Again,

ficers of a railroad company take in their names lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands. *Case v. Kelly*, 133 U. S. 21 (1890). Where a corporation gives a building contract to one of its directors on his representation that the price is the actual cost of the work, when in fact he had already arranged to subcontract it at a less figure, it is a question for the jury as to whether fraud was involved. *Keystone, etc. Co. v. Bate*, 187 Pa. St. 460 (1898); s. c., 196 Pa. St. 566. A contract between a director and a corporation whereby the former gets a commission for selling the product of the latter may be disregarded by a receiver of the corporation. *Griffith v. Blackwater, etc. Co.*, 46 W. Va. 56 (1899). On a second appeal, 55 W. Va. 604<sup>1</sup>(1904), the court held that where with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays in connection with the contract.

<sup>1</sup> Quoted and approved in *Rutland, etc. Co. v. Bates*, 68 Vt. 579 (1896). See § 662, *infra*. It is illegal for directors to be stockholders in a construction company to which a construction contract is let. *Gilman, etc. R. R. v. Kelly*, 77 Ill. 426 (1875). See also *Bayliss v. Lafayette, etc. Ry.*, 8 Biss. 193 (1878); s. c., 2 Fed. Cas. 1079; *Paine v. Lake Erie, etc.*

*R. R.*, 31 Ind. 283 (1869); *Flint, etc. Ry. v. Dewey*, 14 Mich. 477 (1866), where a director had become interested in the construction work after the contract had been given. To same effect, see *Thomas v. Brownville, etc. R. R.*, 109 U. S. 522 (1883), rev'g 2 Fed. Rep. 877, where, however, it is held that bonds issued to a construction company in which a director is interested cannot be altogether repudiated, but are valid to the extent of the actual value of work done. See also *Ryan v. Leavenworth, etc. Ry.*, 21 Kan. 365 (1879), holding also that a stockholder in a corporation which is a stockholder in the defrauded corporation may sue to remedy the wrong to the latter; *European, etc. Ry. v. Poor*, 59 Me. 277 (1871). See also *Risley v. Indianapolis, etc. R. R.*, 62 N. Y. 240, 248 (1875); *Whitman v. Bowden*, 27 S. C. 53 (1887), where a building committee of a joint-stock company secretly contracted with themselves. Where the president, in order to get control of the corporation, causes a meeting of the board of directors to vote stock in payment for services and property whose value is much less than the par value of the stock, the stock being voted to outside parties, but thereafter secretly transferred to the president, a stockholder may compel him to return the stock to the corporation for cancellation. *Perry v. Tuscaloosa, etc. Co.*, 93 Ala. 364 (1891). In *Lewis v. Meier*, 14 Fed. Rep. 311 (1882), the remarkable decision is made that the corporation cannot have such a contract set aside, since the corporation is responsible for the frauds of its directors, and hence both parties are *in pari delicto*. Where one of the com-



if a company contracting with the corporation secretly gives to the contracting agent of the latter a subcontract for the construction work,

mon council and of the committee granting a street-railway franchise to individuals who convey the same to a corporation becomes a stockholder in that corporation as soon as it is formed, the franchise is void as having been fraudulently obtained. *Finch v. Riverside, etc. Ry.*, 87 Cal. 597 (1891). Where three out of a board of five public officers give a contract for the supply of water to the town, and one of the three is interested in the contract, the contract is illegal. *Santa Anna Water Co. v. San Buenaventura*, 65 Fed. Rep. 324 (1895). Under the Kentucky statutes a contract between a city and a printing company, in which company a member of the common council is a stockholder, is illegal. *Nunemacher v. Louisville*, 98 Ky. 334 (1895). Where two competing street-railway companies apply for the right to lay tracks, and the board of public works grants the right to a company in which one of the members of the board is a stockholder, the other company may have the grant set aside. *Traction Co. v. Board of Public Works*, 56 N. J. L. 431 (1894). Where one corporation buys a street railroad from another, a stockholder in the former cannot question the validity of bonds issued by the latter and expressly assumed by the former, nor can he raise the question of fraud in constructing the road. *Smith v. Ferries, etc. Ry.*, 51 Pac. Rep. 710 (Cal. 1897). A corporation may compel its directors to turn in the profit they secretly have made on a contract which one of them obtained in his own name and then transferred to the corporation for a higher price, and they are liable jointly and severally. *Asphalt, etc. Co. v. Bouker*, 150 N. Y. App. Div. 691 (1912). The president of a gas company cannot let to a partnership of which he is a member a contract to erect a gas plant for the corporation. If the contract is abandoned and a suit brought on a *quantum meruit*, the value of the labor and materials used, must

be clearly proved. *Sims v. Petaluma, etc. Co.*, 131 Cal. 656 (1901). Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made. *Edison v. Gilliland*, 42 Fed. Rep. 205 (1890). Where the rolling-stock is purchased by the directors in the name of a trustee of a car trust, he being merely a figure-head, payments being made from the funds provided for the building of the road under the construction contract, the court held that there was such a mingling of the funds and of the interests of the directors as directors with their interests as purchasers of the rolling-stock that the title to the rolling-stock passed to the company, and the car trust was invalid. The court said: "Any arrangement by which the road is equipped with rolling-stock belonging to another corporation should be distinct, unequivocal, and above suspicion." *McGourkey v. Toledo, etc. Ry.*, 146 U. S. 536, 567 (1892). Even though directors are interested in the construction company which takes the bonds, and the property is foreclosed and is bought in by the directors, yet the railroad company cannot set aside the transaction unless it offers to pay to the directors what they have expended or offers to take the property subject to such mortgage bonds. *San Antonio, etc. Ry. v. San Antonio, etc. R. R.*, 25 Tex. Civ. App. 167 (1900).

A director who owns the assets of a business which is cognate to the business of his corporation may sell the same to his corporation at an advanced price, and he need not disclose what he paid for it, and a stockholder cannot compel the director to pay to the corporation the profit he has made. The sale may be rescinded, but the court has no power to force the director to sell at a lower price. *Burland, etc. v. Earle, etc.*, [1902] A. C. 83.



the corporation may attack the whole contract and recover back the profits realized therefrom.<sup>1</sup> A contract is not valid and enforceable against the corporation where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract.<sup>2</sup> A stockholder may enjoin the issue of a

<sup>1</sup> "According to my view of the law of this court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court." *Panama, etc. Tel. Co. v. India Rubber, etc. Tel. Works Co.*, L. R. 10 Ch. App. 515 (1875). In this case the secret subcontractor was the agent and engineer of the corporation. He received a commission for his work, and the work was to be accepted subject to his approval. Where a national bank and two of the directors of a corporation are secretly interested in the profit made by selling property to such corporation for stock, the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good. *Zinc, etc. Co. v. First, etc. Bank*, 103 Wis. 125 (1899). The case *Currier v. New York, etc. R. R.*, 35 Hun, 355 (1885), goes still further, and holds that a stockholder may compel the contractors to disgorge when they obtain the contract with the corporation through their associates or hirelings being made directors. An agreement of an attorney to share his fees with a director who votes and aids him in getting the company's business is void. The courts will not compel the attorney to carry out the agreement. All parties are left as they are found. *Attaway v. Third Nat. Bank*, 93 Mo. 485 (1887). See also *Lindley, Company Law*, pp. 328, 368. Where the managing director of the Union Pacific Railroad caused a contract for its construction to be given to a person who acted as his agent, and the director then formed the Credit Mobilier company, a Pennsylvania corporation, and had the construction contract assigned to it, and all the stockholders of the railroad were invited to become stockholders in the

latter company, and all the facts herein were more or less known to all parties, a court of equity refused to enjoin the Credit Mobilier from collecting the contract price of the construction work. *Union Pac. R. R. v. Credit Mobilier*, 135 Mass. 367 (1883). Although an assistant engineer of the company is secretly interested with the contractor in the profits of the construction, yet where the former had nothing to do with the letting the contracts or accepting the work, and merely testified in an arbitration in the settlement, but did not testify falsely, the parties need not give up their profits. *Union R. R. v. Dull*, 124 U. S. 173 (1888). In *Fox v. Hale, etc. Co.*, 108 Cal. 369 (1895), the president was held liable for fraud in reducing ores belonging to the company.

<sup>2</sup> Quoted and approved in *Rutland, etc. Co. v. Bates*, 68 Vt. 579 (1896); *Wardell v. Railroad Co.*, 103 U. S. 651 (1880). A contract by which a person agrees to construct a railroad is not enforceable if by a simultaneous contract he agrees to divide his profits with five of the seven directors. *Stanton v. Sturgis*, 140 Fed. Rep. 789 (1905). A person who brings about a contract whereby the president obtains a secret profit in a corporate contract cannot recover for his services. *Van Valkenburgh v. Thomasville, etc. R. R.*, 4 N. Y. Supp. 782 (1889). Where the directors appropriate the money of the corporation to themselves, a minority stockholder may bring them to account. *Sage v. Culver*, 71 Hun, 42 (1893); *aff'd*, 147 N. Y. 241. Where the directors are secretly interested in the construction contract and are to have a portion of the profits, bonds issued under the contract are void except in *bona fide* hands. *Vanderveer v. Asbury Park, etc. Ry.*, 82 Fed. Rep. 355 (1897). See also § 650, *infra*.



large amount of bonds and stock to take up debenture bonds on an unfair basis where the directors are holders of debenture bonds.<sup>1</sup> In England it has been decided that even though it is legal under the statutes to provide that no calls shall be made on certain shares, except upon a winding up, yet where the directors are the subscribers for such shares and do not fully inform other subscribers of the situation, they may be compelled at the instance of a stockholder to pay at the same time that the others pay, even though there was no actual fraud, the parties having acted in good faith.<sup>2</sup>

In Massachusetts, however, the supreme court, with characteristic independence and recognition of actual conditions, has said in regard to a contract between a corporation and one of its directors: "It was not illegal or void because made with a director, — the only person likely to be willing to make it. In this country it very generally has been deemed impracticable to adopt a rule which absolutely prohibits such contracts."<sup>3</sup>

In New Jersey the highest court has decided that a director may con-

<sup>1</sup> *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709 (1912); s. c., 207 N. Y. 113 (1913).

<sup>2</sup> *Alexander v. Automatic, etc. Co.*, [1900] 2 Ch. 56, rev'g [1899] 2 Ch. 302.

<sup>3</sup> The court held that a director may be employed by a corporation to settle claims against it, he to receive five per cent. of the face value of the company's bonds used in settlement, and also to receive whatever discount he could get from the claims, where he did not vote on the question of his employment, and a jury has found that the contract was made in good faith and was not improvident, it being shown that the company was pressed and had no other way of raising money, and that the director advanced his own money. A receiver cannot recover back the amount so paid the director. *Ft. Payne, etc. Mill v. Hill*, 174 Mass. 224 (1899). A director may make a contract with the company where it is fair and openly made by a majority of the directors acting solely in the interests of the corporation or with full knowledge of the facts. *Wainwright v. Roots Co.*, 97 N. E. Rep. 8 (Ind. 1912). Where an invention pertaining to the company's business is offered to the

board of directors and the president urges them to buy the rights but they decline, he is justified in buying them himself and thereafter he may contract to furnish the article manufactured under the patent to the company where the price is less than the company had been paying, and he may take a lease of that part of the plant of the company to carry out such contract, the evidence showing that the transaction was a fair one from every point of view. Such a transaction is illegal only when it is unfair or fraudulent. *Cowell v. M'Millin*, 177 Fed. Rep. 25 (1910). Notwithstanding a resolution for the issue of stock in payment for a patent does not recite that the patentee is to have a salary, yet that fact may be shown by parol evidence, and the fact that the corporation re-assigned the patent as security for such salary is not necessarily proof of fraud, even though the patentee is president of the corporation. *Gay v. Fair*, 175 Mass. 521 (1900). A purchaser of bonds from a director cannot defeat the sale on the ground that the director was by statute disqualified, he being interested in the construction work for which bonds were issued. *Crittenden v. Cobb*, 156 Fed. Rep. 535 (1907).



tract with the corporation, *if the contract is a fair one*, and if it is made without concealment, and if it is approved by a majority of the stockholders in meeting assembled.<sup>1</sup> Such also seems to be the rule in New York.<sup>2</sup> Thus, two directors and officers may at a stockholders' meeting vote their stock in favor of confirming a resolution of the board of directors increasing the salary of the former and a minority stockholder cannot complain, the transaction in itself being a fair one.<sup>3</sup> On the other hand, it has very properly been decided in California that if the contract is an unfair one, no amount of publicity or ratification by a majority of the stockholders can legalize it.<sup>4</sup> Thus unreasonable salaries

<sup>1</sup> Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied the right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." The court further said: "In *Leavenworth v. Chicago Railway Co.*, 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case *Nye v. Storer*, 168 Mass. 53, and *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 807 (1903).

<sup>2</sup> Even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless

it is shown that the ratification was obtained by fraud or concealment. *Continental Ins. Co. v. New York, etc. R. R.*, 187 N. Y. 225 (1907). Inasmuch as in New York an agreement of a contractor to divide with the officers of the company profits made in the construction of the railroad is legal, unless avoided by the corporation, and is not subject to collateral attack, such a contract will be sustained in Pennsylvania if the contract was made in New York and pertained to a New York corporation, even though such corporation was thereafter consolidated with a Pennsylvania corporation. *Rumsey v. New York, etc. R. R.*, 203 Pa. 579 (1902). A director may sue on a contract between himself and the company. *Vonnoh v. Sixty-seventh, etc.*, 55 N. Y. Misc. Rep. 222 (1907).

<sup>3</sup> *Russell v. Patterson Co.*, 232 Pa. St. 113 (1911). See also § 662, *infra*.

<sup>4</sup> Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. *Goodell v. Verdugo, etc. Co.*, 138 Cal. 308 (1903), the court saying, "the publicity alone of an illegal and unauthorized act of the directors of the corporation does not



voted by a majority of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased.<sup>1</sup>

A majority of the stockholders in interest cannot ratify the officers unlawfully taking for their own use its money's in excess of their salaries or the value of their services.<sup>2</sup> Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock.<sup>3</sup> The proper rule is that such a transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt in his application to the court.

In a stockholder's suit to cancel an alleged agreement by which the corporation is to pay to a director royalties on a void and worthless patent, the allegation that such director and his sons constitute a majority of the board and that the sons are without means and are supported by their father, is material and not impertinent.<sup>4</sup> A director who controls a corporation and its board and causes it to purchase worthless bonds from other corporations in which he is interested, whereby he makes a large profit, may be compelled to pay over the profit.<sup>5</sup> This seems to leave it with the court to decide whether the contract is a fair one or not, with power to set the contract aside, if it is manifestly unfair.<sup>6</sup>

Moreover, this principle of law is a shield and not a sword. The

make it legal or valid." The president and general manager of an insurance company who controls it by proxies and who has a contract giving him a percentage of the insurance premiums for twenty-five years and who four years before its expiration becomes incapacitated and sells the contract to another party, and causes the corporation to ratify it, may be compelled to pay over such price to the company. *Moulton v. Field*, 179 Fed. Rep. 673 (1910).

<sup>1</sup> *Jacobson v. Brooklyn, etc. Co.*, 184 N. Y. 152 (1906).

<sup>2</sup> *Von Arnim v. American Tube-works*, 188 Mass. 515 (1905).

<sup>3</sup> *Booth v. Land, etc. Co.*, 68 N. J. Eq. 536 (1905).

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<sup>4</sup> *Burden v. Burden*, 124 Fed. Rep. 250 (1903).

<sup>5</sup> *Pepper v. Addicks*, 153 Fed. Rep. 383 (1907). A director who is instrumental in causing the company to loan money where he was personally interested and acted in bad faith in overvaluing the security, may be held personally liable for the loss. *Exploring, etc. Co. Ltd. v. Kolekmann*, 94 L. T. Rep. 234 (1905).

<sup>6</sup> A contract between an officer and a corporation, if fair and made in good faith and without undue and unjust benefit or advantage to the officer, and of advantage to both parties, will be enforced by the courts. If otherwise, such a contract is voidable at the option of the corporation

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guilty party cannot avail himself of it.<sup>1</sup> Hence, even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground.<sup>2</sup> Where the president by secret agreement is to participate in a construction contract, he cannot enforce such contract, and hence bonds issued to the contractor are not affected by the Ohio statute prohibiting the sale, directly or indirectly, of bonds to an officer at less than par.<sup>3</sup> Even though the president has authority to make contracts, yet he cannot cancel a contract which he is personally interested in having canceled.<sup>4</sup> Where a director of a construction company compels an iron concern to agree

or its creditors or stockholders. *Wyman v. Bowman*, 127 Fed. Rep. 257 (1904). In the case *People v. Republic, etc. Ass'n*, 97 N. Y. App. Div. 31 (1904), it was held that where a contract in which a majority of the directors were personally interested is attacked on the ground of being merely voidable, it is good up to the time of disaffirmance. The court seems to have the same power that it has as to contracts between two corporations having directors in common. See § 658, *infra*.

<sup>1</sup> Where a railroad construction contract is assigned to trustees, to be carried out and the profits to be paid to the stockholders of a designated corporation, the stockholders may compel the trustees to pay over such profits. The trustees cannot set up that they were also directors of the railroad. *Hazard v. Dillon*, 34 Fed. Rep. 485 (1888). A person sued on a contract by a corporation cannot claim that the contract is unenforceable because another of the parties thereto was a director of the corporation. *Stewart v. Lehigh Valley R. R.*, 38 N. J. L. 505 (1875). Where a corporation has assumed a personal contract between the president and one of the directors, if the president has accepted the corporation as liable on the contract, he cannot thereafter hold the director liable on such contract. *Munson v. Magee*, 161 N. Y. 182 (1900). A lessor to the corporation who is also its manager and director cannot repudiate the lease

on the ground that the company was organized for an unlawful business. *Consolidated, etc. Co. v. Wild*, 42 Colo. 202 (1908).

<sup>2</sup> Even if the promoters stated that a certain part of the plant was in full operation, yet if there was no fraud, and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial, if that fact is made known to the parties. *Lagunas, etc. Co. Ltd. v. Lagunas Syndicate Ltd.*, [1899] 2 Ch. 392.

<sup>3</sup> *Continental Trust Co. v. Toledo, etc. R. R.*, 86 Fed. Rep. 929 (1898). Although the president is secretly to participate in the construction contract, yet if the company does not rescind the contract on this ground, and the corrupt relation is terminated before the completion of the contract, bonds issued under the contract are valid. *Continental Trust Co. v. Toledo, etc. R. R.*, 86 Fed. Rep. 929 (1898); *aff'd in Toledo, etc. R. R. v. Continental T. Co.*, 95 Fed. Rep. 497 (1899).

<sup>4</sup> *Wallace v. Oceanic, etc. Co.*, 25 Wash. 143 (1901). An officer of a bank cannot legally compromise a claim in which he is interested on the other side. *Leonhardt v. Citizens' Bank of Ulysses*, 56 Neb. 38 (1898).



to give a bonus to the construction company under threat that otherwise the railroad would be run on another route, the contract cannot be enforced.<sup>1</sup> Where one corporation owns stock in another corporation, and a committee of the board of directors of the former, in selling such stock, provide for the purchaser purchasing also similar stock owned by the directors and their friends, but not providing for similar stock owned by other stockholders, the contract is illegal.<sup>2</sup>

However, there are many cases in which the above rules do not apply. Thus, where the director was a surety for the contractor, and the latter failed, the former, who finished the construction work under compulsion by the company, may set up its acquiescence as a bar to its suit to recover from him the profits of the transaction.<sup>3</sup> Again, where a director purchased an interest in the construction contract after it had been entered into, but sold that interest before any work was done thereunder, the illegality of his connection with the construction company cannot affect the legality of his sale of that interest.<sup>4</sup> Even though a director prevents a removal of the company's business to another location on advantageous terms, his reason being that he did not get a secret bonus, yet he is not personally liable for damages for so doing, it appearing that the information which he gave to the parties who were about to deal with the corporation was correct.<sup>5</sup> Where the business of a lumber railroad has been exhausted, it is legal for the majority of the directors to vote to extend the road, even though the extension is to enable them to market their own timber.<sup>6</sup> Upon the consolidation of two companies, it is legal for one of the companies to pay the president and vice-president of the other company a sum of money in consideration of their agreeing not to engage individually in the same business during the period of ten years within a defined territory. A stockholder in the company in which such persons were officers cannot compel the officers to account for the money if the consolidation itself was acquiesced in and the transaction was honest in fact.<sup>7</sup> Even though in a sale of all the corporate assets to another company one of the directors of the former is to receive a salary from the latter and his vote is necessary to make a quorum of the directors, yet if it is not concealed and if all the stockholders acquiesce in that part of the contract for six years

<sup>1</sup> *Woodstock Iron Co. v. Richmond, etc. Co.*, 129 U. S. 643 (1889).

<sup>2</sup> *Kelsey v. New England, etc. Ry.*, 62 N. J. Eq. 742 (1901).

<sup>3</sup> *Kelley v. Newburyport, etc. R. R.*, 141 Mass. 496 (1886).

<sup>4</sup> *Barnes v. Brown*, 80 N. Y. 527 (1880).

<sup>5</sup> *Hale v. Mason*, 160 N. Y. 561 (1899).

<sup>6</sup> *Bucksport, etc. R. R. v. Edinburgh, etc. Co.*, 68 Fed. Rep. 972 (1895).

<sup>7</sup> *Bristol v. Seranton*, 57 Fed. Rep. 70 (1893); *aff'd*, 63 Fed. Rep. 218 (1894).



this cures the defect.<sup>1</sup> But a settlement between a corporation and its creditors, made by a board of directors of whom a majority are interested in the matter adversely to the corporation, is voidable as against the corporation and non-assenting stockholders, even though the settlement may have been for the best interests of the corporation at the time.<sup>2</sup> In England it is customary to insert in the by-laws a provision that if a director is interested in a corporate contract without declaring his interest, his office is thereby vacated.<sup>3</sup> A person dealing with a director, and taking from him notes or securities which the corporation has issued, must investigate as to the legality of the issue of such securities.<sup>4</sup>

A contract between a director and the corporation is voidable, and not void. Accordingly, if none of the stockholders object to such a contract it is legal.<sup>5</sup> A corporation may maintain a suit to cancel

<sup>1</sup> *Kidd v. New York, etc.*, 75 N. H. 154 (1909).

<sup>2</sup> *Higgins v. Lansingh*, 154 Ill. 301 (1895). A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid, and may be set aside by a judgment creditor of the selling corporation. *Summers v. Glenwood, etc. Co.*, 15 S. D. 20 (1901).

<sup>3</sup> See *Turnbull v. West Riding, etc. Co.*, 70 L. T. Rep. 92 (1894). Where the by-laws provide that "the office of director is vacated if a director be concerned in any contract," a director ceases *ipso facto* to be a director upon his being secretly interested in the profits of a contract with the corporation, but if he is re-elected at the next election he then again becomes a director, and hence the company cannot recover back the salary paid to him except for a period from the date of the contract to the next election. *Re Bodega Co. Ltd.*, [1904] 1 Ch. 276.

<sup>4</sup> See § 293, *supra*, and § 727, *infra*.

<sup>5</sup> If all parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). Creditors cannot object to

a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. *Welch v. Importers, etc. Bank*, 122 N. Y. 177 (1890). A director of a corporation, in which a director is interested may purchase corporate property from trustees to whom an embarrassed corporation has conveyed the same to pay its debts, and return the remainder to such latter corporation, and especially is a stockholder estopped from complaining after four years' delay, with knowledge of the facts, large improvements having been made and the value of the property having greatly increased. *Kessler & Co. v. Ensley Co.*, 141 Fed. Rep. 130 (1905); *aff'd*, 148 Fed. Rep. 1019. Where neither the corporation nor any stockholder objects, it is legal for the directors to have an interest in the profits of a contract for the construction of the road, and they may compel the contractor to pay over to them their part of the profits. The contract was voidable, not void. *Robison v. McCracken*, 52 Fed. Rep. 726 (1892); *aff'd*, 57 Fed. Rep. 375, *sub nom.* *McCracken v. Robison*. Bonds issued at their full par value to the president in payment for work done by him under a contract between himself and his company are valid and enforceable where all the stockholders assented to such contract. *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1889). Where



stock which the directors and president voted to themselves as commissions for selling the stock of the company.<sup>1</sup> But where the stockholders ratify a contract between the president and the corporation itself, the corporation cannot thereafter repudiate such contract.<sup>2</sup> Where the directors own all the stock of a corporation, the usual rules

all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1889). The letting of a construction contract to one who owns ninety-nine one hundredths of the stock, in payment for such stock, is legal, although he as president issues it to himself, where a *bona fide* board of directors ordered it in the usual discharge of their duties. The fact that the contractor received stock and bonds four times in par value the value of the work is not fatal where no fraud is alleged and the actual cost of the work is not alleged. But where the contractor then entered into a contract whereby the mortgage was to be foreclosed, and he was to participate at the sale, all for the purpose of cutting off other creditors, he is liable to them. *Cleveland, etc. Co. v. Crawford*, 9 Ry. & Corp. L. J. 171 (Chicago, 1891). In *McGourkey v. Toledo, etc. Ry.*, 146 U. S. 536 (1892), the court, speaking of a contract in which the directors were interested, said: "Did the vice of these contracts lie in an attempted concealment of the actual facts, as is frequently the case where preferences are secretly reserved in assignments, there would be much force in this suggestion; but if it inheres in the very nature of the contract, — if there be a thread of covin running through the web and woof of the entire transaction, — in other words, if the purpose be unlawful, it is not perceived that an open avowal of such purpose make it the less unlawful. We do not wish to be understood as saying that the transaction in question necessarily in-

involved actual fraud on the part of those participating in it." A contract between the president and a third party from whom the company buys lumber, that such third party shall pay him a commission, is not illegal *per se*. The president may collect such commissions unless it is shown that the agreement was concealed from the corporation, or that the president was exercising some discretion or trust. *Jameson v. Coldwell*, 23 Oreg. 144 (1892). But see *s. c.*, 25 Oreg. 199. Bondholders cannot sustain a bill in equity to remove a trustee who holds the stock of various gas companies as collateral security for the payment of their bonds, even though such trustee has voted such stock in favor of directors who have made improvident contracts in which such directors were personally interested, it appearing that by the terms of the trust agreement the trustee was to vote such stock as the pledgors directed, until default on the bonds, and it not being shown that the trustees knew that such default had been made. Moreover, such removal will be denied when the trust agreement itself provides for the removal of the trustee by vote in writing of one third in interest of the bondholders at a meeting called for that purpose, and no reason is shown for disregarding this mode of changing the trustee. *Dillaway v. Boston, etc. Co.*, 174 Mass. 80 (1899). See also ch. XLIV, *infra*. Under the Michigan statute that the trustees of public institutions should not be interested in sales to such institution, and that such contracts should be void, a sale to a public institution by a corporation in which the trustee is a stockholder, is void. *Consolidated, etc. Co. v. Board of*

<sup>1</sup> *Central, etc. Co. v. Madden*, 68 Atl. Rep. 777 (N. J. 1908).

<sup>2</sup> *Goss & Co. v. Goss*, 147 N. Y. App. Div. 698 (1911). Cf. § 730, *infra*.



preventing a director from contracting with the corporation do not apply.<sup>1</sup> A contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby.<sup>2</sup> Where, with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays in connection with the contract.<sup>3</sup> In some of the states there is a statute prohibiting a director from voting on a contract in which he has a personal interest.<sup>4</sup>

A stockholder may be interested in the construction company, and bonds may be issued to him, even though he owns a majority of the stock and thereby has control.<sup>5</sup> A stockholder who is also secretary of the board, but not a member of the board, may contract with the company.<sup>6</sup>

Where the manager, in order to continue a profitable contract which he has with the corporation, keeps up a deadlock in the board of directors, due to there being a vacancy, he is bound to prefer the interests of the company, or else to terminate his employment and rely on his contract.<sup>7</sup>

An agreement by which the engineer of a corporation shares in the profits of a person contracting with the corporation cannot be enforced unless the corporation knew and approved thereof.<sup>8</sup> Where only a

Trustees, 164 Mich. 235 (1910). A statute that a state contract shall be void where a state officer is pecuniarily interested in it, renders void a contract by the state with a corporation in which the secretary of state is a stockholder. *Re Opinion of the Justices*, 82 Atl. Rep. 90 (Me. 1911).

<sup>1</sup> *McCracken v. Robison*, 57 Fed. Rep. 375 (1893). On the organization of a company the directors may issue stock to themselves for property where they are the sole stockholders. The presumption is that the stock was issued for full value. *Turner v. Fidelity, etc.*, 2 Cal. App. 122 (1905).

<sup>2</sup> *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561.

<sup>3</sup> *Griffith v. Blackwater, etc. Co.*, 55 W. Va. 604 (1904). A minority stockholder may bring suit to compel

the president to account for corporate funds misappropriated by him, but even though the corporation uses corporate funds to pay a note at a bank secured by stock in the corporation which he has purchased, this does not give the corporation title to such stock. *Red Bud Realty Co. v. South*, 96 Ark. 281 (1910).

<sup>4</sup> The Virginia statute that a director shall not vote on a contract in which he is personally interested was applied in *Triplett v. Fauver*, 103 Va. 123 (1904).

<sup>5</sup> *Porter v. Pittsburg, etc. Co.*, 120 U. S. 649, 670 (1887). *Cf.* § 662, *infra*.

<sup>6</sup> *Hitt v. Sterling, etc. Co.*, 111 Iowa, 458 (1900).

<sup>7</sup> *Kane v. Schuylkill, etc. Co.*, 199 Pa. St. 198 (1901).

<sup>8</sup> *Smythe's Estate v. Evans*, 209 Ill. 376 (1904).



money judgment is sought by a minority stockholder against directors for incurring debts and allowing the corporate property to be sold on execution the directors being personally interested in the contracts under which the work was done, a court of equity has no jurisdiction, there not being involved any discovery or accounting or setting aside of the sale or judgment. The mere fact that the contract made by the directors was voidable, is no ground for the court of equity interfering in the absence of conspiracy or fraud.<sup>1</sup> A corporation may enjoin its president and manager from divulging or selling secret formulas, even though he had taken part in inventing them, the corporation being the owner.<sup>2</sup> Where the president and director of a company is employed by it as an inventor, his inventions at its expense belong to it.<sup>3</sup> In England there is a statute, under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.<sup>4</sup> A bank president who owes money to the bank is not guilty of the criminal offense of misapplying the bank's funds, even though he adds to the debt, where at the same time he deposits collateral which sells for more than the increase of debt.<sup>5</sup>

§ 650. *Secret gifts to directors from persons contracting with the corporation.* — It is a well-established principle of law that a director commits a breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him.<sup>6</sup> Thus, an agreement of a third person to pay a certain sum to a director if a certain location of a railroad is adopted, or an agreement to allow him to participate in the profits derived from such location, is not an enforceable contract.<sup>7</sup>

<sup>1</sup> Godfrey v. McConnell, 151 Fed. Rep. 783 (1906).

<sup>2</sup> Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293 (1910).

<sup>3</sup> Re Cantelo Mfg. Co., 185 Fed. Rep. 276 (1911).

<sup>4</sup> Re London, etc. Corp., Ltd., [1903] 1 Ch. 728.

<sup>5</sup> Adler v. United States, 182 Fed. Rep. 464 (1910).

<sup>6</sup> Quoted and approved in McClure v. Trask, 161 N. Y. 82 (1899). Where brewers cause a corporation to be organized to purchase their property and secretly divide with two of the directors the price paid above the actual value of the property, the corporation may compel them to pay it

over. Finck v. Canadaway, etc. Co., 152 N. Y. App. Div. 391 (1912). See also §§ 320, 649, *supra*.

<sup>7</sup> Wardell v. Railroad Co., 103 U. S. 651 (1880); Bestor v. Wathen, 60 Ill. 138 (1871); Linder v. Carpenter, 62 Ill. 309 (1872); Fuller v. Dame, 35 Mass. 475 (1836), holding that a promissory note given therefor is void. See also § 649, *supra*, and Union Pac. R. R. v. Durant, 3 Dill. 343 (1874); s. c., 24 Fed. Cas. 628, holding that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the company, the court will decree a reconveyance to the grantors, but this decision was



Where the president is authorized to buy land for the company and he does so and misrepresents the price and retains a secret profit, the corporation may compel him to pay it over.<sup>1</sup> So also where a director receives a commission from one who obtains a loan from the corporation through the director's influence, the latter may be compelled to pay over the commission to the corporation.<sup>2</sup> A treasurer who receives a secret commission from a party selling to a corporation must turn the same over to the corporation.<sup>3</sup>

A similar rule was applied where a director of an insolvent insurance company accepted a secret gift for reinsuring the company's risks in another insurance company.<sup>4</sup> An agreement to turn over the control of a co-operative insurance company is illegal, and money received therefor may be recovered back by a receiver of the company.<sup>5</sup> Where the officers and directors, in a conspiracy, resign their offices and sub-

reversed in 95 U. S. 576; *Holladay v. Patterson*, 5 Oreg. 177 (1874), where the agreement to pay money to a director and president of a railway if a depot was located in a certain place was held unenforceable. A subscription, however, conditioned upon the location of a depot is valid. See § 83, *supra*. Cf. § 681, *infra*. In *Cook v. Sherman*, 20 Fed. Rep. 167 (1882), the court refused to enforce specifically a contract whereby corporate officers agreed to purchase lands, the purpose of all the parties being to influence thereby the location of the railroad. A note for \$5,000 given to a general manager to use his influence to have the company remove its mill is illegal. *Lum v. McEwan*, 56 Minn. 278 (1894). An agreement to convey land to a person in consideration of his endeavoring to have a depot located on the land is illegal and not enforceable, where such person already had an agreement with the officers of the railroad by which they were to receive a part of such land. *Reed v. Johnson*, 27 Wash. 42 (1901). The agreement of a landowner to convey certain land to the president and general manager of a railroad in consideration of a depot being located upon it, cannot be enforced by the latter. *Peckham v. Lane*, 81 Kan. 489 (1910).

<sup>1</sup> *Malden, etc. Co. v. Chandler*, 209 Mass. 354 (1911).

<sup>2</sup> *Farmers', etc. Bank v. Downey*, 53 Cal. 466 (1879); *Imperial, etc. Assoc. v. Coleman*, L. R. 6 H. L. 189 (1873).

<sup>3</sup> In this case the commission was received by an outside party in the way of stock issued at par, which he immediately and secretly turned over to the treasurer. *Rutland, etc. Co. v. Bates*, 68 Vt. 579 (1896).

<sup>4</sup> *Bent v. Priest*, 86 Mo. 475 (1885); *Gaskell v. Chambers*, 26 Beav. 360 (1858), where the director received a secret gift for bringing about a consolidation. *Contra*, if all assented. *Southall v. British, etc. Assoc.*, L. R. 6 Ch. App. 614 (1871).

<sup>5</sup> *McClure v. Law*, 161 N. Y. 78 (1899). Money received by a director of a coöperative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. *McClure v. Wilson*, 70 N. Y. App. Div. 149 (1902). Directors who have been held liable for moneys paid to directors of another company to induce the latter to resign and turn over the assets of such company cannot recover back such money from the parties who received it. *Gilbert v. Finch*, 173 N. Y. 455 (1903).



stitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first-named directors are personally responsible for their action, and a receiver of the corporation may hold them liable.<sup>1</sup> And, in general, whenever an officer or agent of the corporation accepts a secret gift or participates in the profits of a contract with the corporation, without the assent of the stockholders, the corporation is entitled to the gifts or profits, and a stockholder may bring the suit to compel the officer or agent to pay over.<sup>2</sup>

<sup>1</sup> *Bosworth v. Allen*, 168 N. Y. 157 (1901).

<sup>2</sup> "All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation. . . . Agents, guardians, directors of corporations, officers of municipal corporations, and all other persons clothed with a fiduciary character, are subject to this rule." *Perry on Trusts* (3d ed.), § 430. In *Chandler v. Bacon*, 30 Fed. Rep. 538 (1887), the president and secretary were held liable for stock received by them secretly from a patentee to whom all the capital stock had been issued for his patent. Directors receiving stock as a gift from one who sells property to the company for stock will be compelled to give it up to the company. So also will an outside party who aided in the bribe and took some stock himself. *Paducah, etc. Co. v. Mulholland*, 24 S. W. Rep. 624 (Ky. 1894). Where the party selling property to the company for stock gives part of the stock to directors, a person who afterwards becomes president and takes a part of this stock as a gift is liable for it or its value to the company, even though he did not know of the fraud until after he took the stock. *Paducah, etc. Co. v. Hays*, 24 S. W. Rep. 237 (Ky. 1893). In *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101 (1894), a promoter and director was compelled to restore to the corporation the cash or stock which he had received secretly as a gift from a party who had sold patents to the company. The same case holds that such a contract cannot be enforced by the pro-

moter against the patentee. Where the incorporating act required all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceeded to buy land for a consideration of \$500,000 in bonds, of which bonds \$480,000 were turned back by the vendor to the directors, who divided them among themselves, the bonds are void in the hands of directors. The directors in this case had erected over the entrance to the cemetery a statue of Immortality, and had done so "with great pomp and solemnity." *Campbell v. Cypress Hills Cemetery*, 41 N. Y. 34 (1869). A suit by a corporation itself to recover secret profits made by a director in purchasing property for the corporation may be maintained in equity. *American, etc. Co. v. Easton*, 129 Fed. Rep. 1004 (1903), rev'g 120 Fed. Rep. 440. A customer in dealing with a broker corporation cannot agree to give the agent of the corporation an interest in the transactions. *Stephens v. Gall*, 179 Fed. Rep. 938 (1910). Although the officers of a railroad company take in their names lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands. *Case v. Kelly*, 133 U. S. 21 (1890). Land given to the president in consideration of the company extending its line belongs to the corporation, even though the corporation had no power to acquire such property. *Scott v. Farmers', etc. Bank*, 97 Tex. 31 (1903). In *Tyrrell v. Bank of London*, 10 H. L. Cas. 26 (1862), a solicitor was compelled to



The contract being illegal it cannot be enforced by the guilty officer or agent as against the party with whom it is made.<sup>1</sup> Where a direc-

repay with interest a secret gift; *General Exch. Bank v. Horner*, L. R. 9 Eq. 480 (1870), where the manager was paid a large sum in order to obtain his aid to a consolidation scheme. Where the company pays to its solicitor a commission for stock which he induces the president to take, he must repay the commission on the winding up. *Re Stapleford Colliery Co.*, 49 L. J. (Ch.) 253 (1880). A manager who takes secret gifts from parties with whom he contracts for his company must disgorge the same. He also may be dismissed and his contract salary stopped. *Boston, etc. Co. v. Ansell*, L. R. 39 Ch. D. 339 (1888). Where corporate agents organize local branch companies on a basis prescribed by the parent company, and the agents demand and obtain from the local company more than the parent company prescribed, the excess belongs to the parent company. *Sheridan v. Sheridan, etc. Co.*, 38 Hun, 396 (1886). Directors borrowing money from the corporation and giving notes therefor cannot defend against the notes on the ground that a discount thereon was to be allowed to them. *Alford v. Miller*, 32 Conn. 543 (1865). See *Western U. Tel. Co. v. Union Pac. Ry.*, 3 Fed. Rep. 721 (1880); and *quære*, as to the effect of the contract between the complainant and defendant where one of the minor provisions was that the railway officers were to have free telegraph service for themselves and families. Although the purchasing agent of a railroad company buys coal from a coal company in which such agent owns one quarter of the stock, the dividends received by such agent on such stock may be retained by him, although the railroad company was ignorant of the fact that he was such stockholder, there being no proof of fraud and the coal being sold cheaper than the going rate. *Clark v. American Coal Co.*, 86 Iowa, 436 (1892). Nine years' delay on the part of a minority stockholder in complaining of the act of the direc-

tors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. *Cullen v. Coal Creek, etc. Co.*, 42 S. W. Rep. 693 (Tenn. 1897).

<sup>1</sup> A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret commission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. *Smith v. Seattle, etc. Ry.*, 72 Hun, 202 (1893). The officers cannot recover secret commissions on sales to the corporation where the corporation repudiated the purchase by reason of such commissions and then bought from the same parties at a lower figure. *Jameson v. Coldwell*, 25 Oreg. 199 (1894); s. c., 23 Oreg. 144. A secret commission paid to the agent of the other party to the contract invalidates the contract. *Findlay v. Pertz*, 66 Fed. Rep. 427 (1895). "It seems to be illogical to contend that a contract can be avoided as between the officer and the corporation, and yet be held to be valid in favor of the officer against the party with whom he has contracted." *Gillig v. Barrett*, N. Y. L. J., Jan. 6, 1891. A general manager of a road cannot enforce a contract by which he was to receive stock in another road for aiding the latter in procuring municipal bonds, his aid being due to his influence as general manager. *Sargent v. Kansas Mid. R. R.*, 48 Kan. 672 (1892). A contract whereby a party who is about to sell his business to a corporation to be organized agrees secretly to give \$5,000 of stock to a party who agrees to subscribe openly for \$5,000 of the stock is not enforceable, it appearing that the party who was thus to get the extra stock objected to the amount of stock to be issued to the vendor, and withdrew his objection only upon this agreement, and it appearing also that he afterwards be-



tor is secretly interested with a contractor in bonds issued for construction, a contract by which the director sells his interest to the contractor cannot be enforced by the director, the issue having been illegal.<sup>1</sup> And an agreement of the officers of a mutual insurance company without capital stock to endeavor to have the directors resign and turn over the control to other parties and enable them to remove the principal place of business of the company, is illegal and suit does not lie to collect the contract price therefor.<sup>2</sup>

The party paying the bribe may also be held liable in damages to the defrauded party.<sup>3</sup>

came a director and voted to purchase the property at the price demanded by the vendor. *Koster v. Pain*, 41 N. Y. App. Div. 443 (1899). Even though the agent of a corporation represents to it that a party owns certain property and will sell it to the corporation for \$7,500 in bonds and \$30,000 in stock, and the purchase is made on those terms, and the vendor keeps the bonds and gives the stock to such agent, and the agent sells a portion of the stock to a *bona fide* purchaser, yet the latter cannot rescind the sale on the ground of fraud. *Foushee v. Snyder*, 54 S. W. Rep. 730 (Ky. 1900). The agreement of a person who sells property to a corporation that he will divide the profits with the manager does not invalidate the sale where such agreement was made after the sale itself had been made, and was made under threat of the manager to repudiate the contract. *Yellow, etc. Co. v. Daniel*, 109 Fed. Rep. 39 (1901).

<sup>1</sup> *Cobb v. Crittenden*, 161 Fed. Rep. 510 (1908).

<sup>2</sup> *Sauerhering v. Rueping*, 137 Wis. 407 (1911).

<sup>3</sup> The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. *Grand Rapids, etc. Co. v. Cincinnati, etc. Co.*, 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Where the president of a corporation acting as agent causes his corporation

to take a secret profit, the principal may hold both the president and the corporation liable. *Messer-Moore, etc. Co. v. Trotwood, etc. Co.*, 173 Ala. 473, (1910). Even though a person does not know that a promoter to whom he has given an option on his property is a director in the company which proposes to buy it, yet if he discovers this fact before he closes the transaction he must pay to the company the commission which he agreed to pay to the promoter; and even though the company has recovered from the promoter such part of the commission as the promoter actually received, yet the company may recover the balance from the vendor of the property, although such balance had been waived by the promoter in consideration of what was actually paid to him. It is unnecessary to rescind the contract. *Grant v. Gold, etc. Syndicate*, [1900] 1 Q. B. 233. Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900). Even though a director prevents a removal of the company's business to another location on advantageous terms, his reason



There is another large class of cases, particularly in England, wherein persons who desire to form a company for the purpose of purchasing and working certain property, such as patents and mines, cause their friends to accept the position of directors or agents, and then give them money or stock in compensation therefor. This is still a common practice in business, but the courts have uniformly held that a stockholder or the corporation or a receiver on the winding up may compel such directors or agents to pay over to the corporation the money received, or, if stock was received, then to pay to it the value of such stock.<sup>1</sup>

being that he did not get a secret bonus, yet he is not personally liable for damages for so doing, it appearing that the information which he gave to the parties who were about to deal with the corporation was correct. *Hale v. Mason*, 160 N. Y. 561 (1899).

<sup>1</sup> *Re Westmoreland, etc. Co.*, [1893] 2 Ch. 612. A gift by a promoter to a director of a company whilst there are any questions open between the company and the promoter must be accounted for by the director to the company; and the company is entitled to the highest value of the gift at any time between the wrongful act and the time when it came to their knowledge. *Eden v. Ridsdales, etc. Co.*, L. R. 23 Q. B. D. 369 (1889); *Pearson's Case*, L. R. 5 Ch. D. 336, aff'g L. R. 4 Ch. D. 222 (1876), the court saying: "Whether the purchase was or was not an advantageous one for the company . . . is a question wholly immaterial for us to consider; he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances;" *Leeke's Case*, L. R. 6 Ch. App. 469 (1871); *De Ruvigne's Case*, L. R. 5 Ch. D. 306 (1877); *Ormerod's Case*, 25 W. R. 765 (1877), where the director was elected and the gift received even after the contract was made. The court said: "If it is unlawful that a man may be bought as a director, it must be decided by some one else. I never will decide it;" *Weston's Case*, L. R. 10 Ch. D. 579 (1879), where the director was held liable for the full price of the stock less what he paid therefor; *Re Eskern Slate, etc. Co.*, 37 L. T. 222 (1877), where the arti-

cles of association allowed the gift, but were held to be fraudulent; *McKay's Case*, L. R. 2 Ch. D. 1 (1875), where the secretary of the corporation was compelled to pay over; *Hay's Case*, L. R. 10 Ch. App. 593 (1875), where the court said: "No agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal;" *Re Englefield Colliery Co.*, L. R. 8 Ch. D. 388 (1878); *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. D. 396 (1879), where the mining experts of the corporation were compelled to disgorge; *Re Carriage, etc. Assoc.*, L. R. 27 Ch. D. 322 (1884); *Re Drum, etc. Co.*, 53 L. T. 250 (1885), where the party gave money to the directors. See also *Madrid Bank v. Pelly*, L. R. 7 Eq. 442 (1869), where the directors were held liable for the money received by them, but for no more; *Nant-y-Glo, etc. Co. v. Grave*, L. R. 12 Ch. D. 738 (1878), holding that the corporation may sue herein the same as a liquidator; *Mitcalfe's Case*, L. R. 13 Ch. D. 169 (1879), where a director was held liable for the market value of stock given to him by the person to whom the stock was issued as full-paid in consideration of property. There was no evidence that the director acted unfairly or acted as a promoter. He was held liable although he had sold part of the stock. The secretary need not give up a profit which he made as one of the promoters. *Sale, etc. Gardens, Ltd.*, 78 L. T. Rep. 368 (1898), rev'g 77 L. T. Rep. 681. Where the directors vote money to a promoter, and he invests it in the company's debentures and divides them among the directors,



A vendor of property to a corporation may, however, pay the officers of the corporation for services in promoting and organizing the company and procuring the purchase of his lands, there being no fraud or concealment in the matter.<sup>1</sup>

the latter must refund the money so voted, and cannot offset a debt due to them from the company. *Re Anglo-French Co-op. Soc.*, L. R. 21 Ch. D. 492 (1882). Money paid to directors by the person selling to the company, in order to induce them to become directors, cannot be retained. *Re Brighton Brewery Co.*, 37 L. J. (Ch.) 278 (1868). Where the company's agent, in negotiating a contract, procures a larger sum for the company than it demands, on a secret agreement that it should pay him the increase, he cannot collect it. *Re Owens, Ir. Rep.* 7 Eq. 235, 424 (1873). Where the owners of property, the promoters, the directors, and the solicitor sold to the company property the title to which was bad, and divided the proceeds, each was made to repay the amount received by him. *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. D. 394 (1877). And see many English cases in Healey, *Company Law and Pr.*, pp. 543, 544. Directors will be compelled, upon the dissolution of the company, to pay to it the par value of stock which has been presented to them by the promoters in order to induce them to act as directors, even though the arrangement was known to all stockholders, it appearing that stock had been offered to the public without mention of these facts, although the public did not subscribe for any of the stock. So far, however, as the contract between the promoter and the company discloses the facts, the directors were protected. *Re Postage Stamp, etc. Co.*, [1892] 3 Ch. 566. Where a director is required to hold a certain amount of stock, and he takes that stock with a secret agreement by which the promoter is to purchase the stock from the director at a certain price whenever the director so desires, and after the company becomes insolvent the director sells the stock to the promoter at such price and receives the

money, the director may be compelled to turn in the money to the corporation. *Re North Australian, etc. Co.*, [1892] 1 Ch. 322. Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution demanded by a joint tortfeasor. *Gilbert v. Finch*, 173 N. Y. 455 (1903).

<sup>1</sup> *Dexter v. McClellan*, 116 Ala. 37 (1897). Where one company buys out another, the former may agree to pay a certain sum to the directors and secretary of the latter "as compensation for loss of office." This agreement is legal if the stockholders of the selling company ratify the same. The notice of a meeting of the stockholders, however, to ratify such an agreement, must specify such payment, in addition to stating that the object of the meeting is to ratify the agreement generally. A circular subsequently sent to the stockholders referring to the payment to the directors and secretary is not sufficient, even though it was sent before the meeting was held. *Kaye v. Croydon, etc. Co.*, [1898] 1 Ch. 358. Even though the purchaser of land from a corporation has agreed to pay a director one half of the net profit such purchaser might make in case the director resold the land, yet if the director did not vote for the sale and a full disclosure was made to the board, and the price received is the full value thereof, and the company was in liquidation, a profit thereafter received by the director does not belong to the corporation. *Tenison v. Patton*, 95 Tex. 284 (1902). A commission paid to a director on the purchase of land by the company does not invalidate a purchase-money mortgage where there was no fraud and



Even though a party purchases property and makes a partial payment thereon, yet, where he then proceeds to form a corporation and controls the corporation, and acts as a director in taking over the property at a largely increased price, the corporation may compel him to turn over to it all the profit he has made by the transaction.<sup>1</sup> In any case, unless all persons interested are fully informed of the facts and assent thereto, the promoter, director, or vendor may be brought to account.<sup>2</sup>

the fact was known to the directors. *Blood v. La Serena, etc. Co.*, 134 Cal. 361 (1901).

<sup>1</sup> The only way he could have avoided this result would have been by making a full disclosure of all the facts, and by furnishing the company with a board of directors capable of forming a competent and impartial judgment as to the wisdom of the purchase and the price to be paid. The company may enjoin him from voting or selling stock. *Plaquemines, etc. Co. v. Buck*, 52 N. J. Eq. 219 (1893).

<sup>2</sup> Where the promoters paid to a person who was to act as chairman of the directors, and his firm who underwrote 10,000 shares, a commission of 12,000 shares, the court held that 10,000 of the 12,000 was for the use of his name, and only 2,000 shares for the commission, and hence he was liable, at the instance of an investor in the stock, to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. *Cackett v. Keswick*, 85 L. T. Rep. 14 (1901); *aff'd*, [1902] 2 Ch. 456. As regards the duties and liabilities of a promoter, pure and simple, see the next section. That a director is disqualified to buy for the corporation from himself, see § 652, *infra*. The cases now under consideration involve a combination of frauds. Thus, where the owner of property agrees with two persons that

if they form a company to purchase the property he will secretly pay them a certain amount, and they form a company and act as a minority of the directors, and it purchases the property even at a fair valuation, the court, upon a corporate insolvency, will refuse to allow the two persons their salaries and will declare their agreement to be a fraud. *Re Hereford, etc. Co.*, L. R. 2 Ch. D. 621 (1876). Where the directors, who were also promoters, had purchased property before the company was formed, and then sold to the company at an advance, and induced the public to subscribe by representations that the price paid was the original price paid by them to the original vendors, they must pay the secret profit to the company. *Simons v. Vulcan, etc. Co.*, 61 Pa. St. 202 (1869). Where the directors had purchased property before the company was formed, and then as directors bought it for the company at an advance, the title passing direct from the first vendor to the company, and the directors' interest being concealed, the court held the directors liable to the company for their profit, the suit being brought by stockholders. *Hichens v. Congreve*, 1 Russ. & M. 150 (1829); s. c., 4 Russ. 562. Under similar facts and to same effect, *Benson v. Heathorn*, 1 Y. & C. 326 (1842). A stockholder cannot rescind a subscription for fraud where a person purchased a patent outright on condition that he could resell it, and then proceeded to promote and organize a company and to sell to it the patent at an advanced price, even though he was a director, it being clearly known to all that he owned and sold the patent as his own. *Gover's Case*, L. R. 1 Ch. D. 182 (1875). Where parties purchase prop-



A director cannot even with the knowledge of the other directors accept pay from a contractor with a corporation for inducing the corporation to make the contract.<sup>1</sup> Again, a person who agrees with the owner of patent-rights to form a corporation to buy them is a promoter, and is liable to give up a secret gift given to him by the patentee, especially where such promoter was a director when the purchase was made by the company.<sup>2</sup> A secretary is not liable as a promoter even though he accepts a gift from the promoter.<sup>3</sup> Where the general manager acts as an intermediary in selling all the stock of the company and he makes a secret profit, the stockholders may compel him to pay it over.<sup>4</sup> A general manager in control of the offices of an insurance company who sells the office of general manager for pay, the purchaser thereby being enabled to defraud the company, is liable to the company for the fraud.<sup>5</sup>

A committee of stockholders appointed to purchase land for the corporation may be compelled to give up secret pay which they received from the vendor.<sup>6</sup>

Even though three persons, who own all the stock of a corporation, enter into a contract to sell it, and one of them secretly receives a higher price for his holdings of the stock, yet the other vendor cannot by an action in *assumpsit* claim a part of such extra price. His remedy, if he has any, is in equity for an accounting, or an action for deceit.<sup>7</sup>

§ 651. *Promoters' frauds on the corporation.* — A promoter is a person who brings about the incorporation and organization of a cor-

erty and agree absolutely to pay therefor themselves, and not by the issue of the stock of a corporation to be formed, or by the money of that corporation, the fact that they intend to and do then form a company to buy the property from themselves at an advance does not render them liable to the company for the profit. If they had formed the company partially or completely before they purchased, the case might be different. The court referred to the word "promoters," but only to refuse to use it on account of its indefiniteness. One of the parties purchasing the mine and afterwards selling to the company was a director in the latter at the time of purchase. The right to rescind was barred by the fact that the company had lost the property, a leasehold, by non-payment of rent. *Ladywell Min. Co. v. Brookes*, L. R. 35 Ch. D. 400 (1887). It is to be borne in mind in all transactions

of this kind that the objections mentioned above may be obviated by the unanimous consent of the stockholders or by their acquiescence or participation with knowledge, all of which is considered in § 662 and ch. XLIV, *infra*.

<sup>1</sup> *Landes v. Hart*, 131 N. Y. App. Div. 6 (1909).

<sup>2</sup> *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101 (1894).

<sup>3</sup> *Re Sale, etc. Co.*, 78 L. T. Rep. 368 (1898).

<sup>4</sup> *Barbar v. Martin*, 67 Neb. 445 (1903). See also §§ 320, 321, *supra*, and § 662, *infra*.

<sup>5</sup> *Field v. Western, etc. Co.*, 166 Fed. Rep. 607 (1908).

<sup>6</sup> *Colonizers' etc. Co. v. Shatzkin*, 129 N. Y. App. Div. 609 (1908).

<sup>7</sup> *Cummings v. Synnott*, 120 Fed. Rep. 84 (1903). See also §§ 320, 321, *supra*.



poration. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.<sup>1</sup>

<sup>1</sup> Quoted and approved in *Moore v. Warrior etc. Co.*, 59 S. Rep. 219 (Ala. 1912). *Burbank v. Dennis*, 101 Cal. 90 (1894); *Dickerman v. Northern T. Co.*, 176 U. S. 181, 203 (1900); *South, etc. Co. v. Crommer*, 202 Mo. 504 (1907). See *v. Heppenheimer*, 69 N. J. Eq. 36, 71 (1905), and *Cox v. National, etc. Co.*, 61 W. Va. 291 (1907). See also *The Telegraph v. Loetscher*, 127 Iowa, 383 (1904). *Armstrong v. Sun, etc. Assoc.*, 137 N. Y. App. Div. 828 (1910). An interesting description of the "promoter" is given by Judge Lurton in *McMullen v. Ritchie*, 64 Fed. Rep. 253, 260 (1894), as follows: "He was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or 'boomer' he seems to be unrivaled; a man of large general information and robust constitution, extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions." In the case *Bigelow v. Old Dominion, etc. Co.*, 74 N. J. Eq. 457 (1908), the word promoter was defined as follows (p. 501): "A promoter is one who seeks opportunities for making advantageous purchases and profitable investments in industrial or other enterprises, who interests men of means in such a project when found, organizes them into a corporation for the purpose of 'taking over' the project, and attends upon the newly formed company until it is fully launched in business. He may be stockholder, director, officer, or none of these. His services begin before the company is formed, and ordinarily are not concluded until some time after its formation. For what he does and for what he spends in seeking out and bringing together property or opportunity, on the one hand, and men with capital, on the other, he is entitled to reasonable compensation and reimbursement by the new company. But it so often happens that promoters

desire to make a profit exceeding mere compensation for their time and legitimate expenses that what they thus get from the company has come to be called 'promoter's profits.' No rule of law or of equity prohibits such profits, provided they be allowed as the result of a fair agreement amongst all parties concerned." Great difficulty is experienced in determining who is and who is not a promoter. An old English statute defined a promoter as "every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company" being fully incorporated (7 & 8 Vict., c. 110, § 3). Other definitions are, "one who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose." *Twycross v. Grant*, L. R. 2 C. P. D. 469, 541 (1877); *Bagnall v. Carlton*, L. R. 6 Ch. D. 371, 381, 382, 407 (1877). See also *New Sombrero Co. v. Erlanger*, L. R. 5 Ch. D. 73, 118 (1877); *Erlanger v. New Sombrero Co.*, L. R. 3 App. Cas. 1218, 1268 (1878); *Whaley Bridge, etc. Co. v. Green*, L. R. 5 Q. B. D. 109 (1879); *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. D. 396, 407 (1879), where Lindley, J., said: "The term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoters assumes towards it." See also *Re Great Wheel Polgooth*, 32 W. R. 107 (1883), holding that the solicitor was not a promoter; *Re Great Western, etc. Co.*, L. R. 31 Ch. D. 496 (1886), practically overruling *Ex parte Valpy*, L. R. 7 Ch. App. 289 (1872). But see *Tyrell v. Bank of London*, 10 H. L. Cas. 26 (1862). An agent of a person selling property to the corporation may also be a promoter of the latter and liable



The supreme court of the United States says: "The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders."<sup>1</sup> A person who procures subscriptions and aids in organizing the company and frames the papers and manages the procuring of options and the vesting of title is a promoter, even though he is also a subscriber.<sup>2</sup> A trust company may be liable in connection with the issue of stock, where it issues receipts for the same and it turns out that by reason of liens on the stock the stock itself is worthless.<sup>3</sup>

It is legal for persons to contract to form a corporation and to provide for its future management and control.<sup>4</sup> But it is not legal for promoters to cause the board of directors to vote stock to such promoters for services already performed.<sup>5</sup> A lower court in New Jersey has

as such. *Lydney, etc. Co. v. Bird*, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328. For other definitions, see *Ladywell Min. Co. v. Brookes*, L. R. 35 Ch. D. 400 (1887); Healey, *Company Law and Pr.* (3d ed.), p. 35. In *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. D. 918 (1879), s. c., L. R. 17 Ch. D. 122, a promoter is defined as "a trustee, agent, or person in a fiduciary position as regards the company; one who has undertaken a duty towards the company of such a character as incapacitates him from making a secret profit at the expense of the company." No doubt a very little will make people promoters of a company, if it can be seen that they were really doing something in the way of speculation for their own interest and not acting merely as agents for others. *Glasier v. Rolls*, L. R. 42 Ch. D. 436 (1889). A banker is not a promoter. *Re Imperial Land Co.*, L. R. 10 Eq. Cas. 298 (1870). Where a mining company is practically reorganized by selling out to a new and larger company having the same directors, and the stock is sold to the public, if the prospectus discloses all the facts excepting the amount of profit which one of the directors made as a stockholder in the former company, he is not liable to the new company for such profit as a promoter thereof, although it might have been ground for rescinding the contract of purchase.

*Re Lady Forrest, etc.*, [1901] 1 Ch. 582. A vendor of property which is afterwards transferred by the vendee to a corporation is not a promoter of the corporation. *South Missouri, etc. Co. v. Crommer*, 202 Mo. 504 (1907).

<sup>1</sup> *Dickerman v. Northern T. Co.*, 176 U. S. 181, 204 (1900), citing § 651, *supra*.

<sup>2</sup> Quoted and approved in *Richlands Oil Co. v. Morriss*, 108 Va. 288 (1908). *Woodbury, etc. Co. v. Loudenslager*, 55 N. J. Eq. 78 (1896).

<sup>3</sup> *McClure v. Central Trust Co.*, 165 N. Y. 108 (1900).

<sup>4</sup> *King v. Barnes*, 109 N. Y. 267 (1888).

<sup>5</sup> Where a company issues fully paid-up stock to parties in payment for services rendered to the company in its formation, and in establishing its business, such a payment is a mere pretense, and such persons are liable on such stock as unpaid stock, if the company becomes insolvent. *Re Eddy-stone, etc. Ins. Co.*, [1893] 3 Ch. 9. A corporation cannot give stock to a promoter as a gratuity. *McAllister v. American, etc. Assoc.*, 125 Pac. Rep. 286 (Oreg. 1912). A stockholder may maintain a bill to compel a promoter to return stock which was issued to him without consideration in violation of the original agreement. *Moore v. Warrior, etc. Co.*, 59 S. Rep. 219 (Ala. 1912). See also § 46, *supra*.



held that it is the duty of promoters to furnish the corporation with a competent and independent board of directors to negotiate the purchase of property for which stock is issued, and such directors should act wholly in the interest of future stockholders and not be biased or influenced by the persuasions or friendship of the proposed vendors. It is the duty of promoters to tell all the facts to the board of directors, including the actual cost of properties which are to be sold, and they should ask for investigation as to the value and cost of reproduction.<sup>1</sup> A promoter is considered in law as occupying a fiduciary relation towards the corporation.<sup>2</sup> He is an agent of the corporation, and is subject to the disabilities of such. There are two classes of cases in which he may be guilty of a breach of his duties to the company.

First, where he sells property to the corporation. If he purchased the property before he began promoting the company, he may sell to the company at an advance without disclosing his profit.<sup>3</sup> But where the promoter obtains merely an option on property and then causes a company to be formed to which he sells it at a profit, without disclosing the amount of that profit, he is liable in damages to subscribers for the stock.<sup>4</sup> He is liable also to the corporation itself,

<sup>1</sup> See *v. Heppenheimer*, 69 N. J. Eq. 36 (1905). But see *Old Dominion Copper Co. v. Lewisohn*, 210 U. S. 206 (1908), as to the supposed duty to have an independent board of directors.

<sup>2</sup> Promoters occupy a fiduciary relation towards the corporation and other stockholders. *Fred. Macey Co. v. Macey*, 143 Mich. 138 (1906).

<sup>3</sup> A person who buys property at a foreclosure sale and then organizes a company to take it over, and who discloses the price which he paid at such sale, should disclose the fact that he had previously bought a part of the mortgage bonds of the bankrupt company and had made a profit thereby. *Re Olympia, Limited*, [1898] 2 Ch. 153. A person who purchases land and partly pays therefor may afterwards cause a corporation to be organized to purchase the land at a higher figure, and is not liable to the corporation for the profit if there was no concealment of the fact. He may also legally pay a commission to parties to induce them to subscribe for stock. The fact that he was a director in the corporation does not necessarily change the rule. *Milwaukee, etc. Co. v.*

*Dexter*, 99 Wis. 214 (1898). Persons owning land may form a corporation and may sell such land to the corporation for more than they paid for it. *Spaulding v. North Milwaukee, etc. Co.*, 106 Wis. 481 (1900). A prospectus need not state what a person paid for property which he has sold to the company, it appearing that he was the absolute owner of the property when he sold it to the company. *Brookes v. Hansen*, [1906] 2 Ch. 129. Promoters who sell their property to the corporation must disclose the whole truth, otherwise the corporation may elect to cancel the purchase or collect from them the profits they receive. *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). Where promoters purchase properties before organizing the company they are not liable to the company for their profits. *Tompkins v. Sperry, etc. Co.*, 96 Md. 560 (1903).

<sup>4</sup> Quoted and approved in *Richlands Oil Co. v. Morriss*, 108 Va. 288 (1908). In *Brewster v. Hatch*, 122 N. Y. 349 (1890), the plan adopted was as follows: The promoters took an option for which they gave \$5,000, and by which they had the privilege of



and this liability may be even greater than any actual profit received by him, especially where stock was issued to him and the corporation

purchasing certain mines at any time within four months for \$135,000. This agreement is set forth in the case. They then issued a prospectus to the public, soliciting subscriptions to a corporation thereafter to be formed to purchase the mines for all its capital stock, which was to be \$1,500,000. The stock was offered to the public at forty cents on the dollar. Subscriptions for \$610,000 par value were received, netting \$244,000. The corporation was then formed, the promoters making themselves directors, and the above plan carried out. A subscriber then sued the promoters for damages. The court held that the plaintiff could recover. The defendants were not mere vendors of the stock. The fatal defect seems to have been in the fact that the promoters did not buy the property before offering the stock. On the contrary they merely obtained options, and would have abandoned them if the stock had not been taken. Moreover they placed the stock before the corporation was organized. All this made them fiduciary agents of the subscribers. If they had been intrinsically vendors of the stock, it was admitted that they would not have been liable. Where a promoter causes the stockholders in various electric companies to turn in their stock to a new corporation in exchange for bonds of the latter, and also gives to such stockholders the right to purchase, at \$30 a share, stock in the latter, a stockholder who has done so and then discovers that the promoter has made \$20,000,000 profit in stock of the new company, may bring suit to compel the promoter to turn over the profit to the corporation and may join the new corporation as a party defendant. It is no defense that the board of directors of the latter thinks it inexpedient that the suit be brought. *Groel v. United, etc. Co.*, 70 N. J. Eq. 616 (1905). The court said: "The authorities hold that it is a matter of discretion in the court whether to permit a suit to be brought by a

stockholder on behalf of his corporation, and that the court will exercise its discretion, having in view the circumstances of the parties, their relationships to each other and to the cause of action, the refusal to sue," etc. In the case *Franey v. Warner*, 96 Wis. 222 (1897), where promoters purchased land for \$32,727 and sold it to the corporation for \$45,000 without divulging the profit, the court held that a stockholder could not rescind his subscription, inasmuch as the corporation was innocent, but that he might have a judgment against the promoters for his *pro rata* share of the profit. See also *Franey v. Wauwatosa Park Co.*, 99 Wis. 40 (1898). A person holding an option right to purchase land for \$6,000 may cause a corporation to be organized to purchase such land for \$8,500, thereby giving a profit to the promoter, for which the company may issue to him its stock, it being known in advance that such promoter was the owner of such option and would sell the same at that price. *Richardson v. Graham*, 45 W. Va. 134 (1898). In *South Joplin Land Co. v. Case*, 104 Mo. 572 (1891), it was held that a person who secures an option on a property with a view to organizing a corporation and selling the property to it, and who, together with another person employed by him, forms the company and places the stock on representations that the property cost \$2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the stockholders that the notes were not included, though they were received by himself, is accountable to the corporation for the profits thus realized by himself, as he occupied a position of trust towards the subscribers, and could not make secret profits out of the transaction. The court said that persons who "project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning



has become insolvent. He may then be liable for the actual original value of the stock.<sup>1</sup> Where promoters take an option on land and then

over to the company property which they own, or have a right to acquire by executory contract, do occupy a double position. On the one hand, they represent their own interest in respect of the disposition of the property; on the other, they represent the proposed corporation." The court also said that a vendor is a promoter, and is bound to protect the interests of those who ultimately constitute the company "if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control and who are practically himself in disguise. He also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence." Where the person holding an option for the purchase of a mine represents that he is to pay a certain price for the mine, and induces parties to form a corporation and to have the corporation purchase the mine at that price, the corporation may rescind the contract if the actual price paid by such person was much less. But the corporation cannot recover back its expenses. *Cortes Co. v. Thannhauser*, 45 Fed. Rep. 730 (1891). An owner of land who gives an option thereon to an irresponsible party and then aids the latter in forming a corporation to take over the land for stock and acts as one of the directors, is a promoter of the corporation and is liable to parties who purchase the stock on misrepresentations as to the transaction, but is to be credited with the actual value of the property. *Hayden v. Green*, 68 Kan. 204 (1903). Where promoters having an option on land obtain subscribers to the stock of a proposed corporation on a prospectus stating that the land was worth \$250,000, and that it would only cost \$175,000, and it turns out that the promoters realized a secret profit of \$30,000 from the \$175,000, a subscriber to the stock is not bound to pay unless

he has ratified the transaction with full knowledge of the facts, even though the facts do not come to his knowledge for a long time. *West End, etc. Co. v. Nash*, 51 W. Va. 341 (1902). A promoter who has merely an option to purchase stock which he then sells to a new corporation is merely an agent of the vendor and a dividend declared on the stock of the new corporation before the option is exercised belongs to the vendor. *Rowe v. White*, 112 N. Y. App. Div. 688. (1906); *aff'd*, 189 N. Y. 523.

<sup>1</sup> Where promoters pay out less than \$30,000 to secure options on land and then sell the options to a corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900). Where promoters are liable to the corporation for stock illegally issued to them, the stock is to be valued not by the first sale, but by its value after it acquired a recognized market value, with interest from that date. *East Tennessee, etc. Co. v. Leeson*, 183 Mass. 37 (1903), being the same case as *Hayward v. Leeson*, 176 Mass. 310. A promoter who obtains an option on land, and then



form a corporation controlled by themselves to take over the property with a large profit to themselves which is concealed, the corporation may compel them to pay it over, but the court will allow them reasonable compensation for their services.<sup>1</sup> Where the promoters misrep-

forms a corporation to purchase the land at an advanced price without disclosing his profit, is liable to the corporation for such profit, and if the corporation refuse to sue for it a stockholder may bring suit, even though other stockholders are not in a position to complain. *Exter v. Sawyer*, 146 Mo. 302 (1898). A corporation may hold liable in damages a person who has sold property to it in payment for stock where the corporation was induced to make the purchase by false representations, even though such false representations were made not to the corporation but to its promoters before the incorporation took place. *Schoefield, etc. Co. v. Schoefield*, 71 Conn. 1 (1898). Where a person obtains an option on land at \$2,500 an acre and then with other persons forms a corporation and sells it to the corporation at \$2,700 an acre, payable partly in cash and partly by mortgage, the profit being concealed from the other subscribers to the stock, and the promoter being a director at the time of the purchase, he and those who coöperated with him are liable to return to the corporation such profit, but such liability cannot be enforced in a suit against the sureties on his bond as treasurer. *First, etc. Co. v. Hildebrand*, 103 Wis. 530 (1899). In a suit against promoters for selling to a corporation land on which they had an option and receiving stock in payment, in such a manner that they pay nothing for the stock, a defendant who is not clearly alleged to have received some of the stock is not liable. *Pietsch v. Krause*, 112 Wis. 418 (1901); s. c., 93 N. W. Rep. 9 (1903). Promoters who obtain an option and then sell the property to a corporation at a secret profit in payment for stock may be held liable by the receiver upon the insolvency of the corporation for the difference between what they paid and what they received, without regard to the actual value. *Central T. Co. v.*

*East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902). Where one of three promoters represents to the other two that he is turning into the corporation an option which he has at cost, and they all subscribe on that basis, yet as a matter of fact he obtained a secret profit from the option, the other two cannot cancel their subscriptions if the corporation is already insolvent but they may compel the guilty promoter to pay over his profit to the company. *Jordan & Davis v. Annex Corporation*, 109 Va. 625 (1909).

<sup>1</sup>*Chaffee v. Berkley*, 141 Iowa, 344 (1908). Where promoters arrange with the owners of patents so that a corporation is organized to take over the patents for \$800,000 common stock and \$100,000 of \$200,000 preferred stock, and they give the \$100,000 preferred stock and \$50,000 of the common stock to the patentees and retain the \$750,000 common stock for themselves as a profit, without disclosing such profit, a *bona fide* purchaser from the corporation of some of the remaining preferred stock, may maintain a bill to compel the promoters to return and cancel their common stock and accept a reasonable sum for their services and expenses, the original plan having contemplated a sale of stock to the public. *Mason v. Carrothers*, 105 Me. 392 (1909). Minnesota subscribers to stock in an Arizona corporation may maintain a suit in equity in Minnesota to compel the corporate officers who are residents of Minnesota to surrender for cancellation stock fraudulently obtained by them from the corporation as promoters, the plaintiffs having subscribed on misrepresentations. It is immaterial that jurisdiction cannot be obtained over the corporation itself. *Gere v. Dorr*, 114 Minn. 240 (1911). Where a promoter obtains an option on property for \$12,000 and then organizes a company in which he is a director, and the remain-



resent the price paid by them for property sold by them to the company, they are liable to the company for their profits, even though the property is worth all that the company paid for it.<sup>1</sup> A corporation it-

der of the directors are dummies, and causes the corporation to purchase the land and pay therefor \$75,000 in full-paid stock and \$12,000 cash, and the balance of the capital stock is then sold to the public, an innocent purchaser of a portion of such balance of the stock may compel him to pay the company the sum of \$75,000 or return the stock for cancellation, it appearing that the property was worth no more than \$12,000. Four years' delay is not a bar if the complaining party had no knowledge of the facts in the meantime. Delay is not laches unless it has worked injury. *Wills v. Neehalem Coal Co.*, 52 Oreg. 70 (1908). Persons who bring about the sale of all the property of a corporation to another corporation and secretly take as a profit \$3,000,000 of the stock of the latter and \$400,000 of its bonds, may be compelled by the stockholders of the latter to account therefor to the new corporation. If the stock has no value, it will not be considered. *Arnold v. Searing*, 78 N. J. Eq. 146 (1910). Where promoters issue stock for land on which they have an option, and then sell unissued stock to the public for cash on representations that all the stockholders entered on the same basis, they may be held liable for such an amount as would put them on the same basis as the other stockholders. *Torrey v. Toledo etc. Co.*, 158 Mich. 348 (1909). A corporation may maintain a bill in equity to cancel 550,000 shares of stock which were issued gratuitously to the promoters, the corporation having subsequently sold stock to the public without all the facts being made known. *Hughes v. Cadena etc. Co.*, 13 Ariz. 52 (1910). Where a promoter tries to sell to a company at \$30 an acre land which he is secretly purchasing at \$5 an acre, he cannot hold the company liable for damages because the company allowed his option to lapse and then bought the land at \$5 an acre. *Mangold v.*

*Adrian Irr. Co.*, 60 Wash. 286 (1910). A promoter may by a bill in equity enjoin a corporation from issuing to another promoter all the stock which represents their profits and may compel a delivery of his part to him, and it is no defense that they had an option on the property at a certain price and then sold the property to a corporation at a much larger price payable in stock, it appearing that the property was worth more than the larger price. The constitutional prohibition in South Dakota against fictitious stock does not apply to such a transaction. *Chambers v. Mittnacht*, 23 S. Dak. 449 (1909). Even though promoters buy mining claims for \$20,000 and incorporate a company and turn them in for stock to the amount of \$300,000 in an Arizona corporation, yet if the charter states that the capital stock was to be paid for by mining claims and the proceeds of the stock sold by them are used for the development of the mine a minority stockholder cannot maintain a suit in behalf of the corporation to hold them personally liable on such stock. *Turner v. Markham*, 155 Cal. 562 (1909). A promoter who obtains an option on a gas plant for \$40,000 and organizes a company to take it over at \$60,000 and sells the stock and bonds without stating what the plant cost, but misrepresents the price, may be held liable to the receiver of the corporation for the profit, the promoter having controlled the board of directors. *Parker v. Boyle*, 99 N. E. Rep. 986 (Ind. 1912).

<sup>1</sup>*Burbank v. Dennis*, 101 Cal. 90 (1894). Where promoters obtain an option on property for \$75,000, and organize a company for \$100,000 capital stock, and, as directors of the company, with other friendly directors, purchase the option for \$100,000, and sell \$75,000 of the stock at par and thereby have the remaining \$25,000 of stock as profit, and the purchasers of the \$75,000 of stock sup-



self may compel promoters to return for cancellation stock issued in excess of the price paid by them for property where they concealed from those who were directors and subscribers to the stock at the time of the transaction the profit that was being made.<sup>1</sup> The principles of law applying to promoters who sell property to the corporation for large quantities of watered stock and bonds are further considered elsewhere.<sup>2</sup> Under the New Jersey statutes it is held that where promoters organize a corporation and through a dummy board of directors cause stock to be issued for property at an overvaluation, the stock will not be considered fully paid-up and the promoters will be held liable as such stockholders.<sup>3</sup> So also if he purchased after he began promoting and then sold to the company, the sale is valid only when he informs the directors that the property belongs to him, and when, also, the directors are competent and impartial judges as to whether the purchase ought or ought not to be made.<sup>4</sup> In a recent celebrated litigation the supreme

posed that the actual price paid was \$100,000 the corporation may compel such promoter to return and cancel the \$25,000 of stock, and it is immaterial that the property was worth \$100,000, the actual facts not having been disclosed to the corporation or its stockholders. The court said: "The promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock so long as he maintains the power of control over it." *Yeiser v. United States, etc. Co.*, 107 Fed. Rep. 340 (1901).

<sup>1</sup> *Davis v. Los Ovas Co.*, 227 U. S. 80 (1913).

<sup>2</sup> See ch. 3, *supra*, and § 655, *infra*.

<sup>3</sup> See *v. Heppenheimer*, 69 N. J. Eq. 36 (1905). See also §§ 46, 47, *supra*.

<sup>4</sup> *Erlanger v. New Sombrero Co.*, L. R. 3 App. Cas. 1218 (1878); *New Sombrero Co. v. Erlanger*, L. R. 5 Ch. D. 73 (1877); *Re Coal, etc. Co.*, L. R. 20 Eq. 114 (1875); s. c., L. R. 1 Ch. D. 182; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221 (1874). Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the stockholders, and are precluded from taking a secret advantage of other stockholders. *Dickerman v. Northern*

*T. Co.*, 176 U. S. 181 (1900). Even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground. Even if the promoters stated that a certain part of the plant was in full operation, yet if there was no fraud and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. *Lagunas, etc. Co., Ltd. v. Lagunas Syndicate, Ltd.*, [1899] 2 Ch. 392. But where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named, who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corpora-



court of Massachusetts held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried

tion and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re Leeds, etc.*, [1902] 2 Ch. 809. In *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. D. 918 (1879); s. c., L. R. 17 Ch. D. 122, the promoter was compelled to disgorge a gift given to him by the vendors of a mine to the corporation, but he was allowed to retain therefrom his disbursements. It is immaterial that the sale was a fair one. The court said: "He must let his company know what profit he has taken, and deal with them, so to say, at arms' length;" *South Durham Iron Co. v. Shaw*, 14 W. N. 159 (1879); *Beck v. Kantorowicz*, 3 K. & J. 230 (1857); *Whaley Bridge, etc. Co. v. Green*, L. R. 5 Q. B. D. 109 (1879), holding also that if the vendor has not yet paid the money to the promoter the corporation may recover it from the former; *Twycross v. Grant*, L. R. 2 C. P. D. 469 (1877), disapproving *Craig v. Phillips*, L. R. 3 Ch. D. 722 (1876). Where a person who is the owner of land buys options on adjoining lands and takes deeds for the whole for \$66,000 (the deeds reciting the consideration as \$80,000), and then sells the same to a corporation, which he forms, for \$80,000 cash and \$40,000 stock, and then divides the stock among the stockholders, keeping the cash himself, he is liable to refund to the corporation his profit, the court holding open the question as to whether he was liable for the profit of the others. *Woodbury, etc. Co. v. Loudenslager*, 55 N. J. Eq. 78 (1896). In *Re Hess Mfg. Co.*, 23 S. C. of Can. 644, 658 (1894), the court said of a promoter: "It was incumbent upon him to sell the land for no excessive price; he was bound to misrepresent nothing which could influence the

company in determining whether to buy or not; to conceal nothing that it was material should be known in order to enable them to form a sound judgment on that question, and to put them in possession of all material information. Further, it was, above all, the duty of Dr. Sloan, as a vendor selling property to a company towards which he stood in a fiduciary relation, to see that the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which he could exercise no influence, and which would, as the expression is, keep him at 'arms' length' in making the bargain." But the court held that the promoter is not liable unless the company rescinds and restores whatever it has received. In this case the court stated that although the promoter stands in a fiduciary relation to the company, yet that he is not necessarily a trustee of property which he acquires to sell to the company; and that even if he were, the remedy is rescission and the turning back of the property to him. In *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43 (1870), the court refused to hold the defendants liable who owned property and formed a company, and sold the property to the company at a profit, without disclosing the original price, but without misrepresenting that price. The court said, however, "that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers; and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts. They may account to the company for the profit, because it legitimately is theirs." Where a promoter, after the company is formed, buys land for \$6,000 and sells it to the company at \$12,000, and represents to a subscriber for stock that the land cost \$12,000



out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors, and officers approved the transaction when it was carried out, it appearing that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.<sup>1</sup>

originally, the stockholder may recover from the promoter the amount paid for his stock. *Short v. Stevenson*, 63 Pa. St. 95 (1869). In *Rice's Appeal*, 79 Pa. St. 168 (1875), where a promoter elected the directors and sold property to the corporation at an exorbitant price, taking payment in money, stock, and bonds, the court refused to allow the bonds upon the winding up. In *McElhenny's Appeal*, 61 Pa. St. 188 (1869), where a person bought land for \$2,000, and then induced others to join him in organizing a company to purchase it for \$40,000 after he had sold it to them for \$12,000, is liable to account to the company for his part of the \$28,000 profit, but not for his \$10,000 profit. A person may purchase property and then proceed to form a corporation and sell the property to it at an advanced price. He is not bound to disclose his profit, nor is he liable therefor unless he makes misrepresentations. *Lungren v. Pennell*, 10 W. N. Cas. 297 (Pa. 1881).

<sup>1</sup> Hence where a person buys all the stock of a corporation for about \$613,000 and some real estate for about \$175,000, and sells the former to a corporation, formed by him for that purpose, for \$2,500,000 par value of stock, having also an actual value of \$2,500,000, and sells the real estate for \$750,000 par value of stock, having also the same actual value, but it

turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said "that is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315 (1905); s. c., 203 Mass. 159 (1909); 225 U. S. 111—(1912), the court refusing to follow *Old Dominion, etc.*



The supreme court of the United States, however, subsequently passed on the same transaction and held very properly that the corpora-

Co. v. Lewisohn, 136 Fed. Rep. 915; aff'd, 148 Fed. Rep. 1020, and 210 U. S. 206 involving the same issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued.

The federal decisions on this same transaction are as follows: Even though the vendors of property to a newly-formed corporation receive an excessive price therefor in fully-paid stock, yet if it is a closed transaction the corporation cannot thereafter hold them liable for the overvaluation, notwithstanding the corporation thereafter sells other stock to the public at par for cash without disclosing the transaction. *Old Dominion Copper, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908), the court saying: "At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land." The court said also that under the decisions a purchaser of stock from the vendors would have no claim excepting, of course, for actual fraud, and that the theory that the corporation is not bound until an independent board of directors passes upon the transaction has no basis in the decisions, and the court distinguished *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, aff'g 5 Ch. D. 73, on the ground that in the latter case the purchase was not completed until the stock had been taken by the public in ignorance of the facts. Even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy directors, cause the corporation to purchase the claims for

\$750,000 par value of stock, although the mining claims were worth but \$5,000 and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. *Old Dominion, etc. Co. v. Lewisohn*, 136 Fed. Rep. 915 (1905). The United States circuit court of appeals, in affirming this decision, said (148 Fed. Rep. 1020): "The bill prays for relief as follows: First, that the sale of the mining claims to the complainant by Leonard Lewisohn, the defendants' testator, and Albert S. Bigelow, a citizen of Massachusetts and not a party to this action, be rescinded, and the real estate reconveyed to the defendants, upon receipt by the complainant of the consideration paid therefor; second, that defendants return to the complainant the consideration paid by complainant for said property, namely 30,000 shares of its capital stock, or account therefor; third, that, if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then and in that event that the court ascertain the amount of damages sustained by complainant and direct the defendants, as executors, to pay the amount to complainant. We are unable to perceive how this relief, or any part thereof, can be granted the complainant upon the facts alleged in the bill. The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company, Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It



tion could not complain at all.<sup>1</sup> On the other hand, the supreme court of Massachusetts has held that where the entire capital stock of a mining

cannot be deceived or defrauded unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them. It may be that such a large overcapitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock; but we are not now dealing with the case of a stockholder alleging concealment, fraud, and misrepresentation. The stockholders, apparently, have no complaint—at least they have not propounded any . . . . The subscribers for the 20,000 shares subsequently issued were not deceived. They asked for no statement and received none. They got what they purchased, and are not complainants here.” In the final decision of this case in Massachusetts a judgment of upwards of \$2,000,000 by the company against the defendant was sustained. The court held that although the contracts were made in New Jersey, the company being incorporated in that state, yet where they were intended to be and were carried out in Massachusetts, the law of Massachusetts governed on this subject. The court gave a wide meaning to the word promoter in defining its fiduciary relation towards the company, and held that in selling property to the company there must be (1) an independent board of directors and a full disclosure to them, or (2) a full disclosure to all existing and future subscribers to shares, or (3) ratification by the stockholders after complete organization, or (4) all the stock issued to himself. The court again held that where the property costing \$1,000,000, with a market value of not over \$2,000,000 was turned in by the promoters for \$3,250,000 of stock,

and then \$500,000 remaining unissued stock was sold to the public at par, without disclosing such purchase and profit, the company might recover such secret profit, even though at the time of the sale the vendor owned the entire capital stock then outstanding. The measure of damages is the difference between the market value of the stock issued and the market value of the property received. *Old Dominion etc. Co. v. Bigelow*, 203 Mass. 159 (1909). A promoter, who is being sued in Massachusetts by a New Jersey corporation for alleged illegal profits, cannot by a suit in equity in New Jersey enjoin the corporation from prosecuting such suit in Massachusetts, even though he has been held liable by the Massachusetts court and he alleges that the decision is erroneous, and even though the New Jersey courts might not have held him liable originally, and even though the United States court in the same transaction held that the parties were not liable, especially where he has delayed five years before he has commenced suit in New Jersey. Where a promoter has been held liable for illegal profits the court will not compel another promoter equally guilty to pay a part of the judgment, even though the judgment is for more than the profit received by the defendant promoter. The liability of a promoter is to be determined by the law of the state where the transaction occurred or where the action is tried, rather than of the state where the corporation was organized. *Bigelow v. Old Dominion, etc. Co.*, 74 N. J. Eq. 457 (1908). If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the allegations in the first suit. *Old Dominion, etc. Co., v. Lewisohn*, 202 Fed. Rep. 178 (1913). An interesting history of the Lewisohn and Bigelow litigation in New York and

<sup>1</sup> See preceding note.



company is issued to one person in exchange for mines in good faith, and in selling the stock he did not withhold or conceal the facts and took no advantage of his position to obtain an unconscionable advantage, the corporation itself cannot subsequently maintain a suit to cancel the transaction.<sup>1</sup> The highest court in New York holds that a stockholder in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose stock was

Massachusetts with an analysis of the various decisions is found in *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911), where the United States Court in New York refused to hold the Lewisohn estate liable. These cases show that the line between liability as promoters, and freedom from liability as vendors of property, to a corporation for stock, is somewhat vague and indefinite, and in fact courts differ even where exactly the same state of facts exist. In this case, for instance, where a New York man named Lewisohn, and a Boston man named Bigelow, acting together, transferred mining properties to a New Jersey corporation in payment for stock, the supreme court of the United States held that Lewisohn was not liable, while the supreme court of Massachusetts held that Bigelow was liable to the corporation for his profit as a promoter. Judge Hough has well said in regard to that particular case that it has "a history writ very large in the reports, and not calculated to encourage any one who hopes to look upon the law as a science." *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911). Where a party contracts to purchase the stock of three sugar refining companies for \$8,250,000 preferred stock in a company to be formed, and then forms a company and becomes a director himself and sells the stock to the new company for \$8,250,000 preferred stock and \$10,000,000 common stock, he and his principal keeping the common stock, a preferred stockholder may compel these promoters to turn over to the company for cancellation on reduction of the capital stock the common stock mentioned above, even though eleven years have elapsed, the

common stock still being in the original hands, and the preferred stockholders not having been informed fully of the facts, and even though the preferred stockholders had given proxies to the guilty parties and the latter had voted such proxies ratifying the acts, but the promoters may keep dividends which were legally declared on the common stock more than six years prior to the suit. Even though the stockholders in their meetings had ratified the transaction this was not binding, the act being *ultra vires*. *Tooker v. National, etc. Co.*, 84 Atl. Rep. 10 (N. J. 1912). Bonds issued to promoters in payment for options on the property of competing companies of small and uncertain prospective value are void under the Pennsylvania constitution, and cannot be turned in to apply on the purchase price at a bankrupt sale. *Wiegand v. Lewis, etc. Co.*, 158 Fed. Rep. 608 (1908), aff'g *In re Wyoming, etc. Co.*, 153 Fed. Rep. 787. See also § 38, *supra*.

<sup>1</sup> *Stratton, etc. Mines Co. v. Stratton*, 206 Mass. 117 (1910). Where two promoters agree that a Minnesota corporation shall issue \$75,000,000 full-paid stock to one of them, \$50,000,000 of which was to be sold to retail grocers at twenty cents on the dollar to obtain their patronage, and \$25,000,000 was to be divided between the promoters, one of whom was to advance \$100,000, of which amount he does advance only \$12,000 and then cancels grocers' subscription to the amount of \$148,400, he may be liable in damages to the other promoter for breach of contract, and the contract itself may not be void under the laws of Minnesota or at common law. *Holman v. Thomas*, 178 Fed. Rep. 675 (1910), rev'g 171 Fed. Rep. 219.



turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded, their remedy is a suit at law for damages against the guilty parties. The court said: "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation. . . . The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured."<sup>1</sup> It is clear that where there is no intent to sell

<sup>1</sup> *Blum v. Whitney*, 185 N. Y. 232 (1906). Even though two of the directors sell to the corporation certain patents for \$3,000,000 full-paid stock, being the entire capital stock, and give to the corporation \$750,000 of the same as treasury stock, and even though the patents are worth but \$10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed \$10,000 was entirely immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the company that that was the value of the patents. I know of no principle which would

justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of course a remedy at law if there were false representations. *Insurance Press v. Montauk, etc. Co.*, 103 N. Y. App. Div. 472 (1905). Even though promoters obtain options on a large number of malting plants, and take subscriptions to stock in a corporation to be organized for the purpose of taking over the plants, and use the proceeds of the subscriptions to pay for the plants and furnish a working capital for the company, and receive from the corporation, in payment for the plants, stock sufficient to fill the subscriptions and also to leave with the promoters \$500,000, as a profit preferred stock and \$7,740,000 common stock, yet neither the corporation nor its stockholders can hold them liable for such profit in stock, there being no proof



stock to outsiders, a promoter with the consent of all parties interested may take such profit as may be agreed upon,<sup>1</sup> and is not liable even to creditors.<sup>2</sup> The rule is different where existing minority stockholders object to a fresh issue of stock and bonds.<sup>3</sup> There are cases which hold that if the intent is to sell the stock to the public, the transaction may be fraudulent.<sup>4</sup> Thus it has been held that a corporation may rescind a contract which promoters have made prior to its organization, and

that the plants were not worth the amount of the stock issued for them, nor that the sale had been rescinded, and there being no complaint made by the original subscribers to the stock and the original subscription having recited that such stock would be so issued for the properties. *Hutchinson v. Simpson*, 92 N. Y. App. Div. 382 (1904).

<sup>1</sup> A person holding an option to purchase lands for \$120,000 may agree with a promoter that a company shall be formed to take over the same for \$150,000 where all the parties interested knew the facts and his profit was represented by common stock. *Selover v. Isle, etc. Co.*, 91 Minn. 451 (1904). See also §§ 46, 47, *supra*.

<sup>2</sup> Even though by arrangement between promoters and the owner of a business, the business is sold to a corporation for £22,000 in full-paid shares of stock and £3,000 cash, the latter to go to the vendor, and all the stock to go to the promoters, and thereafter the company is wound up and its assets sold for £480, yet the promoters are not liable to creditors, inasmuch as all the stockholders knew of the transaction and no stock was sold or intended to be sold to outsiders, and the creditors might have ascertained the facts from the public registry if they desired, and even though the promoters became directors. The court said: "It cannot be suggested that mere inadequacy of price was sufficient of itself to invalidate the contract. You must show that, these shares not having been paid for at all, the contract for purchase was a colorable transaction, and that in truth and in fact, *qua* value, these shares were not part of the consideration, but were a gift. . . . I see nothing in these affidavits

or in anything else in the case to lead me to say that this transaction was not a real transaction, but a colorable transaction hiding the real transaction behind it." *Re Innes & Co. Ltd.*, [1903] 2 Ch. 254, rev'g 88 L. T. Rep. 123. See §§ 46, 47, *supra*.

<sup>3</sup> Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock. *Booth v. Land, etc. Co.*, 68 N. J. Eq. 536 (1905). See also §§ 41, 649, *supra*.

<sup>4</sup> Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law, and is barred by the six-year statute of limitations. *Pietsch v. Milbrath*, 123 Wis. 647 (1904). This seems to have the same basis as the decision by the supreme court of Massachusetts in the case *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315, and other cases in this section. Where options on mining land cost \$52 and the holders turn them in to the corporation for 600,000 of stock, a *bona fide* purchaser of other stock may maintain a suit to cancel the stock so issued to the promoters. *Richlands Oil Co. v. Morriss*, 108 Va. 288 (1908).



turned over to the corporation at a profit, which the promoters concealed from the stockholders, who were induced to subscribe by a prospectus which did not state such profit, it appearing also that the other party to the contract paid the commission to the promoters knowing that it had been concealed.<sup>1</sup> But the corporation itself, all of whose stock has been issued in payment for a mine, cannot hold a vendor liable for misrepresentations as to the value of the property.<sup>2</sup> The corporation cannot be compelled to pay to promoters such part of the purchase price as they were to have for their profits, where they misrepresented the price which the original owner of the property was to receive.<sup>3</sup> One promoter cannot maintain a suit against another promoter for his share of stock obtained by misrepresentations to the corporation as to the price paid for property.<sup>4</sup>

If the promoter conceals the fact that he is selling his own property to the company, the latter may rescind the sale;<sup>5</sup> or, if the promoter

<sup>1</sup> *Commonwealth S. S. Co. v. American, etc. Co.*, 197 Fed. Rep. 797 (1912).

<sup>2</sup> *Stratton's, etc. v. Dines*, 126 Fed. Rep. 968 (1904); *aff'd*, 135 Fed. Rep. 449.

<sup>3</sup> *Tegarden Bros. v. Big Star, etc. Co.*, 71 Ark. 277 (1903).

<sup>4</sup> *Travis v. Travis*, 140 N. Y. App. Div. 191 (1910).

<sup>5</sup> Where promoters represent to capitalists that it will cost \$1,900,000 to purchase a company to be reorganized, when in fact it costs them but \$1,400,000, and the capitalists advance the former sum, and the promoters organize a company and carry out the reorganization and give to the capitalists a part of the stock with bonds, the latter as stockholders may compel the promoters to pay the extra \$500,000 to the company, even though the promoters controlled all the stock at the time the property was taken over, the essence of the transaction being that the capitalists were the stockholders in the new company from the beginning, and it is no defense that for each dollar advanced by the capitalists they were to receive a dollar in bonds and a dollar in stock. *Arnold v. Searing*, 73 N. J. Eq. 262 (1907). Where several persons agree to form a corporation to take over property which they intend to purchase, and one of them purchases

it and misrepresents the price, he may be held liable by the corporation for his secret profit. *Johnson v. Sheridan, etc. Co.*, 51 Oreg. 35 (1908). Where promoters obtain an option on property for \$40,000, but cause the written option to state the price as \$60,000, on which \$20,000 has been paid, and then by misrepresentations cause their associates to organize a company and take over the property and pay the \$40,000 and issue to them \$20,000 in stock, they may be compelled to give up the stock for cancellation. *Cuba, etc. Co. v. Kirby*, 149 Mich. 453 (1907). A promoter who obtains an option on a patent for \$3,000, and induces other people to join him in organizing a corporation to purchase it for \$15,000, claiming that the latter was the lowest sum at which the patent can be bought, may be compelled to return \$12,000 to the company, but other persons are not liable, even if they also solicited subscriptions, without knowing, however, of the fraud. *Second Nat. Bank v. Greenville, etc. Co.*, Ohio Circuits (1899) 274. *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221 (1874); *Erlanger v. New Sombrero Co.*, L. R. 3 App. Cas. 1218, *aff'g* *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. D. 73 (1877); *Re Ambrose Lake, etc. Co.*, L. R. 14 Ch. D. 390 (1880); *Re Cape Breton Co.*, L. R. 29



was a promoter at the time he purchased the property, the company may recover from the promoter the profit made by him.<sup>1</sup> If the promoter owns the property at the time of forming the company, and sells it to the company at an advance over its cost to him, and then induces persons to subscribe by stating that he made no profit thereby, he is liable in equity to account to them for the injury they have sustained.<sup>2</sup>

Ch. D. 795 (1885). But not if the company is unable to restore the property, where the disability to restore it is due to the company and not the promoter. *Western Bank v. Addie*, L. R. 1 Sc. App. (H. L.) 145 (1867); *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. D. 394 (1877); *Head v. Tattersall*, L. R. 7 Exch. 7 (1871); *Re Cape Breton Co.*, L. R. 29 Ch. D. 795 (1885). The company may rescind as to part if the transaction is severable. *Maturin v. Tredinnick*, 2 N. R. 514 (1863); s. c., 4 N. R. 15. Where a mine was sold to a company for \$30,000, the promoters representing that they did not have any interest therein, and it afterwards was discovered that they received \$20,000 of the price, the corporation succeeded in having the whole purchase set aside and the \$30,000 and interest and expenditures refunded. *St. Louis, etc. Co. v. Jackson*, 5 Cent. L. J. 317 (1877, St. Louis Ct.).

<sup>1</sup> *Re Cape Breton Co.*, L. R. 26 Ch. D. 221 (1884); aff'd, L. R. 29 Ch. D. 795; *Lydney, etc. Co. v. Bird*, L. R., 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; *Tyrell v. Bank of London*, 10 H. L. Cas. 26 (1862); *Benson v. Heathorn*, 1 Y. & C. Ch. 326 (1842); *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. D. 918 (1879); s. c., L. R. 17 Ch. D. 122. *Re Ambrose Lake, etc. Co.*, L. R. 14 Ch. D. 390 (1880).

<sup>2</sup> *Getty v. Devlin*, 54 N. Y. 403 (1873); s. c., 70 N. Y. 504 (1877); *Getty v. Donnelly*, 9 Hun, 603 (1877); *Brewster v. Hatch*, 10 Abb. N. Cas. 400 (1881); aff'd, 122 N. Y. 349. See also chs. IX and XX, *supra*. Where promoters transfer worthless copyrights for \$100,000 common stock and then by misrepresentations as to the value of the preferred stock sell it, in order to raise money for the company, the purchaser may hold them personally

liable, even though with each share of preferred stock so sold they contributed one half of a share of common stock. *Grover v. Cavanaugh*, 40 Ind. App. 340 (1907). In the important case *Ex-Mission, etc. Co. v. Flash*, 97 Cal. 610 (1893), where persons purchased land at \$5 an acre and subsequently proceeded to organize a corporation to purchase it at \$25 an acre, representing to the stockholders that \$25 an acre was the lowest price at which the land could be purchased, it being concealed from the stockholders that one of their number, a large subscriber, was interested in the contract, and that the organizers of the corporation were his agents, the corporation caused to be set aside a mortgage and foreclosure thereof which was given to the promoters in part payment for such land, and the notes were ordered canceled. In this case it appears that the representation was made that \$25 per acre was the lowest price for which the land could be purchased, and that the subscribers came "in on the ground floor at bed-rock figures." Where a prospectus contained a material misrepresentation which induced a person to subscribe he may maintain a suit to rescind the subscription, even though the prospectus stated that there were certain contracts not mentioned in the prospectus and that the subscribers would be held to have had notice of the same, and even though the subscription contract contains a provision that the subscriber has notice of that which in fact is concealed from him. The misrepresentation in this instance was a misleading and ambiguous statement and also the non-disclosure of an agreement to which the promoter was a party, such agreement not relating to the formation of the company or his subscription to its



Second, a promoter may commit a breach of trust by accepting a commission or bonus from a person who sells property to the corporation.

stock. The court rescinded the subscription and held the directors personally liable for loss sustained by the subscriber. *Greenwood v. Leather, etc. Co. Ltd.*, [1900] 1 Ch. 421. The Solicitors' Journal (vol. 31, p. 740) has summarized the law on this subject: "Where the promoter had originally bought, not for himself, but for a company to be afterwards formed, in such a case it was an ordinary instance of purchase by an agent, and the company would be entitled both to keep the property and to call upon the promoter to repay the profit he had made. But it is for the company to prove this relationship of principal and agent, and also that it existed at the time of the original purchase. Hence, where this is not shown, the above rule does not apply, not even although the promoter subsequently becomes a director of the company. In this case it is his duty to inform the company of the profit he is making; and in default they are entitled, if they so choose, to a rescission of the contract. But they cannot affirm the contract and also claim the profits; and if rescission of the contract has become impossible, they seem to have no remedy at all." Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. *Du Puy v. Transportation, etc. Co.*, 82 Md. 408 (1896). Where the promoters represented that property cost them \$23,000, at which price they turned it in to the corporation, and as a fact it cost them \$13,000, they are each liable for the \$10,000 profit, even though they did not personally make the representations, a conspiracy being shown. *Fountain, etc. Co. v. Roberts,*

92 Wis. 345 (1896). Where promoters have a right to purchase land for \$31,000, and induce persons to join with them to form a corporation to purchase the land at \$55,000, and represent to such persons that \$55,000 is what the land actually costs, the persons so induced to subscribe may have the purchase of the land rescinded. *Hebgen v. Koeffler*, 97 Wis. 313 (1897). Where a promoter misrepresents to subscribers the cost of property which is to be and is sold to the corporation for cash, the corporation may rescind. *Limited Inv. Assoc. v. Glendale Inv. Assoc.*, 99 Wis. 54 (1898). In *Franey v. Wauwatosa Park Co.*, 99 Wis. 40 (1898), the subscription was held to be binding, although the promoters were individually liable to the subscribers for the profit made by the promoters. Where promoters represent that the territorial rights which they sell to a corporation cost a certain sum, when in fact one half of that sum went to them, the corporation may compel them to pay to it such one half. *Cook v. Southern, etc. Co.*, 75 Miss. 121 (1897). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern; concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business; and statements leading to the conclusion that all subscribers for stock stood on an equal footing, — constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. Hence, where partners organize a corporation to take over their business, each of the partners is liable for misrepresentations and concealments of the others committed while engaged in promoting and bringing out the enterprise. They are liable as promoters. *Walker v. Anglo-Am. etc. Trust Co.*, 72 Hun, 334,



The company may compel a promoter to turn his profit into the corporate treasury,<sup>1</sup> or the company may rescind its purchase of the property.<sup>2</sup>

341 (1893). Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that \$75,000 of stock should be sub-

scribed for within a certain time and then proceeds to organize the company, he, himself, subscribing for \$25,000 of the stock, and the corporation then purchases certain worthless patents and agency

<sup>1</sup> A promoter, who for a cash consideration from a patentee organizes a corporation to purchase the patent and acts as a director, is liable to the corporation for the money so received by him, the payment having been concealed, and the suit may be brought within a reasonable time after the fraud is discovered. *The Telegraph v. Loetscher*, 127 Iowa, 383 (1904). Where the promoters receive pay from the contractor, such pay being in excess of their disbursements, the company may compel them to turn in the amount to the company, although all the original stockholders and directors knew of the transaction. *Mann v. Edinburgh, etc. Co.*, [1893] A. C. 69; *Hichens v. Congreve*, 4 Russ. 562 (1828); s. c., 1 Russ. & M., 150; *Beck v. Kantorowicz*, 3 K. & J. 230 (1857); *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. D. 394 (1877); *Bagnall v. Carlton*, L. R. 6 Ch. D. 371 (1877); *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. D. 918 (1879); *Whaley Bridge, etc. Co. v. Green*, L. R. 5 Q. B. D. 109 (1879), holding also that, if the bonus has not yet been paid to the promoter, the company may claim it from the person contracting with it. Cf. *Arkwright v. Newbold*, L. R. 17 Ch. D. 301, 319 (1881); *Lydney, etc. Co. v. Bird*, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; *Albion, etc. Co. v. Martin*, L. R. 1 Ch. D. 580 (1875). The promoter is allowed a reasonable sum for disbursements. *Lydney, etc. Co. v. Bird*, L. R. 33 Ch. D. 85 (1886). Cf. *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. D. 918 (1879); *Bagnall v. Carlton*, L. R. 6 Ch. D. 371 (1877); *South Durham Iron Co. v. Shaw*, 14 W. N. 159 (1879). The promoter must disgorge, though

by his efforts the company paid for the property less than it was worth. *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. D. 918 (1879); s. c., L. R. 17 Ch. D. 122. The statute of limitations bars the suit. *Metropolitan Bank v. Heiron*, L. R. 5 Exch. D. 319, 325 (1880). But only from the time when the facts are known to the directors, or, if the directors are also implicated, to the stockholders. *Re Fitzroy, etc. Co.*, 50 L. T. 144 (1884). Where promoters, in collusion with the owner of a mine, pay him \$20,000 therefor and cause him to transfer it to a corporation for \$100,000 of the capital stock, and then induce third persons to buy such stock at par on representations that the mine cost the promoters \$90,000, and then receive from the owner of the mine the proceeds from the sale of the stock, less the \$20,000, the corporation may compel them to pay over the profits to it. *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307. (1889). Even though promoters agree that dividends shall be paid before they receive salaries as directors, and such salaries shall be paid only from profits, and even though the corporation adopted a resolution to that effect as specified in the agreement, yet a receiver cannot recover back the salaries paid from the capital with the consent of the stockholders. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

<sup>2</sup> *Munson v. Syracuse, etc. R. R.*, 103 N. Y. 58 (1886); *Erlanger v. New Sombbrero Co.*, L. R. 3 App. Cas. 1218 (1878); *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221 (1874); *Bagnall v. Carlton*, L. R. 6 Ch. D. 371 (1877). Cf. *Smith v. Sorby*, L. R. 3 Q. B. D. 552, n. (1875).



If the commission or bribe paid to the promoter consisted of shares of stock, then the company may recover from him the amount received by him upon a sale of the shares and all dividends previously received, together with interest;<sup>1</sup> or, if he still holds the shares, the company may recover the value of the stock together with interest.<sup>2</sup> The party who sells the property to the corporation through the promoter may also be liable to the corporation for the promoter's profits.<sup>3</sup> If, however, the vendor had nothing to do with the formation of the corporation he is not liable.<sup>4</sup> The vendor of land to a corporation is not responsible

contracts and issues therefor, \$63,250 of full-paid stock, including the \$25,000 subscribed for by him, and afterwards the corporation collects \$4,000 of such donations and borrows money from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the \$4,000. *Moore v. Universal, etc. Co.*, 122 Mich. 48 (1899).

<sup>1</sup> *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. D. 396 (1879).

<sup>2</sup> *McKay's Case*, L. R. 2 Ch. D. 1 (1875); *Pearson's Case*, L. R. 4 Ch. D. 222, L. R. 5 Ch. D. 336 (1877); *Re Fitzroy, etc. Co.*, 50 L. T. 114 (1884); *Nant-y-glo, etc. Co. v. Grave*, L. R. 12 Ch. D. 738 (1878); and see § 650, *supra*; *Chandler v. Bacon*, 30 Fed. Rep. 538 (1887), where promoters were compelled, at the option of the corporation, to transfer stock back to it or pay over the amount received by them for stock sold, or to pay to it the market value of stock which they as promoters had received from him to whom all the capital stock had been issued in payment for a patent. The agent of the person who deals with the corporation may recover his compensation from that person, but he cannot recover compensation for improperly influencing the agents of the corporation to make the contract. *Lydney, etc. Co. v. Bird*, L. R. 31 Ch. D. 328 (1885); *Arkwright v. Newbold*, L. R. 17 Ch. D. 301 (1881); *Davison v. Seymour*, 1 Bosw. (N. Y.) 88 (1857), where the court said: "There was secrecy, applications to individuals, a concealed promise of compensation, and utter ignorance and recklessness as to the competency of the party whose cause he was promot-

ing and whose reward he was to receive."

<sup>3</sup> Even though a person does not know that a promoter to whom he has given an option on his property is a director in the company which proposes to buy it, yet if he discovers this fact before he closes the transaction he must pay to the company the commission which he agreed to pay to the promoter, and even though the company has recovered from the promoter such part of the commission as the promoter actually received, yet the company may recover the balance from the vendor of the property, although such balance had been waived by the promoter in consideration of what was actually paid to him. It is unnecessary to rescind the contract. *Grant v. Gold, etc. Syndicate*, [1900] 1 Q. B. 233.

<sup>4</sup> Even though the agent of a land-owner forms a corporation, which purchases the land at a profit to the owner, and even though such agent receives a part of the profit, yet if the vendor did not contemplate and had nothing to do with the formation of the corporation he cannot be held liable for the profit. *Forest, etc. Co. v. Bjorkquist*, 110 Wis. 547 (1901). Although a person owning land employs an agent to sell it, and the agent, without the principal's knowledge, organizes a company and turns in the land at an advanced price, yet neither the corporation nor its stockholders can have the sale rescinded on the ground that the owner of the land was guilty of a promoter's fraud. *Godfrey v. Schneck*, 105 Wis. 568 (1900). See *De Klotz v. Broussard*, 203 Fed. Rep. 942 (1913).



for the misrepresentations of his agent to a party who purchases stock of the corporation, such vendor not having taken part in organizing the corporation or selling its stock.<sup>1</sup> The vendors of a mining property of a corporation are not liable for the misstatements of such corporation in selling its stock, in order to pay for the mine, even though they knew that a prospectus had been issued and they accepted payment from the corporation.<sup>2</sup>

A promoter may be liable to parties whom he induces to sell property to the corporation, a secret profit having been taken by him.<sup>3</sup> Where in a contract between a number of manufacturers and bankers as promoters for the organization of a corporation to take over the plants, the bankers secretly gave a larger price to some of the vendors than was specified in the agreement, one of the vendors who did not receive such secret price may file a bill for an accounting of the secret profits,

<sup>1</sup> *Hoyer v. Ludington*, 100 Wis. 441 (1898).

<sup>2</sup> *Wiser v. Lawler*, 189 U. S. 260 (1903).

<sup>3</sup> Promoters who cause some thirty-nine owners of paper mills to turn their property into a single corporation in exchange for bonds and stock of the latter are bound to disclose to such property owners the profit made by themselves as promoters. Promoters are entitled to a reasonable sum for their services and expenses, but are not entitled to a large profit which they realize without the knowledge of the parties "who represented the substantial interests in the new corporation," being the parties whom the promoters induced to sell their properties to the corporation in exchange for bonds and stock. But even though a large number of owners of paper mills are induced to turn their property into a single corporation in exchange for bonds and stock of the latter, and the promoters secretly receive a large quantity of additional profit, and even though the total amount of bonds and stock issued is about twice the price actually paid to the owners for the properties, yet this does not invalidate the mortgage securing the bonds, and the remedy of the parties who so turned in their properties is against the promoters and not in defense of a suit to foreclose the mortgage. *Dicker-*

*man v. Northern T. Co.*, 176 U. S. 181 (1900). A contract between the owner of property and a promoter, by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. *Brehm v. Sperry*, 92 Md. 378 (1901). The vendors of a mine to a corporation, the title not to pass until full payment, are not estopped from reclaiming possession, even though they knew that the vendee had assigned his interest to a corporation and stock of the corporation sold to the public. *Wiser v. Lawler*, 7 Ariz. 163 (1900); *aff'd*, 189 U. S. 260. Where a promoter induces an owner of timber land to convey it to a corporation for stock, one quarter to go to the owner and three quarters to the promoter, for which the promoter pays nothing, the owner may cause the whole transaction to be set aside. *Cranor Co. v. Miller*, 147 Ala. 268 (1906).



and may join as parties defendant the corporation, and the parties taking the secret profit, and the promoters.<sup>1</sup> Where a holding company turns the control for a number of years over to a person controlling competing companies, and such person causes contracts to be made between the various companies and then sells his own companies at a large profit, the holding company may compel him to divide the profit with it, it appearing that all the transactions were to secure such profit and the profit was due to all the companies being so united. If there is no other basis of division, the profits will be divided half to each.<sup>2</sup>

The subscriber for stock may sue the directors for fraudulent representations if they knew that the promoter was secretly receiving large illegal profits.<sup>3</sup> The New York court of appeals has held that the promoter of a company, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts naturally tending to mislead and to induce the public to purchase its stock or other securities, is responsible to those who are injured thereby, and that where there are a number of such promoters all the coadventurers are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities without reference to their own moral guilt or innocence.<sup>4</sup> Where a promoter organizes a syndicate to buy the stock of a company to be organized to take over certain properties, and conceals the fact that he is interested in the selling company, and in fact intends to pay his subscription from his interest in the selling company, the other members of the syndicate may rescind and on tendering to him their stock in the new company recover back the moneys they have paid.<sup>5</sup>

<sup>1</sup> *Shutts v. United, etc. Co.*, 67 N. J. Eq. 225 (1904). One of the vendors who was secretly to have a higher price than the others may recover the higher price, even though he may possibly be under legal obligation to divide it with the other vendors. *Boice v. Jones*, 106 N. Y. App. Div. 547 (1905). See also § 320, *supra*.

<sup>2</sup> *Bay State, etc. Co. v. Rogers*, 147 Fed. Rep. 557 (1906).

<sup>3</sup> Persons induced to subscribe by a prospectus stating that a certain price was paid for a business, when in fact a large part of that price went as a bonus to promoters, may sue the directors for fraudulent misrepresentations. *Capel v. Sim's, etc. Co.*, 58 L. T. Rep. 807 (1888). Where a promoter induces a person to subscribe

and pay for a stock by representing that property conveyed by the promoter to the company cost the promoter \$20,000, when in fact it cost him \$14,000, the subscriber may sue the promoter for damages for false representations. *Teachout v. Van Hoesen*, 76 Iowa, 113 (1888). See also ch. XX, *supra*. Cf. *Gaslier v. Rolls*, L. R. 42 Ch. D. 436 (1889), where merely deceit was involved.

<sup>4</sup> *Downey v. Finucane*, 205 N. Y. 251 (1912); holding also that a statement that a certain amount of stock had been issued or contracted to be issued is fraudulent where \$41,000,000 of stock was issued for a franchise which had been purchased by the promoters for \$250,000.

<sup>5</sup> *Heckscher v. Edenborn*, 203 N. Y. 210 (1911).



Bondholders cannot complain of promoters in the same way that the corporation may.<sup>1</sup> Where the court authorizes the receiver to sue promoters for secret profits, the proceeds of the suit to belong to the creditors who agree to pay the expenses, costs, etc., a creditor who delays taking part until it is evident that a large sum will be recovered, will not be allowed to come into such suit.<sup>2</sup> Under the English statute prohibiting commissions for underwriting, a plan by which a company sells its property to an individual and he agrees to organize a new company to take over the property and to pay him a profit is illegal.<sup>3</sup> A sale of the assets at foreclosure sale, and purchase thereof by a reorganized company, does not carry a cause of action against promoters for fraud.<sup>4</sup>

A stockholder may maintain a suit in equity to cancel stock which has been unlawfully issued.<sup>5</sup> A promoter may be held liable for his secret profits without a rescission of the transaction.<sup>6</sup> A plaintiff may, upon the trial, be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation.<sup>7</sup> Each promoter is liable jointly and severally for the whole damage,<sup>8</sup> and there is no contribution.<sup>9</sup> It is no defense to one promoter that a similar suit against his co-promoter in another jurisdiction has been defeated.<sup>10</sup> A compromise and

<sup>1</sup> *Banque, etc. v. Brown*, 34 Fed. Rep. 162, 196 (1888). Cf. §§ 42, 43, *supra*, and § 735, *infra*. A receiver will not be directed to hold promoters liable until after the visible assets have been exhausted. *Land, etc. Co. v. Asphalt Co.*, 121 Fed. Rep. 587 (1902).

<sup>2</sup> *McEwen v. Harriman, etc. Co.*, 138 Fed. Rep. 797 (1905).

<sup>3</sup> *Booth v. New Afrikander, etc. Co.*, [1903] 1 Ch. 295.

<sup>4</sup> *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902).

<sup>5</sup> *Ellis v. Penn. Beef Co.*, 80 Atl. Rep. 666 (Del. 1911). A stockholder may resort to a court of equity to attack an alleged fraudulent issue of stock to promoters. *Simon v. Weaver*, 143 Wis. 330 (1910).

<sup>6</sup> *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909).

<sup>7</sup> *Brewster v. Hatch*, 122 N. Y. 349 (1890). A suit by a stockholder against a promoter in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock,

and also to enjoin a proposed sale of plaintiff's stock, in order to pay an assessment, is multifarious. *Pietsch v. Krause*, 116 Wis. 344 (1903).

<sup>8</sup> *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909).

<sup>9</sup> Where the owners of property give to one of their number an option on the property for \$27,500 and he offers the property through a broker at \$33,000, of which \$3,000 was to go to the broker and \$2,500 to the party holding the option, and the broker and others then cause a land company to be organized, which buys the property for \$39,000, the party holding the option, and the broker and those taking part in the sale are liable to the land company for their profits, each for the whole, and no contribution will be enforced, the profit having been a secret profit and misrepresentations having been made as to the cost of the property, and there being parties in the land company who were not aware of the facts. *Lomita, etc. Co. v. Robinson*, 154 Cal. 136 (1908).

<sup>10</sup> *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909).



settlement of suits between promoters and the corporation will be upheld by the court.<sup>1</sup>

A provision in a contract of subscription to the stock of the company whereby the subscriber waives notice of all contracts between the promoters and the company is not binding on the stockholders, if such waiver is tricky and fraudulent.<sup>2</sup> A secretary is not liable as a promoter even though he accepts a gift from the promoter.<sup>3</sup>

One promoter cannot hold another liable for an accounting where the transactions were to defraud the public by the sale of mining stocks.<sup>4</sup> A fraudulent sale of mining stock by means of the United States mails, the fraud consisting of misrepresentations known to be such by the party so using the mails, is a criminal offense under the revised statutes of the United States.<sup>5</sup>

§ 652. *Sales of property by corporate officers to the corporation.* — It is well said in the case *Michoud v. Girod*<sup>6</sup> that a person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller. Especially is this the rule with corporate directors.<sup>7</sup> If they make sales to the corporation they may be compelled to pay over to the corporation the profit realized by such sales,<sup>8</sup> or the corporation may refuse altogether

<sup>1</sup> *Coburn v. Cedar Valley, etc. Co.*, 138 U. S. 196 (1891). Where a corporation brought suit against a promoter for fraud which suit failed, and a contract was then made by which all the stockholders were given an opportunity to sell their stock to the promoter, and the board of directors ratified the contract and agreed to stop all litigation, a dissenting stockholder cannot have the contract set aside for fraud, even though by the contract the president is paid for his services. *Hallenborg v. Cobre, etc. Co.*, 200 U. S. 239 (1906).

<sup>2</sup> *Greenwood v. Leather, etc. Co. Ltd.*, [1900] 1 Ch. 421. A statement in a prospectus that there are various contracts of the ordinary trade character, and that subscribers are bound to take notice of them, is not a waiver of notice of such contracts on the part of subscribers, under the English statutes. *Watts v. Bucknall*, [1903] 1 Ch. 766. See also § 160, *supra*.

<sup>3</sup> *Re Sale, etc. Co.*, 78 L. T. Rep. 368 (1898).

<sup>4</sup> *Primeau v. Granfield*, 193 Fed. Rep. 911 (1911); *rev'g*, 184 Fed. Rep. 480. See also §§ 705-707, *infra*.

<sup>5</sup> *Horn v. United States*, 182 Fed. Rep. 721 (1910).

<sup>6</sup> 4 How. 503 (1846).

<sup>7</sup> Quoted and approved in *Stanley v. Luse*, 36 Oreg. 25, 32 (1899).

<sup>8</sup> Where the directors buy property for \$2,500 and sell it to the company for \$8,000, they can collect only \$2,500 from the corporation, although the corporation has sold the land for \$17,000. *Higgins v. Lansingh*, 154 Ill. 301 (1895). Directors who purchase land in the name of one of them and then cause the corporation to purchase it at an advance, the real price being concealed, may be compelled to pay over their profit to the corporation. *Spaulding v. North Milwaukee, etc. Co.*, 106 Wis. 481 (1900); *Albion Steel, etc. Co. v. Martin*, L. R. 1 Ch. D. 580 (1875), holding the directors liable to refund profits on contract made subsequent to incorporation, but not on those made previous to incorpora-



to complete the contract.<sup>1</sup> Where a director dominates the board and induces the board to purchase worthless securities of other companies in which he is interested, and he thereby makes a large individual profit, he may be compelled by a receiver of the corporation to account for his profits and it is immaterial whether he did or did not vote therefor as a director.<sup>2</sup> Where the company purchases at an excessive price

tion; *Dunne v. English*, L. R. 18 Eq. 524 (1874), where two brokers, having agreed to divide the profits on a mine to be bought by one and sold by the other the former compelled the latter to divide a secret profit which the latter had obtained; *Benson v. Heathorn*, 1 Y. & C. (Ch.) 326 (1842), § 650, *supra*, and other cases therein. Concerning the right of the corporation to confirm the sale and sue the director at law or in equity for the profit made by him, see "the remedial rights of corporations against their directors," by Judge Fenn, 3 Yale L. J. 111. See also § 660, *infra*. Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside, the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved. *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781 (1906). Where the promoters are directors and cause the board to buy property from them at a large profit, which was not divulged, they may be held liable for such profit. *Shawnee, etc. Co. v. Miller*, Ohio Circuits (1903), p. 198.

<sup>1</sup> *Coleman v. Second Ave. R. R.*, 38 N. Y. 201 (1868). A contract by a corporation to buy land of a director is not enforceable by the latter where it was authorized by only three out of five directors, and two of those three were interested in the contract. *Hill v. Rich Hill, etc. Co.*, 119 Mo. 9 (1893). *Cf. Re Cape Breton Co.*, L. R. 26 Ch. D. 221 (1884); *aff'd*, 29 Ch. D. 795, where the court declined to hold a director responsible for profits made by a sale of property from him-

self to the company, and declined to rescind the sale, since the corporation could not restore the property. Where the corporation is insolvent, a director cannot turn in his property in payment of his debt due to the corporation. *White, etc. Co. v. Pettes, etc. Co.*, 30 Fed. Rep. 864 (1887). A purchaser of corporate assets at a receiver's sale cannot claim a leasehold which the president holds to premises which were used by the corporation. *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, 37 Hun, 9 (1885). Directors cannot purchase machinery and then sell it to the company at an advance. *Redmond v. Dickerson*, 9 N. J. Eq. 507 (1853). In *Great Luxembourg Ry. v. Magnay*, 25 Beav. 586 (1858), where the director purchased for the corporation property secretly owned by himself, the court refused to interfere after the corporation had resold the property without loss. Under the above principle of law the court refused to enforce a contract by a director to furnish railway chairs to his corporation. *Aberdeen Ry. v. Blakie*, 1 Macq. 461 (1854). And in *Flanagan v. Great Western Ry.*, L. R. 7 Eq. 116 (1868), the court refused to enforce a corporate agreement to lease property to a director. A stockholder's bill does not lie to enjoin an execution sale of the corporate franchise and property on a judgment obtained against the corporation by a director for property sold to it by him, there being no actual fraud, nor proof of directorship at the time of the sale. *Ward v. Salem St. Ry.*, 108 Mass. 332 (1871). School directors may be enjoined from selling their property to the district. *Witmer's Appeal*, 15 Atl. Rep. 428 (Pa. 1888).

<sup>2</sup> *Pepper v. Addicks*, 153 Fed. Rep. 383 (1907).



real estate in which the directors are personally interested, they may be compelled to repay the excess with interest or take the property at cost; otherwise the property should be sold and they be held liable for the difference between the price and the price originally paid with interest.<sup>1</sup> Generally the director has purchased the property for the express purpose of selling it to the corporation. When such is the case the company may ratify and confirm the transaction, or it may keep the property and recover from the director the profit realized by him, or the company may repudiate the whole transaction, return the property, and recover back the purchase money.<sup>2</sup> But where the director already owns the property in good faith, the court, while it may set the sale aside, cannot compel the director to take a less price than that already agreed upon.<sup>3</sup>

<sup>1</sup> *Klein v. Independent, etc. Assoc.*, 231 Ill. 594 (1907).

<sup>2</sup> *Parker v. Nickerson*, 112 Mass. 195 (1873), where the directors were held liable for the profit on a price paid by the corporation for a boat purchased from another corporation, in which the directors were also the directors and sole stockholders. They were held liable to refund all profit above the cost of the boat to the vendor corporation. A receiver may cause to be set aside a purchase of land by the corporation from the wife of the president, which cost her \$450 and which she sold to the corporation for \$3,000 by means of the influence of her husband. *Voorhees v. Nixon*, 72 N. J. Eq. 791 (1907). If the corporation has made improvements on land purchased from the director, it cannot compel him to take the land and pay it the price paid him and also the cost of the improvements. *Paine v. Irwin*, 16 Hun, 390 (1878). Where the corporation secretly agrees to give a subscriber extra stock if he will subscribe for a certain amount, and he subscribes and intends that his subscription shall be used to induce others to subscribe without knowledge of the secret gift, and they do subscribe, he cannot recover from the corporation such extra stock. The contract is void as against public policy. *Nickerson v. English*, 142 Mass. 267 (1886). A sale of mortgaged property, under a power to sell, by the mortgagee, to a newly-formed corporation in which he holds

stock, does not invalidate the sale, though he could not sell to himself. *Farrar v. Farrars*, L. R. 40 Ch. D. 395 (1888). The president of a stockyard company, who takes a lease of property in his own name, and then assigns the lease to the company on a guaranty of a large stockholder in the corporation that said president shall have one fifth of the profits from the use of the property, cannot enforce that guaranty. *Robinson v. Jewett*, 14 N. Y. St. Rep. 223; aff'd, 116 N. Y. 40 (1889). A director cannot be a partner with the corporation in sharing profits. *Rudd v. Robinson*, 54 Hun, 339 (1889), rev'd on another point in 126 N. Y. 113. It is illegal for directors to buy from themselves lots for the corporation. *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895). Where a person obtains an option on land at \$2,500 an acre, and then with other persons forms a corporation and sells it to the corporation at \$2,700 an acre, payable partly in cash and partly by mortgage, the profit being concealed from the other subscribers to the stock and the promoter being a director at the time of the purchase, he and those who coöperated with him are liable to return to the corporation such profit, but such liability cannot be enforced in a suit against the sureties on his bond as treasurer. *First, etc. Co. v. Hildebrand*, 103 Wis. 530 (1899).

<sup>3</sup> A director who owns the assets of a business, which is cognate to the



A corporation may purchase its own stock, and if it purchases such stock from a director the sale may be valid, but the price is not binding and the director will be allowed only what the stock is reasonably worth. Even though the stockholders for two years, with full knowledge of the facts, do not object, the corporation may defend against the agreed price, but may be obliged to pay what the stock was worth.<sup>1</sup> A person who sells property to a director to be paid for partly in the stock of a corporation cannot afterwards object that the director was disqualified from selling the property to the corporation.<sup>2</sup> Where the president of a railroad corporation secretly owns land in the name of another person, and causes the corporation to purchase it and issue stock and bonds in payment, without disclosing his interest in the land, he is liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land.<sup>3</sup>

Where, however, the directors sell to the corporation at a profit to themselves, but with a full and fair disclosure thereof to the stockholders, and without participating in the acceptance of the property by the corporation, and no objection is made, the transaction cannot be impeached afterwards.<sup>4</sup> In most cases a disclosure to the board of

business of his corporation, may sell the same to his corporation at an advanced price, and he need not disclose what he paid for it, and a stockholder cannot compel the director to pay to the corporation the profit he has made. The sale may be rescinded, but the court has no power to force the director to sell at a lower price. *Burland, etc. v. Earle, etc.*, [1902] A. C. 83. *Cf. Oliver v. Rahway, etc. Co.*, 64 N. J. Eq. 596 (1903).

<sup>1</sup> *Oliver v. Rahway, etc. Co.*, 64 N. J. Eq. 596 (1903). A going corporation may purchase stock owned by its president in order to terminate his contract of employment and obtain his resignation as president, where the contract is a fair one and another party had agreed to purchase such stock from the corporation at once and subscribe for further capital stock. *Joseph v. Raff*, 82 N. Y. App. Div. 47 (1903); *aff'd*, 176 N. Y. 611.

<sup>2</sup> *Mackey v. Burns*, 16 Col. App. 6 (1901). It is not for the purchaser of land from a company to raise the objection that the company purchased it from one of its directors. *Farnham Brewery Co. v. Hunt*, 68 L. T. Rep. 440 (1893).

<sup>3</sup> *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa. 1898). A president who obtains an option on property and then causes the corporation to buy the property direct without disclosing his secret profit, may be compelled to pay it over to the company. *Douglass, etc. Co. v. Simpson*, 233 Pa. St. 515 (1912). Where a director through his wife sells property to the corporation for an exorbitant price in stock and mortgage bonds, and the hotel built thereon fails, the court may reduce the mortgage by the amount of profit made by the director. *Voorhees v. Malott*, 73 N. J. Eq. 673 (1908).

<sup>4</sup> Where a director sells a plant to the corporation, and the sale is ratified unanimously at the stockholder's meeting, a stockholder cannot subsequently cause it to be set aside, especially where a great majority of the stockholders still object to its being set aside. The terms of the sale were held by the court to be reasonable. *Barr v. Pittsburgh Plate-Glass Co.*, 57 Fed. Rep. 86 (1893). Where the directors own all of the capital stock there is no objection to their selling property to the company, and the price may be



directors alone is insufficient. Acquiescence or ratification by the stockholders is necessary.<sup>1</sup>

collected if the company subsequently becomes insolvent. *Attorney-General, etc. v. Standard, etc. Co. of New York*, [1911] A. C. 498. A director may sell property to the corporation if the price is fair and the transaction is open. *Figge v. Bergenthal*, 130 Wis. 594 (1906), holding also that a corporation engaged in buying whisky may buy from one of its directors, the transaction being entirely fair, and the purchase is neither void nor voidable by the corporation. Even though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. *Stetson v. Northern Inv. Co.*, 104 Iowa, 393 (1898); *Chesterfield, etc. Co. v. Black*, 37 L. T. Rep. 740 (1877), where the court refused to hold liable for profits a director and a promoter where they had purchased a mine before incorporation and had sold it to the company at a profit, it being clearly stated to the company that a profit was being made, but the amount of that profit not being divulged; *Battelle*

*v. Northwestern, etc. Co.*, 37 Minn. 89 (1887). Even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet, if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction where he had himself moved that the stock be so issued. *Mackey v. Burns*, 16 Col. App. 6 (1901). Even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal, and the new company cannot repudiate the sale on that ground. Even if the promoters stated that a certain part of the plant was in full operation, yet, if there was no fraud and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient

<sup>1</sup> A director who assigns a contract to the company at a profit of \$40,000 to himself must refund his profit to the company, but will be allowed such sums as he paid out for commissions. It is immaterial that all of the original directors knew all of the facts and assented to the transaction. *Re George Newman Co.*, [1895] 1 Ch. 674. The vice-president and manager may lease property to the corporation, and may execute the lease for the corporation, where the lease is fair and the other officers approve. *Louisville, etc. Ry. v. Carson*, 151 Ill. 444 (1894). The fact that the president of an iron manufacturing company purchases iron for the company through his firm, which takes a commission, does not render the contract invalid unless it was actually unfair and fraudulent, there being no concealment of

the facts, and especially where there was evidence that the contract was reported to and discussed by the board of directors. *Salem, etc. Co. v. Lake Superior, etc. Mines*, 112 Fed. Rep. 239 (1901). The president of a company may as a member of a firm purchase land which might have been purchased by the company and even sell land to the company if his acts are open and fair and known to the directors and stockholders. *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509 (1910). A purchase of property in which a director is interested is not necessarily illegal, although such director voted for the same, it being shown that all the other directors also voted for such purchase. *Porter v. Lassen County, etc. Co.*, 127 Cal. 261 (1899). *Cf.* §§ 649, 662, and ch. XLIV.



However, it is within the power of the majority of the stockholders to ratify and confirm such a transaction where there is no *actual* fraud involved. The fraud is not an *actual* one if the director sold at a fair price and did not use his position to induce the corporation to purchase. Such a sale, however, is always a constructive fraud, and unless legally ratified is voidable at the option of any director or stockholder.<sup>1</sup> The proper rule is that such a transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt in his application to the court.

There is some difficulty in determining what will constitute a confirmation of such a transaction. If a majority of the directors and of the stockholders, without counting the votes controlled by the director who is interested, favor a confirmation of the transaction, a dissenting stockholder cannot bring suit to set it aside unless he can show the existence of some fraud other than the mere fact that the vendor was a director when he made the sale. If, however, a majority of the stockholders, excluding the votes owned directly or indirectly by the guilty parties, are in favor of bringing the directors to an accounting, greater difficulty arises. The weight of authority holds that the votes of the director as a stockholder are to be counted. If, however, *actual* fraud is involved, this question is immaterial, since no majority, however large, can ratify actual fraud.<sup>2</sup> Even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the

ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. *Lagunas, etc. Co. Ltd. v. Lagunas Syndicate, Ltd.*, [1899] 2 Ch. 392. It is no defense to a subscription that the insolvency of the company is due to debts incurred in buying land from the directors, such contract being voidable instead of void and being subject to the ratification of the majority of the stockholders. *Urner v. Sollenberger*, 89 Md. 316 (1899). In *St. Louis, etc. R. R. v. Tiernan*, 37 Kan. 606 (1887), it is held that a sale, by the directors, of a roadbed to the corporation is legal where all the facts are known to all except a few nominal holders of stock. But a partial disclosure is insufficient.

*Imperial, etc. Assoc. v. Coleman*, L. R. 6 H. L. 189 (1873), rev'g L. R. 6 Ch. App. 558. Where the president, by fraudulent representations, induces the corporation to buy property from himself, a minority stockholder may cause the purchase to be set aside, even though all had consented to the purchase. *Gerry v. Bismarck Bank*, 19 Mont. 191 (1897). Even though a wholesale drug company issues stock to its president in payment for a retail drug business sold by him to the company, yet if it was part of the contract by which he was made general manager the company cannot rescind. *Iowa Drug Co. v. Souers*, 139 Iowa, 72 (1908). See also ch. XLIV, *infra*.

<sup>1</sup> Quoted and approved in *Stanley v. Luse*, 36 Oreg. 25, 33 (1899).

<sup>2</sup> See § 662, *infra*.



refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment.<sup>1</sup>

§ 653. *Sales of property by the corporation to corporate officers, and purchases by corporate officers at foreclosure and execution sales.*—One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation directly or indirectly, or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much as the property is worth.<sup>2</sup> This principle of law was fully established by the cases of Cumberland Coal Company against Sherman<sup>3</sup> and Hoffman Steam Coal Company against Cumberland Coal and Iron Company.<sup>4</sup> There are exceptions, however, to this rule,

<sup>1</sup> Continental Ins. Co. v. New York, etc. R. R., 187 N. Y. 225 (1907).

<sup>2</sup> Quoted and approved in Morgan v. King, 27 Colo. 539, 555 (1900). Mosher v. Sinnott, 20 Colo. App. 454 (1905), and Miller v. Brown, 1 Neb. Unof. 754 (1901).

<sup>3</sup> 30 Barb. 553 (1859). The court also held that the purchase by the directors could be ratified only by the unanimous vote of all the stockholders, and that a ratification by proxy would not bind the stockholder himself. See also Cumberland Coal Co. v. Sherman, 20 Md. 117 (1863).

<sup>4</sup> 16 Md. 456 (1860), where a minority of the directors purchased part of the corporate property at an undervaluation and then sold it to the Hoffman Company, in which they were large stockholders. The court held that the latter was chargeable with notice of the voidable act. This case and the preceding one grew out of the same transaction. Directors purchasing property from the corporation may be held liable for the difference between the cost of the property and the price of its sale to the directors plus a profit, which the court in this case made twenty-five per cent. of the cost, that being the full value of the property sold. Barry v. Moeller, 68 N. J. Eq. 483 (1904). A stockholder may enjoin the corporation from selling property to one of its

directors at an unfair price. Andrews v. Sumter, etc. Co., 87 S. C. 301 (1910). A contract between a corporation and one of its directors will not be upheld if unfair. Paine v. Milton, etc. Co., 127 Pac. Rep. 774 (Oreg. 1912). A vendor's claim upon logs which are to be cut into lumber cannot be defeated by the president of a manufacturing company selling the same to himself. Frelsén v. Strader, etc. Co., 110 La. 877 (1903). A deed by a corporation to one of the directors, whose vote is necessary to carry the resolution is voidable, without proof of any actual fraud. Mobile, etc. Co. v. Gass, 142 Ala. 520 (1905). A sale of all the property to one director is not void, but will not be upheld unless fairly made at a full price and for the best interests of the company. Union T. Co., etc. v. Carter, 139 Fed. Rep. 717 (1905). A sale of all the assets to the managing director may be enjoined until the stockholders have passed upon it. Ellis v. Norwich, etc. Co., 8 Ont. W. R. (Can.) 25 (1906). See also Buell v. Buckingham, 16 Iowa, 284 (1864), holding that the purchase is voidable, but not void. It may be avoided, however, without proving any actual fraud on the part of the director or injury to the corporation. It is fraudulent *per se*. A sale of the corporate property to one of the directors is a construc-



especially where the corporation is insolvent, or the sale is a public

tive fraud, even if not an actual fraud, and may be set aside at the instance of a minority stockholder. *Stanley v. Luse*, 36 Oreg. 25 (1899). A sale of valuable mining stock by a bank to some of the directors is illegal, especially where the stock paid for itself within six years. *Morgan v. King*, 27 Colo. 539 (1900). Where the manager of a coöperative grain elevator company sells the grain to himself he must account for the profits, even though the fixed price of the company for handling the grain has been duly paid. *Goodhue, etc. Co. v. Davis*, 81 Minn. 210 (1900). Where trustees hold stock as security for various debts of various parties, the stock to be sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustees to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price for the benefit of himself and the other trustees. The sale will be set aside. *Jenkins v. Hammerschlag*, 38 N. Y. App. Div. 209 (1899). Where a director has been director for three years and then resigns and purchases property from the corporation and then is reelected, the purchase is the same as though he had been director during the whole period, and he may be held liable for the difference between the price paid by him and the actual value of the property. *Millsaps v. Chapman*, 76 Miss. 942 (1899). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the persons so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900). A stockholder may

file a bill to set aside a transfer of real estate of the corporation to a director without consideration. *Mobile, etc. Co. v. Gass*, 129 Ala. 214 (1901). Even though after dissolution two of the three directors convey corporate land to a third director, and he sells it at a profit, yet if he is responsible, he alone is liable to a stockholder for the latter's proportion of such profit. *Noe v. Headley*, 118 Mo. App. 722 (1906). Where without the knowledge of the board of directors the president purchases from a corporation notes which it owns and indorses the corporate name thereon, the corporation cannot be held liable on such indorsement. *Smith v. Pacific, etc. Works*, 145 Cal. 352 (1904). Where a corporation gives rebates to its customers the president may take a similar rebate on goods purchased by him from the corporation. *Consolidated, etc. Co. v. Wisner*, 103 N. Y. App. Div. 453 (1905).

A director may be the trustee in a trust deed executed by his corporation. *Bassett v. Monte Christo, etc. Co.*, 15 Nev. 293 (1880). Although a company is insolvent, a lease of its property to a director on fair terms is legal, especially where for many years there is no complaint. *Pneumatic Gas Co. v. Berry*, 113 U. S. 322 (1885). A sale of the property of an insolvent foreign corporation, for an insufficient consideration, by the executive committee to two of the trustees, is voidable. *Third Nat. Bank v. Elliott*, 42 Hun, 121 (1886); *aff'd*, 114 N. Y. 622. See also *Reilly v. Oglebay*, 25 W. Va. 36 (1884). Where a sale of land is made by the corporation to a director, in order to raise funds to pay debts due to mismanagement, the corporation itself may subsequently cause the sale to be set aside. *Crescent City, etc. Co. v. Flanner*, 44 La. Ann. 22 (1892). Where a director buys land of the corporation at one tenth of its value, a stockholder may cause the transaction to be set aside. *Woodroof v. Howes*, 88 Cal. 184 (1891). Where a contract is made



sale.<sup>1</sup> Corporate creditors cannot cause to be set aside an old sale of

by a corporation to sell coal to one of its directors, and the corporation does not fulfill, the director cannot recover damages where the money for the coal was to pay a personal debt of the president, and the director has relieved the corporation from liability. *Main Jellico, etc. Co. v. Lotspeich*, 20 S. W. 377 (Ky. 1892). A receiver may replevy corporate personalty fraudulently sold to a director. *Mish v. Maine*, 81 Md. 36 (1895). Where a board of directors, consisting of six, sell corporate property to two of them, the sale being authorized at a meeting at which five were present, including the two, the remaining three do not constitute a quorum and the sale is illegal. *Leary v. Interstate, etc. Bank*, 63 S. W. Rep. 149 (Tex. 1901). As to whether the director of a bank who, with the consent of the other directors, takes a part of the profit realized by the purchaser of land from the bank, may be compelled by a stockholder to repay that amount to the bank, although the purchaser has not yet paid the amount to the director, see *Tenison v. Patton*, 95 Tex. 284 (1901). A deed of the corporate assets to the directors personally will be set aside at the instance of a stockholder, even though the consideration was adequate and full and no actual injury was done to the corporation. *Barnes v. Lynch*, 9 Okla. 156 (1899).

<sup>1</sup> A corporation having a leasehold with the privilege of purchasing the fee may sell the latter to a director where the company has neither the money nor credit to exercise such privilege. *Hannerty v. Standard Theater Co.*, 109 Mo. 297 (1892). And a sale of an insolvent corporation's property to a director for its full value is upheld when *bona fide* and advantageous to all. *Ashhurst's Appeal*, 60 Pa. St. 290 (1869). A sale of corporate bonds to a syndicate of which three of the directors are members is valid, the price being fair. *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883). Where an insolvent corporation sells its assets for bonds and

stock in another corporation, it may sell such bonds and stock to one of its directors at a fair price, no actual fraud being involved. *Graham v. Carr*, 130 N. C. 271 (1902). A solvent corporation may sell a note to its president. *Blake v. Ray*, 110 Ky. 705 (1901). Where the stockholders of an insolvent corporation have authorized the directors to sell the property and public sale is thereupon made, the court will not set the sale aside, although directors who were creditors of the corporation purchased at such sale at a low figure. *Patterson v. Portland, etc. Works*, 35 Oreg. 96 (1899). Where the trustee sells at public sale, a corporation which owns the debt may purchase, especially where the trust agreement allowed the holder of the debt to purchase. The purchase is not invalid, even though the trustees were stockholders and directors in the corporation which purchased. *Herbert Kraft Co. v. Bryan*, 140 Cal. 73 (1903). Even though a railroad which owns stock in another railroad sells such stock to a copartnership in which one of the directors is a partner, yet the court will not enjoin the sale if it is a fair one. *Ryan v. Williams*, 100 Fed. Rep. 172 (1900). A title is not bad merely because in the chain of title was a deed from a corporation to its president. *Jones v. Hanna*, 24 Tex. Civ. App. 550 (1900). A sale of property to a syndicate, of which a director is a member, will not be set aside when the full value was received by the corporation, and the sale was made in order to protect the parties who were sureties for the price to be paid by the corporation for the property. *Hill v. Nisbet*, 100 Ind. 341 (1884). Where all the assets of a corporation are transferred for stock of another corporation and such stock is sold by trustees of the former to pay its debts, the fact that one of the trustees subsequently buys a portion of the stock does not render him liable for such debts. *Wing v. Charle-roi, etc. Co.*, 112 Fed. Rep. 817 (1902).

Perry on Trusts (3d ed.), § 428, states the rule as follows: "A trustee,



land by the corporation to the directors through "dummies," even though the sale was at an inadequate price.<sup>1</sup> Where, however, the director and treasurer of an insolvent corporation promises its creditors that he will pay its debts if he is allowed to acquire the property at a judicial sale for less than its real value, they may enforce such promise.<sup>2</sup>

Where all the stockholders and directors assent to a lease of corporate property to a director, a receiver appointed at the instance of a foreclosing mortgagee cannot have the lease declared void, it not being shown that he represents other creditors or is vested with equities to maintain the suit.<sup>3</sup> The proper rule is that such a transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt in his application to the court.<sup>4</sup> Where a transaction between the corporation and the directors is fraudulent, it cannot be ratified except with the consent or acquiescence of the stock-

executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase. But if a trustee buys up an outstanding debt for the benefit of the *cestuis que trust*, and they refuse to take it or pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves. Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust*. The better opinion, however, is, that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity. So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have

the sale set aside, or to claim all the benefits and profits for the sale himself."

<sup>1</sup> *Graham v. Railroad Co.*, 102 U. S. 148 (1880). A deed from the corporation to the president's firm is not void. It is voidable by the corporation or its stockholders only. *Fudickar v. East*, etc. Dist., 109 Cal. 29 (1895). As against corporate creditors a corporation cannot sell its merchandise to one of its directors at sixty per cent. of its actual value. *Pender v. Speight*, 75 S. E. Rep. 851 (N. C. 1912).

<sup>2</sup> *Lilienthal v. Betz*, 185 N. Y. 153 (1906).

<sup>3</sup> *Tyler v. Hamilton*, 62 Fed. Rep. 187 (1894).

<sup>4</sup> Where a corporation sells all its property to its president at a price less than a minority stockholder is willing to pay, he may have the sale set aside, even though a majority in interest of the stockholders have approved it, the decree being that the sale shall be void only in case such higher price is paid. *Wheeler v. Abilene*, etc. Co., 159 Fed. Rep. 391 (1908). A lease by an insolvent company of its chief property to its president and general manager may be set aside by its creditors. *Ward v. McPherson*, 87 Ark. 521 (1908).



holders.<sup>1</sup> A minority stockholder in a railroad company may hold the directors personally responsible to the corporation for issuing increased capital stock in exchange for the stock of a terminal company which has little or no value, it being shown that the terminal company was to transfer the stock without consideration to a syndicate in which the directors were personally interested.<sup>2</sup> Leases to a director "will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation."<sup>3</sup>

More difficult questions arise in regard to a director's purchases of corporate property at foreclosure sale thereof. The old rule was that he could not be a purchaser, either directly or indirectly, at the foreclosure sale. This was the rule whether the foreclosure was instituted

<sup>1</sup> *Shaw v. Staight*, 107 Minn. 152 (1909). A corporation may set aside a sale of corporate land to the directors themselves, and not even a subsequent board of directors can ratify such a sale, and it is immaterial that the stock is held by persons who purchased with knowledge of the transaction. *Nueces, etc. Co. v. Davis*, 116 S. W. Rep. 633 (Tex. 1909). 87 Atl. Rep. 444.

<sup>2</sup> *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1913).

<sup>3</sup> *Tyler v. Hamilton*, 62 Fed. Rep. 187 (1894). Where an invention pertaining to the company's business is offered to the board of directors and the president urges them to buy the rights but they decline, he is justified in buying them himself and thereafter he may contract to furnish the article manufactured under the patent to the company where the price is less than the company had been paying, and he may take a lease of that part of the plant of the company to carry out such contract, the evidence showing that the transaction was a fair one from every point of view. Such a transaction is illegal only when it is unfair or fraudulent. *Cowell v. M'Millin*, 177 Fed. Rep. 25 (1910). Where the directors of an insolvent corporation lease the property to themselves, they must account to corporate creditors for the profits, but the creditors cannot claim material which the directors have purchased and manufactured by means of the property. *Hutchinson v. Bidwell*, 24 Oreg. 219 (1893). A corporation cannot hold the directors liable on

stock which the corporation issued to them for services, being taken by the directors at five cents on the dollar in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock, that is, stock which was issued for property as full-paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent-right and was purely speculative and had no market value. *Divine v. Universal, etc. Co.*, 38 S. W. Rep. 93 (Tenn. 1896). A lease to a director is not necessarily illegal, even though a stockholder objects thereto, where a majority of the stockholders have ratified the lease. The court refused, at the instance of a dissenting stockholder, to set aside such a lease, in the case *Nye v. Storer*, 168 Mass. 53 (1897). Even though the board of directors have leased all the corporate property to a minority of the directors, yet the minority stockholders cannot have a receiver appointed unless it is shown that the lease was unfair, especially where one of the complaining stockholders has ratified the transaction. *Farwell v. Babcock*, 27 Tex. Civ. App. 162 (1901), a case involving a corporation owning 3,000,000 acres of land and 120,000 head of cattle valued at \$10,000,000. Cf. *Burns v. National, etc. Co.*, 130 Pac. Rep. 1037 (Colo. 1913). See also §§ 649, 662, as to the effect of the transaction being fully stated to the stockholders and approved by a majority.



by those interested in the corporation or by third parties. If the director purchased at such a foreclosure sale he held the property as trustee for the benefit of the corporation and the stockholders. Upon being repaid the price he gave therefor, he was bound to make over the property to the corporation.<sup>1</sup> The supreme court of the United States, however, has held in regard to the president that if the foreclosure is not brought about by the president "in violation of his duties as an officer of the company, his official relations to the company prior to the foreclosure did not prevent him from bidding for the property or from being interested in its purchase," by another.<sup>2</sup>

<sup>1</sup> *Harts v. Brown*, 77 Ill. 226 (1875). To same effect, *Hope v. Valley City Salt Co.*, 25 W. Va. 789 (1885), where the director resold the property at three times its cost to himself. See also *Jackson v. Ludeling*, 21 Wall. 616, 625 (1874), where the directors were part of those who purchased at a foreclosure sale of the corporate property; also, *Munson v. Syracuse, etc. Ry.*, 29 Hun, 76 (1883), where the directors purchased for the purpose of reorganizing the corporation; s. c., 103 N. Y. 58 (1886), where Munson was a director in an insolvent railroad corporation, and also a director in a corporation that wished to purchase said railroad, and in behalf of the latter company contracted to purchase the said railroad from the bondholders after the latter should purchase the same at a foreclosure sale. The court refused to enforce the contract; *Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501 (1887), where the directors of a corporation owning the land subject to a mortgage allowed a foreclosure to be made, and then purchased at the sale. See *Foster v. Oxford, etc. Ry.*, 13 C. B. 200 (1853). See also *Allen v. Jackson*, 122 Ill. 567 (1887), holding a director who had purchased corporate property at a foreclosure sale liable to former purchasers of that property from the corporation, subject to the mortgage. Where a director purchases property from an insolvent corporation, "it devolves on the directors to show that the transaction was made in good faith, and that the sale produced the full value of the property. If they fail to show these facts, creditors are entitled to compel

them to account for the full value of the property." *Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (1886); *Jones, etc. Co. v. Arkansas, etc. Co.*, 38 Ark. 17 (1881), involving a scheme where a director purchased at a foreclosure sale and reorganized. A stockholder who did not come in caused the purchase to be set aside. See also *Dennis v. Kennedy*, 19 Barb. 517 (1854). Where the directors had purchased corporate property after its sale on a lien, and the purchase by them was held to be fraudulent, the passive connivance of a director renders him liable the same as though he participated. *Weetjen v. Vibbard*, 5 Hun, 265 (1875). A director who purchases the property at foreclosure sale is bound to turn the property over to the corporation on being repaid the price he paid therefor. *Kroegher v. Calivada, etc. Co.*, 119 Fed. Rep. 641 (1902).

<sup>2</sup> *McKittrick v. Arkansas Central Ry.*, 152 U. S. 473, 497 (1894). In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 (1875), a director loaned money to the corporation, took bonds therefor, and had the bonds secured by a mortgage running to a third person as a trustee, and upon a sale by the trustee the director purchased for himself. Laches barred any remedy. Directors may purchase at a foreclosure sale, under some circumstances. *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888). A director may own bonds and may purchase at the foreclosure sale. The sale is valid even though allowed by the directors from corrupt motives, and this was known to the purchasing trustee. At



Again, it has been held that where the directors find it necessary to extend the plant in order to meet competition, and the cost is greater than expected, and bonds are offered to the stockholders and not taken, and the directors loan money to the company on the bonds at par, and then on foreclosure buy in the property, their purchase will be upheld, there being no actual fraud in the transaction.<sup>1</sup> In Michigan it is held that as against a stockholder a director may purchase the property at foreclosure sale.<sup>2</sup> Judgment creditors cannot complain where, upon

least the stockholders must offer to redeem before they can do anything. *Harpending v. Munson*, 91 N. Y. 650 (1883). The president of the company may purchase at the foreclosure sale. He does not thereby become a trustee for the bondholders. *Credit Co. etc. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882). Where all the capital stock is deposited with a bank as security for certain debts of the corporation and is sold under a decree of the court for the amount of such debts, the sale is valid, although the president of the bank purchased the stock at such sale, and although he had already purchased the debts so secured, it being shown that he had been one of the creditors from the beginning. *Harrison v. Mulvane*, 62 Kan. 454 (1901). A director in an insolvent corporation may purchase the property at the receiver's sale at public auction, but the court will carefully scrutinize the purchase. *Janney v. Minneapolis, etc.*, 79 Minn. 488 (1900). A liquidating trustee of a national bank may purchase at the sale of the assets, notice of such sale having been given to all parties interested. *Shappard v. Cage*, 19 Tex. Civ. App. 206 (1898). A director who owns bonds may purchase the property at foreclosure sale. *Rawlings v. New Memphis, etc. Co.*, 105 Tenn. 268 (1900). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. *Burgess v. St. Louis County R. R.*, 99 Mo. 496 (1889). At a reorganization sale a director may purchase in behalf of a part of the stockholders, and the transaction will be upheld if the price

is a fair one. *Hayden v. Official, etc. Co.*, 42 Fed. Rep. 875 (1890). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money, and the stockholders knew of the condition of things, but made no effort to prevent a sale, and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. *Osborne v. Monks*, 21 S. W. Rep. 101 (Ky. 1893). An insurance company cannot refuse payment of a loss on the ground that the insurer was a director and had bought the corporate property at a foreclosure sale. *Caraher v. Royal Ins. Co.*, 63 Hun, 82 (1892); *aff'd*, 136 N. Y. 645. As to the purchase of the property by the president and others on a foreclosure, with a view to reorganization, see also ch. LII, *infra*.

<sup>1</sup> *Foster v. Belcher's, etc. Co.*, 118 Mo. 238 (1893).

<sup>2</sup> *Lucas v. Friant*, 111 Mich. 426 (1897). A director or a corporation in which a director is interested may purchase corporate property from trustees to whom an embarrassed corporation has conveyed the same to pay its debts, and return the remainder to such latter corporation, and especially is a stockholder estopped from complaining after four years' delay, with knowledge of the facts,



the foreclosure sale of the corporate property, the president purchases the property at its full value.<sup>1</sup> Where the directors are sureties on corporate notes secured by mortgage they may buy in the property at the foreclosure sale for their own protection.<sup>2</sup> There is a limit, however. Thus, where a director who practically controlled the board of directors caused all the earnings of the railroad to be used in improving the property, thereby preventing a payment of interest on the corporate indebtedness and bringing about a foreclosure of the mortgage, the director himself having purchased the bonds secured by the mortgage and having purchased the railroad at the foreclosure sale, the court held that the purchase at the foreclosure sale by the director was voidable. Upon repayment to him of the purchase price he was compelled to retransfer the property to the corporation, even though another foreclosure would be the result. Third persons who had purchased the road from him with notice stood in no better position than the director himself.<sup>3</sup> In Missouri it is held that where the wife of the president

large improvements having been made and the value of the property having greatly increased. *Kessler & Co. v. Ensley Co.*, 141 Fed. Rep. 130 (1905); *aff'd*, 148 Fed. Rep. 1019.

<sup>1</sup> *Inglehart v. Thousand Island Hotel Co.*, 109 N. Y. 454 (1888). A corporate creditor cannot hold a director liable for a profit which he has made in purchasing a property at a foreclosure sale even though the corporation was the equitable mortgagor of such property. *Ready v. Smith*, 170 Mo. 163 (1902). A sale of property by an insolvent corporation to one of its directors is valid as against its creditors where a full consideration was paid therefor. *Webb v. Rockefeller*, 66 Kan. 160 (1903). A creditor of an insolvent corporation who causes its property to be sold under execution cannot complain that a director purchased at the sale at a low price. *Potvin v. Denney Hotel Co.*, 26 Wash. 309 (1901). Where a director purchases the corporate assets at a mortgage sale for much less than their value, a creditor of the corporation may hold him liable for profits made by him. *Fishel v. Goddard*, 30 Colo. 147 (1902). A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that

the transaction was not duly authorized by the board of directors or signed by the proper officers, where he has participated in the results of their action. *Swentzel v. Franklin, etc. Co.*, 168 Mo. 272 (1902).

<sup>2</sup> *College, etc. Line v. Ide*, 15 Tex. Civ. App. 273 (1897).

<sup>3</sup> *Covington, etc. R. R. v. Bowler*, 9 Bush (Ky.), 468 (1872). Where the president transfers corporate property to himself without authority, a purchaser with notice from him is not protected. *Re Schoenfield*, 190 Fed. Rep. 53 (1911). In *Kitchen v. St. Louis, etc. Ry.*, 69 Mo. 224 (1878), the court said: "Whatever is sufficient to put a person on inquiry is notice; that is, when a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it." So also where a director agrees to redeem from an execution sale certain corporate property, on an understanding that he does it for the corporation, and his payment is to be a preferred corporate debt, the corporation may redeem long subsequently, even though the director had, after a time, treated the property as his own. *Wasatch Min. Co. v. Jennings*, 5 Utah, 243, 385 (1887). Where a corporation is liable to an officer on a debt, the officer may purchase at a foreclosure sale property upon which the corporation



purchases property on the foreclosure of a mortgage, given by the corporation to secure a note which the president had indorsed and taken up, the sale is void and a purchaser at execution sale is entitled to the property.<sup>1</sup>

The same general rules apply to execution sales. A director is disqualified from purchasing corporate property sold under execution.<sup>2</sup> Where a director causes the property to be sold on an execution issued on his own debt, and buys in the property, he must allow other creditors to participate in the price paid at the execution sale.<sup>3</sup> A director, who is also secretary and treasurer and agent, and who purchases the company's property at sheriff's sale and pays the price by borrowing the money which he might have borrowed for the company, may be compelled to return the property on payment of what is justly due him.<sup>4</sup>

has a subsequent lien; may pay the prior lien out of the corporate funds; and may hold the title to secure the debt due him. *Smith v. Lansing*, 22 N. Y. 520 (1860).

<sup>1</sup> *Shields v. Hobart*, 172 Mo. 521 (1903).

<sup>2</sup> *Hoyle v. Plattsburgh, etc. R. R.*, 54 N. Y. 314 (1873). Where the president and a director purchase the corporate property at an execution sale, and agree to convey it to the corporation upon repayment of the amount paid, the corporation may redeem it long subsequently upon payment and reimbursement for improvements made. *Wasatch Min. Co. v. Jennings*, 5 Utah, 243, 385 (1888). Where in a joint-stock company one member buys all the company's property at an execution sale, though he owes the company more than the price paid, the company is entitled to the property and an accounting lies. *Bradbury v. Barnes*, 19 Cal. 120 (1861). Where the director of an insolvent corporation buys its property at an execution sale to which he is not a party, he is liable to the corporation for the value of the property less the amount he paid for it. *Tobin Canning Co. v. Fraser*, 81 Tex. 407 (1891). The purchase of a boat at judicial sale, by the manager of the corporation owning such boat, for himself and other stockholders, may not cut off the maritime lien of another person. *Crosby v. The Lillie*, 42 Fed. Rep. 237 (1890). Where a director and treasurer buys

corporate land at an execution sale brought about by himself, he cannot maintain an action of forcible entry and detainer against the company. *Hoffman v. Reichert*, 147 Ill. 274 (1893); aff'g 31 Ill. App. 558. Where a director purchases for \$8,400 property of the company sold on an execution on a judgment obtained by him against the company, and within a year sells the property for \$23,000, he must pay over the profit to the company. *Re Iron, etc. Mfg. Co.*, 19 Ont. Rep. (Can.) 113 (1889). Where the president turns over claims against the corporation to his wife, even for value, and the corporate property is sold out to her on judgments on the notes, although the corporation was doing a good business and in no danger, the court will set the transaction aside. *Butler, etc. Co. v. Robbins*, 151 Ill. 588 (1894). Minority stockholders may enjoin a sale of the property of the company under an execution levied on a judgment fraudulently obtained by the president against the company. *Paxton v. Heron*, 41 Colo. 147 (1907).

<sup>3</sup> *Kittel v. Augusta, etc. R. R.*, 78 Fed. Rep. 855 (1897).

<sup>4</sup> *Fricker v. Americus, etc. Co.*, 124 Ga. 165 (1905). Where a director on a judgment obtained by himself against his company causes execution to be issued and at the sale purchases the property at one half of its value, a stockholder may compel him to give the company the benefit of the pur-



Where a director purchases corporate property at a sheriff's sale, and the corporation acquiesces in his deeding the property to another person, the corporation cannot afterwards complain.<sup>1</sup>

A director cannot be interested in the purchase of corporate property sold for the non-payment of taxes.<sup>2</sup> The corporation may reclaim the property upon payment to the director of the amount he paid therefor.<sup>3</sup>

A similar rule applies where a director allows or brings about a forfeiture of a lease which the company holds as lessee, and then takes a new lease of the same property in his own name.<sup>4</sup> But a corporate officer may purchase property at an execution sale where he does so in good faith and pays the full value of the property,<sup>5</sup> even though he is a

chase. *Marr v. Marr*, 73 N. J. Eq. 643 (1908). Where the directors allow the property to be sold under an execution, and then they take part in redeeming the same for themselves personally and make a profit thereby, no effort having been made by them to borrow the money in behalf of the stockholders, they may be compelled to turn the property back to the corporation upon receiving the amount they have advanced. The transaction is a fraud in law, even though there was no fraudulent intent. *Coombs v. Barker*, 31 Mont. 526 (1905).

<sup>1</sup> *Fagan v. Stuttgart, etc.*, 91 Ark. 141 (1909).

<sup>2</sup> *Smith v. Fagan*, 17 Cal. 178 (1860). Where the president of the mortgagor corporation allows the property to be sold for non-payment of taxes and buys in the property himself, the mortgagee may recover such property from him. *Appleton, etc. Co. v. Central Trust Co. etc.*, 93 Fed. Rep. 286 (1899).

<sup>3</sup> Quoted and approved in *McLeod v. Lincoln, etc.*, 69 Neb. 550 (1904). Where a corporation is ignorant of the fact that its property is being sold for non-payment of taxes, and the manager and secretary buys it at such sale, the corporation may redeem the property. *Collins v. Hoffman*, 62 Wash. 278 (1911). In redeeming land which a director fraudulently purchased at an execution sale the redemption is by the corporation and not by the stockholders who bring about such redemption. *Bramblett v. Commonwealth, etc. Co.*, 86 S. W. Rep. 1114 (Ky. 1905).

<sup>4</sup> *Bengley v. Wheeler*, 45 Mich. 493 (1881); *Smith v. Bank of Victoria*, 41 L. J. (P. C.) 34 (1872). In the latter case the director reorganized and allowed part of the old stockholders to come in. A dissenting stockholder caused the whole transaction to be set aside. Where the funds of a mining corporation are exhausted, and the stockholders refuse to advance money to continue work on a leasehold and it is forfeited and thereafter the president becomes interested in a new leasehold of the same mine, and it develops into a valuable mine, one of the stockholders who refused to advance further funds cannot complain. *Hall v. Nash*, 33 Colo. 500 (1905). Where personal property is leased to a corporation on partial payments to be made and title then to pass, this is a conditional sale. If the corporation becomes insolvent and the vendor, by collusion with the president, sells it to the president's brother, a receiver cannot claim the property unless he repays the price. *Kidder v. Wittler, etc. Co.*, 38 Wash. 179 (1905).

<sup>5</sup> *Horbach v. Marsh*, 37 Neb. 22 (1893). Where directors are joint indorsers of corporate notes and one of them buys the property at public sale in good faith and pays the notes, he may sue the others for contribution and need not account for profits he made in such purchase. *Weeks v. Parsons*, 176 Mass. 570 (1900). In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors,



director and the judgment was obtained by himself.<sup>1</sup> The disability of directors to purchase property from the corporation may restrict their right to subscribe for unissued stock of the corporation.<sup>2</sup> There is some difficulty in determining whether this disqualification of a corporate officer to purchase property from the corporation extends to officers other than the president and directors. It has been held to affect the treasurer of the corporation<sup>3</sup> and also the cashier of a bank.<sup>4</sup> It

it is not necessary for the court to order an accounting, but the court may hear the entire case and decide it. *Davis v. Hofer*, 38 Oreg. 150 (1900).

<sup>1</sup> Directors who have obtained a judgment against the corporation on claims against it which they have purchased, may purchase corporate property sold on execution to satisfy such judgment, the purchase being in good faith to protect their interest, and it appearing that the plaintiff refused to contribute his share towards redeeming from the sale. *Snediker v. Ayers*, 146 Cal. 407 (1905). A person to whom a corporate note is issued may take judgment thereon and cause the corporate real estate to be sold under execution, and may purchase the same even though such person became a director after the note was given and before the sale took place. *Relender v. Riggs*, 20 Colo. App. 423 (1905).

<sup>2</sup> Where a director takes for himself the right of the corporation to subscribe for new stock he is liable in damages. *Greenfield Sav. Bank v. Simons*, 133 Mass. 415 (1882). Where the directors cause treasury stock to be sold to themselves at less than its real value, for the purpose of carrying an election, the court will set the transaction aside as fraudulent. *Hilles v. Parrish*, 14 N. J. Eq. 380 (1862). Where the four directors issue 58,220 shares of treasury stock to two of their number for \$348.40, the court will set aside the issue at the instance of a stockholder, even though that was all the stock was reasonably worth. *Mosher v. Sinnott*, 20 Colo. App. 454 (1905). A sale of treasury stock to the president in payment of a debt may be set aside by the corporation. *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). Where, long after the company has commenced business,

it has disposed of its property and is ready to declare a five per cent. dividend, the directors' issuance to themselves at par of that part of the original capital stock which never had been issued is a fraud on the remaining stockholders. *Arkansas, etc. Soc. v. Eichholtz*, 45 Kan. 164 (1891). Where a director issues to himself at par stock belonging to the corporation, and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce therein for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. *St. Croix Lumber Co. v. Mittlestadt*, 43 Minn. 91 (1890). But see *Sims v. Street R. R.*, 37 Ohio St. 556 (1882). See also §§ 65, 70, 286, 614, *supra*. Cf. *Charleston Ins. & T. Co. v. Sebring*, 5 Rich. Eq. (S. C.) 342 (1853), where the directors purchased from the corporation stock which the corporation had previously issued and had purchased for itself. See also *Parker v. McKenna*, L. R. 10 Ch. App. 96 (1874), and *York, etc. Ry. v. Hudson*, 16 Beav. 485 (1853), holding that upon an increase of the capital stock the directors have no right in its disposal to make a secret profit.

<sup>3</sup> *McAllen v. Woodcock*, 60 Mo. 174 (1875), holding that the treasurer's purchase of the corporate property at an execution sale thereof is a purchase for the benefit of the corporation. See also *Parker v. Nickerson*, 112 Mass. 195 (1873). Where the general manager sells goods to himself under another name, the corporation may compel him to pay over to it the profit made by him, the board of directors having no knowledge of the character of such sales. *Steward Mfg. Co. v. Steward*, 109 Tenn. 288 (1902).

<sup>4</sup> *First Nat. Bank v. Drake*, 29 Kan.



has also been intimated that a superintendent of the corporation is under the same disability.<sup>1</sup> A sale by a corporation to its manager will be carefully scrutinized by the court.<sup>2</sup>

A stockholder, however, even though he owns a majority of the stock of the corporation, may at a *public* sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves."<sup>3</sup>

Where a reorganization committee purchase bonds at a price less than the amount finally realized on the bonds, and keep the profit, they are liable jointly and severally for the profit to the parties who have participated in the reorganization, and the fact that in organizing the new company they stated that profits made by them "from *interim* investments" were excluded is not a sufficient disclosure of their secret profit.<sup>4</sup> Where liquidating trustees sell the property to one of their number and he conveys it to a new corporation and the latter sells it, a *bona fide* purchaser is protected, but the profits will go to the stockholders of the first corporation.<sup>5</sup> A bankruptcy court's sale of corporate property is valid, even though the property is purchased by a reorganization committee with the approval of the trustees in bankruptcy, and even though the committee were allowed to turn in mort-

311 (1883); *Torrey v. Bank of Orleans*, 9 Paige, 649 (1842); *aff'd*, *Bank of Orleans v. Torrey*, 7 Hill, 260.

<sup>1</sup> *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433 (1877). In this case the superintendent's purchase was illegal, inasmuch as one of the directors was a secret partner in the purchase. A corporation may set aside an execution sale fraudulently concealed by its agent, who was interested in the judgment, which fact the purchaser knew. *Lang Syne, etc. Co. v. Ross*, 20 Nev. 127 (1888). The superintendent and surveyor of a rural cemetery association may purchase from it a large number of lots in the cemetery, although he intends to resell them. *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429 (1890).

<sup>2</sup> *Ekberg v. Swedish-American Pub. Co.*, 114 Minn. 196 (1911).

<sup>3</sup> *Price v. Holcomb*, 89 Iowa, 123 (1893); *Mickles v. Rochester City Bank*, 11 Paige, 118 (1844). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate

property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. *Farmers', etc. Co. v. Penn. etc. Co.*, 103 Fed. Rep. 132, 157 (1900); *aff'd*, 186 U. S. 434. Even though the purchasers of an equity in land sell it to a corporation which they form at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. *Fleckenstein v. Waters*, 160 Mo. 649 (1901). See also § 886, *infra*.

<sup>4</sup> *Gluckstein v. Barnes*, [1900] A. C. 240, *aff'g* [1898] 2 Ch. 153.

<sup>5</sup> *Eberhardt v. Christian, etc. Co.*, 81 Atl. Rep. 774 (Del. 1911).



gage bonds in payment to the extent that such bonds would be entitled to a proportion of the proceeds of the sale.<sup>1</sup>

Even though a contractor taking stock and bonds in payment for work subcontracts the work for the stock, and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock.<sup>2</sup> A commissioner, appointed by the court to sell the assets of a company, cannot sell to a bank in which he is a stockholder and director, even though the sale and price were fair.<sup>3</sup>

An insurance company's secretary has no right to insure in the company his own property, unless other officers properly approve of it.<sup>4</sup> The secretary may sell property to the corporation and receive stock in payment therefor.<sup>5</sup> Where an agent of a mining company notifies it that its taxes were due and that he has no money to pay them, and the company pays no attention to it, and the property is sold, and the agent buys the tax title and offers to turn it over to the company on repayment of the cost, and for six years it does nothing, and the mine then turns out to be valuable, the company cannot make him give it up, even though he was a stockholder.<sup>6</sup> A judgment that a corporation has a right to have set aside a sale of certain of its property to its president is personal, and cannot be assigned.<sup>7</sup>

§ 654. *Reorganization of corporations.* — This subject is considered elsewhere.<sup>8</sup>

§ 655. *Issue of "watered" stock and of bonds at discount — Division of assets leaving creditors unpaid.* — The general subject of the legality of issues of stock<sup>9</sup> and bonds<sup>10</sup> at less than their par value is considered elsewhere. The fact that such issues are made to directors instead of to the public is immaterial, unless actual fraud is involved. As will be shown hereafter, bonds may legally be issued to directors,<sup>11</sup> and such issues may be at less than par.<sup>12</sup> A corporate creditor cannot complain that a company sold its bonds to some of the

<sup>1</sup> *Schuler v. Hassinger*, 177 Fed. Rep. 119 (1910).

<sup>2</sup> *McLane v. King*, 144 U. S. 260 (1892).

<sup>3</sup> *McCullough, etc. Co. v. Nat. Bank, etc.*, 111 Ga. 132 (1900).

<sup>4</sup> *Pratt v. Dwelling, etc. Ins. Co.*, 130 N. Y. 206 (1891). Where the secretary, who is also general manager, buys in the corporate property at an execution and tax sale, he must yield it up to the company upon payment of the amount for which it was sold, and his grantee, who is also in a fiduciary relation, must do the same. *San*

*Francisco Water Co. v. Pattee*, 86 Cal. 623 (1890).

<sup>5</sup> *Garretson v. Pacific, etc. Co.*, 146 Cal. 184 (1905).

<sup>6</sup> *Steinbeck v. Homme, etc. Co.*, 152 Fed. Rep. 333 (1907).

<sup>7</sup> *Smith v. Pacific Bank*, 137 Cal. 363 (1902).

<sup>8</sup> See ch. LII, *infra*.

<sup>9</sup> See ch. III, *supra*.

<sup>10</sup> See ch. XLVI, *infra*.

<sup>11</sup> See §§ 660, 661, 692, *infra*.

<sup>12</sup> *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883). See also § 766, *infra*.



directors at a discount of twenty-five per cent.<sup>1</sup> Frequently the question of liability on an issue of watered stock and the bonds at a discount is still further complicated by the fact that the parties to whom they are issued are promoters and are subject to the disabilities and liabilities of promoters. The general principles applicable to promoters on this subject are considered elsewhere.<sup>2</sup> The liabilities of promoters on watered stock and bonds issued at a discount depends largely in each case on the facts peculiar to that case. In England it is held that although none of the stockholders and creditors of a company which is in difficulties object to a new issue of bonds and stock for contract work, a part of the bonds and stock being given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company, the scheme is illegal and the directors are liable.<sup>3</sup> A somewhat similar conclusion was reached by the supreme court of Massachusetts in a celebrated litigation a few years ago,<sup>4</sup> but the federal courts took a different view of the mat-

<sup>1</sup> Bank of Toronto v. Cobourg, etc. Ry., 10 Ont. Rep. (Can.) 376. (1885).

<sup>2</sup> See § 651, *supra*.

<sup>3</sup> London Trust Co. v. Mackenzie, 68 L. T. Rep. 380 (1893). See also § 766, *infra*. Even though by arrangement between promoters and the owner of a business, the business is sold to a corporation for £22,000, in full-paid shares of stock and £3,000, cash, the latter to go to the vendor, and all the stock to go to the promoters, and thereafter the company is wound up and its assets sold for £480, yet the promoters are not liable to creditors, inasmuch as all the stockholders knew of the transaction and no stock was sold or intended to be sold to outsiders, and the creditors might have ascertained the facts from the public registry if they desired, and even though the promoters became directors. The court said: "It cannot be suggested that mere inadequacy of price was sufficient of itself to invalidate the contract. You must show that, these shares not having been paid for at all, the contract for purchase was a colorable transaction, and that in truth and in fact, *qua* value, these shares were not part of the consideration, but were a gift. . . . I see nothing in these affidavits or in anything else in the case to lead me to say that this transaction

was not a real transaction, but a colorable transaction holding the real transaction behind it." *Re Innies & Co. Ltd.*, [1903] 2 Ch. 254, rev'g 88 L. T. Rep. 123.

Where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re Leeds, etc.*, [1902] 2 Ch. 809.

<sup>4</sup> The court held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who is-



ter.<sup>1</sup> In another case the Massachusetts court held that where the entire capital stock of a mining company is issued to one person in exchange

the stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors, and officers approved the transaction when it was carried out, it appearing, however, that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders. Hence, where a person buys all the stock of a corporation for about \$613,000, and some real estate for about \$175,000, and sells the former to a corporation formed by him for that purpose, for \$2,500,000, par value of

stock, having also an actual value of \$2,500,000, and sells the real estate for \$750,000, par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said: "That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation

<sup>1</sup> Even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy directors, cause the corporation to purchase the claims for \$750,000, par value of stock, although the mining claims were worth but \$5,000, and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. *Old Dominion, etc. Co. v. Lewisohn*, 136 Fed. Rep. 915 (1905); *aff'd*, 148 Fed. Rep. 1020 and 210 U. S. 206. A promoter's possible liability and the liability of stockholders on unpaid stock will not be adjusted and offset in the distribution among bondholders after foreclosure sale, even though

the bondholders were promoters and stockholders. Independent suits must be instituted for that purpose especially as general creditors are interested. *Land, etc. Co. v. Tatnall*, 132 Fed. Rep. 305 (1904). The corporation itself, all of whose stock has been issued in payment for a mine, cannot hold a vendor liable for misrepresentations as to the value of the property. *Stratton's, etc. v. Dines*, 126 Fed. Rep. 968 (1904); *aff'd*, 135 Fed. Rep. 449. Neither a corporation nor a receiver suing in its name and behalf can maintain a suit to set aside a contract made between the corporation and all its stockholders. Such a contract can only be attacked by or on behalf of creditors who are shown to have been defrauded thereby. *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561.



for mines in good faith, and in selling the stock he did not withhold or conceal the facts and took no advantage of his position to obtain an unconscionable advantage, the corporation itself cannot subsequently maintain a suit to cancel the transaction.<sup>1</sup> And the New York courts also are not inclined to declare such promoting plans illegal,<sup>2</sup> and the

was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315 (1906), and 203 Mass. 159 (1909); *Cf.* 225 U. S. 111 (1912), the court refusing to follow *Old Dominion, etc. Co. v. Lewisohn*, 136 Fed. Rep. 915, aff'd 210 U. S. 206, involving the other issue of stock. If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the allegations in the first suit. *Old Dominion, etc. Co. v. Lewisohn*, 202 Fed. Rep. 178 (1913). An interesting history of the *Lewisohn* and *Bigelow* litigation in New York and Massachusetts with an analysis of the various decisions is found in *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911), where the United States court in New York refused to hold the *Lewisohn* estate liable. See also *Bigelow v. Old Dominion, etc. Co.*, 74 N. J. Eq. 457 (1908). The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued. Where promoters pay out less than \$30,000 to secure options on land and then sell the options to a corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the

stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit for services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900).

<sup>1</sup> *Stratton, etc. Mines Co. v. Stratton*, 206 Mass. 117 (1910).

<sup>2</sup> Stockholders in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded their remedy is a suit at law for damages against the guilty parties. The court said: "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation.



New York rule is generally followed in other states, even where con-

... The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured." *Blum v. Whitney*, 185 N. Y. 232 (1906). Even though two of the directors sell to the corporation certain patents for \$3,000,000 full-paid stock, being the entire capital stock, and give to the corporation \$750,000 of the same as treasury stock, and even though the patents are worth but \$10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed \$10,000 was entirely immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the company that that was the value of the patents. I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of

course a remedy at law if there were false representations. *Insurance Press v. Montauk, etc. Co.*, 103 N. Y. App. Div. 472 (1905). Even though promoters obtain options on a large number of malting plants, and take subscriptions to stock in a corporation to be organized for the purpose of taking over the plants, and use the proceeds of the subscriptions to pay for the plants and furnish a working capital for the company, and receive from the corporation, in payment for the plants, stock sufficient to fill the subscriptions and also to leave with the promoters as a profit \$500,000 preferred stock and \$7,740,000 common stock, yet neither the corporation nor its stockholders can hold them liable for such profit in stock, there being no proof that the plants were not worth the amount of the stock issued for them, nor that the sale had been rescinded, and there being no complaint made by the original subscribers to the stock and the original subscription having recited that such stock would be so issued for the properties. *Hutchinson v. Simpson*, 92 N. Y. App. Div. 382 (1904). In *Brewster v. Hatch*, 122 N. Y. 349 (1890), the plan adopted was as follows: The promoters took an option for which they gave \$5,000 and by which they had the privilege of purchasing certain mines at any time within four months for \$135,000. This agreement is set forth in the case. They then issued a prospectus to the public, soliciting subscriptions to a corporation thereafter to be formed to purchase the mines for all its capital stock, which was to be \$1,500,000. The stock was offered to the public at forty cents on the dollar. Subscriptions for \$610,000 par value were received, netting \$244,000. The corporation was then formed, the promoters making themselves directors, and the above plan carried out. A subscriber then sued the promoters for damages. The court held that the plaintiff could recover. The defendants were not mere vendors of the stock. The fatal defect seems to have been in the fact



stitutional and statutory prohibitions exist.<sup>1</sup> As between the directors and the stockholders the rule invalidating contracts between the corporation and its directors<sup>2</sup> would apply to the sale of bonds at a price which is unfair. The stockholders may sue the directors for gross mismanagement, and for damages, where fraudulent mortgages have been placed by them on the corporate property.<sup>3</sup> A division of the assets of a corporation leaving its creditors unpaid is considered elsewhere.<sup>4</sup> A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached.<sup>5</sup> The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been absorbed by

that the promoters did not buy the property before offering the stock. On the contrary, they merely obtained options, and would have abandoned them if the stock had not been taken. Moreover, they placed the stock before the corporation was organized. All this made them fiduciary agents of the subscribers. If they had been intrinsically vendors of the stock, it was admitted that they would not have been liable. A consolidated company may maintain a suit against a director of one of the constituent companies for fraudulently causing, at the time of consolidation, an issue of a large amount of stock to him out of the treasury stock for past services, which stock was thereupon exchanged for stock in the constituent company, especially where such director as trustee of the treasury stock of both companies controlled them and voted such stock for the consolidation, and also voted proxies obtained on a notice of the meeting, which did not state that his compensation was to be voted upon. *United, etc. Co. v. Smith*, 44 N. Y. Misc. Rep. 567 (1904).

<sup>1</sup> See §§ 46, 47, *supra*. A corporation itself cannot maintain a suit to set aside a conveyance of some of its property to a person without consideration and to defraud stockholders and creditors. *Pigg v. Casper Co.*, 196 Fed. Rep. 177 (1912). A person holding an option to purchase lands for \$120,000 may agree with a promoter that a company shall be formed to

take over the same for \$150,000 where all the parties interested knew the facts and his profit was represented by common stock. *Selover v. Isle, etc. Co.*, 91 Minn. 451 (1904). Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six years' statute of limitations. *Pietsch v. Milbrath*, 123 Wis. 647 (1904). The owner of a single share of stock in a street railway company may file a bill to enjoin the company from issuing stock and bonds to a construction company, where the par value of the stock and bonds is greater than the value of the construction work, and the construction company already controls the railway company and its board of directors. *Montgomery Trac-tion Co. v. Harmon*, 140 Ala. 505 (1904).

<sup>2</sup> See §§ 649, 652, *supra*.

<sup>3</sup> *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895).

<sup>4</sup> See ch. XL, *infra*.

<sup>5</sup> *Angle v. Chicago, etc. Ry.*, 151 U. S. 1 (1894).



another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.<sup>1</sup> Although one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply.<sup>2</sup> As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company.<sup>3</sup>

§ 656. *Stockholders' actions against persons other than directors for frauds, etc., against the corporation.* — Ordinarily, where third persons have defrauded a corporation, and have defrauded it by collusion with the corporate officers, the stockholder's action is against both the officers and the third persons, all being joined as parties defendant. When such is the case the third parties may be held liable, even though the corporation itself is in no position to complain.<sup>4</sup> Where

<sup>1</sup> *Mason v. Henry*, 152 N. Y. 529 (1897).

<sup>2</sup> *Sidell v. Missouri Pac. Ry.*, 78 Fed. Rep. 724 (1897).

<sup>3</sup> *Levins v. Peeples, etc. Co.*, 38 S. W. Rep. 733 (Tenn. 1896).

<sup>4</sup> See the cases in the notes to §§ 649-655. Thus, where a railroad has been leased to another railroad company under a certain agreement of the latter guaranteeing a fixed sum to the former, and the lessee railroad company refuses to fulfill its contract and has control of the lessor railroad, a stockholder of the latter may bring suit to remedy the wrong. *March v. Eastern R. R.*, 40 N. H. 548 (1860); s. c., 43 N. H. 515. And the case *Lewis v. St. Albans, etc. Works*, 50 Vt. 477 (1878), very properly says "that whenever the trustee has been guilty of a breach of trust, and has transferred the trust property by sale or otherwise to any third party, the *cestui que trust* has a full right to follow such property into the hands of such third party, unless he stands in

the situation of a *bona fide* purchaser for value without notice." See also *Imperial, etc. Assoc. v. Coleman, L. R.* 6 H. L. 189 (1873). A person receiving corporate money in compromise of his suit against guilty directors may be compelled to pay it back to the corporation. *Erie Ry. v. Vanderbilt*, 5 Hun, 123 (1875). The fact that an officer of the company took part in a swindling scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme. *Farrow v. Holland Trust Co.*, 74 Hun, 585 (1893). Where a person buys goods from an insolvent corporation and pays for them by delivering goods to the president for his own use, an assignee for the benefit of creditors of the corporation may hold such party liable for the value. *Mott v. Edwards*, 98 N. Y. App. Div. 511 (1904); *aff'd*, 184 N. Y. 541. Where trust deeds to a trust company run to the president as trustee, the court will compel him to administer the trusts for



the directors have turned over the property to an assignee to pay illegal debts, the stockholders may file a bill to set the transaction aside.<sup>1</sup> A director of an assessment life insurance company who receives money for causing a person and his friends to be elected directors, thereby giving them the control of the company, together with its property, may be held liable by the receiver of the company for the money so received.<sup>2</sup> An attorney who receives money from a company for a specific purpose cannot retain it and set it off against his fees.<sup>3</sup> A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government.<sup>4</sup>

Another class of cases arises when third persons commit frauds against the corporation without the collusion of the corporate officers, but the latter neglect or refuse to institute a suit to rectify the wrong. The right of the stockholder is then not so clear. It is ordinarily within the discretion of the corporate officers to enforce, compromise, or abandon claims which the corporation may have against third persons. Generally this exercise of discretion cannot be questioned or remedied by the stockholders, except by electing at a subsequent election directors more in accord with the stockholders' views. It is possible, however, that cases may occur where the judgment of the directors is so palpably and injuriously wrong that the courts will sustain a stockholder's action herein. This subject is treated elsewhere.<sup>5</sup> Where directors have been compelled to turn over to the corporation a secret profit in stock issued for property, they cannot compel outside people who also received stock in the same transaction to divide the same with them.<sup>6</sup>

§ 657. *Salaries or compensation to corporate officers.* — A frequent fraud upon corporations and stockholders is perpetrated by the corporate funds being used to pay illegal salaries and compensation to corporate officers and assistants. It is a general rule that a director is not entitled to any pay for his services to the corporation, *as a director*, where there has been no agreement in advance that he shall have such

the benefit of the company. *Tulleys v. Keller*, 45 Neb. 220 (1895).

<sup>1</sup> *People's Sav. Bank v. Colorado, etc. Co.*, 8 Colo. App. 354 (1896). Where an investment company in a receiver's hands has paid all its debts, but by fraud its remaining assets have been transferred to various parties, a suit lies at the instance of a stockholder to set aside the transfer; but the complaint is multifarious where it joins parties not having a common interest and unites distinct and disconnected causes of action. 63 Kan. 429 (1901).

<sup>2</sup> *McClure v. Law*, 161 N. Y. 78 (1899). See also § 650, *supra*.

<sup>3</sup> *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567. Where bonds are issued by a corporation to a director or officer for a certain purpose, he cannot retain them on the ground that the company owes him money. *Greenville Gas Co. v. Reis*, 54 Ohio St. 549 (1896).

<sup>4</sup> *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429 (1895).

<sup>5</sup> See § 750, *infra*.

<sup>6</sup> *Newcomb v. Thorpe*, 156 Mich. 101 (1909).



pay.<sup>1</sup> Hence a salary or back pay voted to a director after the services have been rendered cannot be enforced so far as such pay is for his

<sup>1</sup> *Graftner v. Pittsburg, etc. Ry.*, 207 Pa. St. 217 (1903); *American Cent. Ry. v. Miles*, 52 Ill. 174 (1869); *Illinois Linen Co. v. Hough*, 91 Ill. 63 (1878); *Citizens' Nat. Bank v. Elliott*, 55 Iowa, 104 (1880); *Smith v. Putnam*, 61 N. H. 632 (1882). A director or president is not entitled to pay for his services as such, there being no agreement to that effect. *Marcy v. Shelburne, etc. Ry.*, 210 Mass. 197 (1911). A director is not entitled to pay for his services unless there was an express contract of employment before the services were performed, even though he acted as a member of the executive committee. *Brophy v. American, etc. Co.*, 211 Pa. St. 596 (1905). In a suit by a stockholder to hold a president liable for an illegal salary paid to him the validity of his election may be contested and an injunction asked against his continuing to act as president. *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903). A corporation is not liable for services performed by a director unless they are outside the scope of his regular duties and it was understood that they were to be paid for. *Henry v. Michigan, etc. Assoc.*, 147 Mich. 142 (1907). The president of a bank is not entitled to pay for past services unless there was an agreement to pay or unless there were extraordinary services rendered, or unless he was not a director or stockholder. *Lowe v. Ring*, 123 Wis. 370 (1904). The president cannot recover for past services where there was nothing in the charter or by-laws or resolutions of the board of directors providing for such payment. *Home, etc. Co. v. Tillman*, 125 Ga. 172 (1906). A stockholder whose stock is about to be forfeited to pay an illegal assessment, may, in a suit to enjoin such forfeiture, join a cause of action against the directors for illegal salaries and other illegal acts. *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). The president cannot claim a salary for services after dissolution. *Mason v. Pewabic Min. Co.*,

66 Fed. Rep. 391 (1894). Neither the president nor any director is entitled to pay unless there is an express vote granting it and fixing the amount, and hence the company may recover back a salary paid the president on a vote of the directors at a meeting held on insufficient notice. *Hayes v. Canada, etc. Co.*, 181 Fed. Rep. 289 (1910). A minority stockholder may compel directors to repay salaries voted to themselves by themselves amounting to \$24,000 consuming practically the entire profits, the capital being but \$30,000. *Dauids v. Dauids*, 135 N. Y. App. Div. 206 (1909). A president who is a large stockholder, and who of his own accord renders services to advance its interests, cannot afterwards recover a salary or even his personal expenses, the claim of the president in this case being \$1,000,000. *McMullen v. Ritchie*, 64 Fed. Rep. 253 (1894). The vice-president of a bank is not entitled to a salary where none had been agreed upon. *Blue v. Capital Nat. Bank*, 145 Ind. 518 (1896). In a suit by a director for reasonable compensation the company may show its practice in regard to salaries; also the holdings of the director as a stockholder, and also any agreement between the original incorporators that no salaries be paid. *McCarthy v. Mt. Tecarte, etc. Co.*, 111 Cal. 328 (1896). Where one company sells out to another, and the president of the former goes into the employ of the latter, the presumption is that his salary as president ceases. *Simonson v. New York City Ins. Co.*, 141 N. Y. 12 (1894). Where, by agreement between the corporation and its creditors, the corporate affairs are managed by a committee of the creditors, the committee may collect for their services. The committee may sue jointly. *Dallas v. Columbia, etc. Co.*, 158 Pa. St. 444 (1893). In Danville, etc. R. R. v. Kase, 39 Atl. Rep. 301 (Pa. 1898), where the court compelled the president of the company to refund a back salary which had been



services as director only, and not for special services performed by him. It is invalid and voidable. It is the same as giving away the assets of the corporation.<sup>1</sup>

voted and paid to him, the court nevertheless said: "Kase for years, from the inception of the enterprise to its close, performed most arduous duties and rendered the most drudging service to the company. He was, in one sense, the company, and without him there would have been no railroad. Some of his acts were reckless, and perhaps improvident. He was strong, energetic, and domineering. The only one who seemed to exercise any restraint upon him was Mr. Wolverton, the treasurer, and he often failed in holding him to anything like business methods. But immense work, whether good or ill, Kase performed; and if this work had been preceded by a contract for reasonable compensation, he would be entitled to a credit for the contract price." A director who receives a salary for certain services cannot recover a further sum for other services, where he was not expressly employed to render the latter services and there was no promise to pay. Acceptance of the service is immaterial. *Gill v. New York Cab Co.*, 48 Hun, 524 (1888), holding also that a vice-president cannot recover for extra services where there was no agreement to pay him. An allegation that the plaintiff had demanded that the president repay an illegal salary, and that he refused to do so, and that he controlled the board of directors and that they refused to take action, is sufficient even in Massachusetts. *Blair v. Telegram News Co.*, 172 Mass. 201 (1898). The secretary of a director is not entitled to pay. *West, etc. Co. v. Rose*, 76 Miss. 61 (1898).

Back pay cannot legally be claimed by a director. *Bennett v. St. Louis, etc. Co.*, 19 Mo. App. 349 (1885); *Ogden v. Murray*, 39 N. Y. 202 (1868); *Blatchford v. Ross*, 54 Barb. 42 (1869); *Jones v. Morrison*, 31 Minn. 140 (1883); *Maux Ferry, etc. Co. v. Branegan*, 40 Ind. 361 (1872); *Loan Assoc. v. Stone-*

*metz*, 29 Pa. St. 534 (1858); *Holder v. Lafayette, etc. Ry.*, 71 Ill. 106 (1873), where the director even acted as treasurer; *Gridley v. Lafayette, etc. Ry.*, 71 Ill. 200 (1873), where the director was a member of the executive committee. The salaries of the officers cannot be increased to operate retroactively. *Klein v. Independent, etc. Assoc.*, 231 Ill. 594 (1907). Directors are not liable to account for extra pay voted to a director for his services as an agent. *Godbold v. Mobile Branch Bank*, 11 Ala. (N. S.) 191 (1847). The majority of the stockholders cannot, on the winding up, vote back pay to directors. *Hutton v. West Cork Ry.*, L. R. 23 Ch. D. 654 (1883); *North-eastern Ry. v. Jackson*, 19 W. R. 198 (1870), holding a director liable for back salary paid him by vote of the directors when the statute required such vote to be by the stockholders. In *Hall v. Vermont, etc. R. R.*, 28 Vt. 401 (1856), compensation for taking subscriptions had been voted by the stockholders. After the rescinding of that vote no compensation was allowed, and none was allowed for lobbying the charter through the legislature. A vote by the stockholders of free passes over the road to a director in consideration of his efforts as a promoter before incorporation may be repudiated at any time by the corporation. *New York, etc. R. R. v. Ketchum*, 27 Conn. 170 (1858). But see *St. Louis, etc. R. R. v. Tiernan*, 37 Kan. 606 (1887), where back pay to directors for services in promoting and launching the enterprise was voted and upheld. A director cannot collect pay from the company for his services on the executive committee and for his expenses in travel where there has been no resolution passed previous to the services entitling him to the pay. *Lafayette, etc. Ry. v. Cheeney*, 87 Ill. 446 (1877). Directors cannot vote compensation to them-

<sup>1</sup> Quoted and approved in *Voorhees v. Mason*, 148 Ill. App. 647, 655 (1909).



There is authority to the effect that directors cannot vote a salary to themselves even in advance of their services as directors.<sup>1</sup> In an English case Judge Lindley said: "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves, out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting."<sup>2</sup>

Where by the charter the directors' fees are limited, they cannot by

selves after the services have been performed. *Pfeiffer v. Lansberg Brake Co.*, 44 Mo. App. 59 (1891), reviewing at length the cases; *Burns v. Commencement Bay, etc. Co.*, 4 Wash. St. 558 (1892). A director cannot recover pay for past services, even though he devoted considerable time to the affairs of the company and traveled on several occasions in its behalf, his expenses on such occasions having been paid by the company. The court held that the rule that the director was entitled to pay for services rendered clearly outside of his duties as director is subject to the condition "that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation." *Brown v. Republican, etc. Mines*, 17 Colo. 421 (1892). Where no salary is attached to the office none can be recovered. *Field v. Union Box Co.*, 2 W. N. Cas. 426 (1876). Nor, when the salary is fixed, will extra compensation be allowed for extra services. *Carr v. Chartiers Coal Co.*, 25 Pa. St. 337 (1855). And a resolution remunerating officers who have been elected to serve without compensation is merely voluntary and revocable. *Loan Assoc. v. Stonemetz*, 29 Pa. St. 534 (1858). An officer cannot claim a past-due salary when it was never voted to him and he had on several occasions acted as though nothing was due him. *Pyper v. Salt Lake, etc. Assoc.*, 20 Utah, 9 (1899).

<sup>1</sup> A resolution that directors shall receive pay for attendance in the future does not sustain an action therefor. It is a promise to give a gratuity, and is not enforceable compulsorily. *Dunston v. Imperial Gas Light Co.*,

3 B. & Ad. 125 (1832). *Kelsey v. Sargent*, 40 Hun, 150 (1886), denying the right of the directors to vote salaries to themselves. See also cases in the following note.

<sup>2</sup> *Re George Newman Co.*, [1895] 1 Ch. 674, 686. The court said: "The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing, and to make them out of capital or out of money borrowed by the company is a very different matter." The court held that even the fact that all the stockholders knew of the transaction and acquiesced therein was not sufficient. *Cf. Re Woods, etc. Co.*, 62 L. T. Rep. 760 (1890). Where directors are allowed a salary by the charter, it may be paid out of the capital if no profits are made. *Re Lundy Granite Co.*, 26 L. T. Rep. 673 (1872). A resolution relative to directors' pay passed at a special stockholders' meeting may differ from the resolution specified in the notice of the meeting, but if the meeting adjourns and such resolution is confirmed at the adjourned meeting, it must not differ from the resolution as first passed. *Torbock v. Lord Westbury*, [1902] 2 Ch. 871. A director and stockholder who, by contract with the company, is entitled to a certain salary, may, upon the insolvency of the company, prove his claim the same as other creditors. *Re Dale*, L. R. 43 Ch. D. 255 (1889).



appointing one of their number managing director increase his fees, and any increased fees of any of the directors may be recovered back, even though the stockholders in a general meeting had ratified the payment.<sup>1</sup> And there is strong authority in America to the effect that compensation to directors for serving as directors merely must be voted by the stockholders or provided for in the by-laws.<sup>2</sup> Even though the

<sup>1</sup> *Boschoek, etc. Co. Ltd. v. Fuke*, [1906] 1 Ch. 148.

<sup>2</sup> Directors cannot vote salaries to themselves. *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). Directors have no power to vote a salary to one of their number unless the charter or by-laws authorize such vote, and especially they have no power to vote back pay. *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). In West Virginia by statute, neither the president nor any director is entitled to pay unless it has been allowed by the stockholders. *Maxon's Admx. v. Maxon-Miller Co.*, 52 W. Va. 150 (1903). The Virginia statute requiring the stockholders to pass on compensation to the president or the directors was applied in *Triplett v. Fauver*, 103 Va. 123 (1904). Where a by-law provides that salaries of officers shall be fixed by the stockholders at the end of each year's service, and authorizes the treasurer to pay in the meantime certain sums, and the stockholders fail to fix the amount, it may be left to the jury as to what is a reasonable amount to be paid. *Metropolitan, etc. Co. v. Place*, 147 Fed. Rep. 90 (1906). Where the stockholders unanimously vote to pay a certain salary to an officer, he may collect the same. *Caho v. Norfolk, etc. Ry.*, 147 N. C. 20 (1908). In a vote by stockholders fixing the salaries of directors, the directors may vote stock held by themselves. *Green v. Felton*, 42 Ind. App. 675 (1908). A stockholder may file a bill to compel the president to repay a salary which the president had paid to himself from the corporate funds, without being authorized so to do, even though the board of directors, which was controlled by the president, afterwards ratified such payment. *Blair v. Telegram News Co.*, 172 Mass. 201 (1898). Where a

person who, with his friends, controlling a majority of the stock, takes control of the board of directors, and causes the board to vote him a salary as president and to vote one of his employees a salary as director, which salary he himself takes, dissenting stockholders may compel him to repay such salaries. *Strouse v. Sylvester*, 66 Pac. Rep. 660 (Cal. 1901). Where by the by-laws each director is to be paid so much a year, he can collect nothing for services for less than a year. *Inman v. Ackroyd, etc.*, [1901] 1 K. B. 613, aff'g 82 L. T. Rep. 621 (1900). A by-law authorizing the directors to fix the salaries of the officers does not authorize them to vote a salary to themselves, and they may be compelled to pay it back. *Schoening v. Schwenk*, 112 Iowa, 733 (1901). Where by the by-laws salaries are to be fixed by the board of directors, and the salary of the president is not fixed until a year has expired, and is then reduced from \$25,000 for the prior year to \$10,500 on account of personal hostility to him, the execution of the by-law was unreasonable and the court fixed the amount at \$17,500. *Banigan v. United States, etc. Co.*, 22 R. I. 452 (1901). A resolution that the president shall receive \$5,000 a year, which has been acted on for fifteen years, may be relied upon by a new president, even though he does not collect it for two and a half years. *Farmers' L. & T. Co. v. Housatonic R. R.*, 152 N. Y. 251 (1897), aff'g *Starbuck v. Housatonic R. R.*, 83 Hun, 534 (1895). Directors may increase their own salaries. *Poutch v. National, etc. Co.*, 147 Ky. 242 (1912). Reasonable salaries fixed by the directors were sustained in *Hodder v. Hogg*, 230 Pa. St. 9 (1911). A contract between a director and his company for his services for five years, even though



by-laws allow the directors to fix their own compensation, yet a court

partly performed, cannot be sustained as to the balance unless its fairness and propriety are established. *Merrill v. United Box, etc. Co.*, 143 N. Y. App. Div. 833 (1911). Two directors and officers may at a stockholder's meeting vote their stock in favor of confirming a resolution of the board of directors increasing the salary of the former and a minority stockholder cannot complain, the transaction in itself being a fair one. *Russell v. Patterson Co.*, 232 Pa. St. 113 (1911). In South Dakota by statute neither a director nor his wife as director can vote on an increase of his salary. *Ritchie v. People's Tel. Co.*, 22 S. D. 598 (1909). Where the salary of the president has been fixed for a year by resolution of the board of directors, the board cannot rescind the resolution. It is a contract. *Kimball v. New England, etc. Co.*, 168 Mass. 32 (1897). In *Re New British Iron Co.*, [1898] 1 Ch. 324, the by-laws provided that £1,000 annually should be paid to the board of directors for fees, to be divided as the board might direct. The contract to pay the president may be oral and informal, and may consist of conversations. *Bagley v. Carthage, etc. R. R.*, 25 N. Y. App. Div. 475 (1898); *aff'd*, 165 N. Y. 179. Where the board consists of the president, his son, and his clerk, and they vote five years' back pay to the president, the act is illegal, and notes issued therefor are illegal. *Doe v. Northwestern, etc. Co.*, 78 Fed. Rep. 62 (1896), the court saying: "The directors of a corporation have not the power to fix their own salaries, nor to bind the corporation by a resolution to pay for services which have been rendered in their official capacity under by-laws which contain no express provision for such compensation." The principle of law that back pay cannot be voted to officers of a corporation who are also directors does not apply to a case where the stockholders had assented to the officers receiving reasonable compensation for their work and by the by-laws the board of directors were

authorized to fix such compensation. A note given to the president under such circumstances for past work is legal. *National, etc. Co. v. Rockland Co.*, 94 Fed. Rep. 335 (1899). A salary duly voted to the president is payable although he by reason of disability is absent part of the time. Such salary is not payable to the vice-president, although he acts as president in the meantime. *Brown v. Galveston, etc. Co.*, 92 Tex. 520 (1899). A contract to pay a salary to the president will be closely scrutinized, but where every stockholder assents to it directly or by agents the court will not set the contract aside if reasonable. *Church v. Church, etc. Co.*, 75 Minn. 85 (1898). Unpaid salaries voted to its officers by an insolvent corporation which has never made any profits cannot be offset as against the stockholders' liability to creditors. *Burns v. Beek, etc. Co.*, 83 Ga. 471 (1889). "The rule that trustees can make no profit out of the estate is carried so far in England that they can receive no compensation for their services. In the United States, trustees are entitled to a reasonable compensation." *Perry on Trusts* (3d ed.), § 432. Even though a trustee of stock who has been an officer and stockholder in the corporation is voted a salary, this is no ground for removing him as trustee, there being no proof that he voted in favor of the salary. Neither is the fact that the company did not pay as large dividends as it formerly did any ground for the removal of the trustee. *Dailey v. Wight*, 94 Md. 269 (1902). Where directors vote salaries to themselves for services to be performed, the court will pass upon the reasonableness thereof, and in this case reduced salaries of \$5,000 each of the president, vice-president, and secretary to \$2,000 each. *Davis v. Thomas A. Davis Co.*, 63 N. J. Eq. 572 (1902). The Virginia statute requiring stockholders to authorize salaries to the directors before such salaries are paid is satisfied if the salaries are ratified by the stockholders. *Shickell v. Berry-*



may pass upon the reasonableness of such compensation which the directors vote to themselves.<sup>1</sup>

Where unissued stock and so-called income certificates are voted by the directors to themselves at fifty cents on the dollar in consideration of "the large amount of labor and the weighty responsibility" which devolve upon them, and afterwards they vote themselves a commission for selling further stock, a dissenting stockholder may compel them to pay to the company such commissions and the full price of the stock and certificates, but reasonable compensation will be allowed them for actual work in selling stock and income certificates.<sup>2</sup>

Where an illegal salary has been paid, with the consent of a majority of the stockholders, but a minority stockholder files a bill to compel repayment, the court may order the repayment to dissenting stockholders of such part of the salary as they would get if the whole salary was repaid to the corporation and a dividend made.<sup>3</sup> A stockholder cannot enjoin an agreement authorized by the directors that their pay be increased, inasmuch as such agreement will be legal if ratified by a majority in interest of the stockholders.<sup>4</sup> The president cannot claim a salary for his services as president where none was voted to him before the services were rendered.<sup>5</sup> But the directors may vote a

ville, etc. Co., 99 Va. 88 (1901). Under the West Virginia statutes the directors cannot vote compensation to the president or directors. Such vote must be of the stockholders. *Ravenswood, etc. Ry. v. Woodyard*, 46 W. Va. 558 (1899).

<sup>1</sup> *Carr v. Kimball*, 153 N. Y. App. Div. 825 (1912).

<sup>2</sup> *Voorhees v. Mason*, 245 Ill. 256 (1910).

<sup>3</sup> *Brown v. De Young*, 167 Ill. 549 (1897). In *Eaton v. Robinson*, 19 R. I. 146 (1895), where illegal salaries had been paid, the court ordered the guilty parties to pay to each stockholder his proportionate part of the money. Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. *Elias v. Schwyer*, 27 N. Y. App. Div. 69 (1898). A receiver will not be appointed at the instance of a stockholder to recover back illegal salaries, inasmuch as such a suit may be carried on by the stockholder himself. *Marcuse v. Gullett, etc. Co.*, 52

La. Ann. 1383 (1900). In holding the president liable for an illegal salary the court should not order repayment direct to the stockholders. *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903). Where a court decrees that salaries are illegal, it should not order distribution among the stockholders, because that is ordering a dividend at the instance of a minority stockholder. *Miller v. Crown, etc. Co.*, 125 N. Y. App. Div. 881 (1908). In a suit by a vendor of stock to the corporation to cancel the sale for fraud, the court cannot in the same suit order the officers to repay to the corporation funds illegally taken by them for salaries. *Pellio v. Bulls Head, etc. Co.*, 224 Pa. St. 379 (1909). Cf. § 734, *infra*.

<sup>4</sup> *Normandy v. Ind. etc. Co. Ltd.*, [1908] 1 Ch. 84.

<sup>5</sup> The president is not entitled to a salary unless the same is fixed by resolution or by-law of the board of directors. *St. Louis, etc. R. R. v. O'Hara*, 177 Ill. 525 (1898). The president cannot recover for his services as president, even though an officer and stockholder of the corporation promised that he would be paid, it not



salary to the president even though he is one of their number.<sup>1</sup> Where the board of directors pays salaries to the president and vice-president

being shown that the other directors knew of the promise and the by-laws not providing for his salary and no salary having been voted by the directors. *Henry, etc. Co. v. Schaefer*, 173 Mass. 443 (1899). The president and directors who vote back pay to him and cause corporate notes to be issued therefor are liable to the company therefor, but directors not taking part in the issue of the notes are not liable. *Metropolitan Elev. Ry. v. Kneeland*, 120 N. Y. 134 (1890); *Merrick v. Peru Coal Co.*, 61 Ill. 472 (1871); *Holland v. Lewiston Falls Bank*, 52 Me. 564 (1864); *Barril v. Calendar, etc. Co.*, 50 Hun. 257 (1888); *Commonwealth Ins. Co. v. Crane*, 47 Mass. 64 (1843); where it was even proved that the former president had a salary. The president is not entitled to a commission on stock sold by him in the absence of an agreement. *Re Voorhees, etc. Co.*, 187 Fed. Rep. 611 (1911). *Cf. s. c.*, 188 Fed. Rep. 425. The president is not entitled to pay for past work unless there was a special agreement to pay him, and unless the services are outside of his ordinary duties, and the circumstances show that it was well understood by the proper corporate officers as well as himself that he should be paid. *Dial v.*

*Inland, etc. Co.*, 52 Wash. 81 (1909); *Pacific Imp. Co. v. Chattanooga, etc. R. R.*, 189 Fed. Rep. 161 (1911); *Kilpatrick v. Penrose, etc. Co.*, 49 Pa. St. 118 (1865), where both the president and treasurer sued. The salary of the president ceases upon the discontinuance of the corporate business by a sale of all its property. *Long Island Ferry Co. v. Terbell*, 48 N. Y. 427 (1872). The president is not entitled to a preference in payment under a statute giving to "laborers" of an insolvent corporation such a preference. *England v. Beatty, etc. Co.*, 41 N. J. Eq. 470 (1886). A note is not collectible by a principal whose agent made the note as president of a corporation, where the consideration therefor was unpaid salary of the president, and the note was ratified by the corporation only by the casting vote of the president. *Chamberlain v. Pacific, etc. Co.*, 54 Cal. 103 (1880). Under a peculiar charter provision it was held in *Grundy v. Pine Hill Coal Co.*, 9 S. W. Rep. 414 (Ky. 1888), that there was an implied obligation of the corporation to pay its president a salary. A salary as fixed for a preceding year gives no right to a salary for prior years. *Smith v. Woodville, etc. Co.*, 66

<sup>1</sup> *Fillebrown v. Haywood*, 190 Mass. 472 (1906). An increase of salary to the president may be legal, even though he has agreed to buy the stock of three fourths of the directors who vote for the salary, it being shown that the salary is a fair one. *Cowell v. M'Millin*, 177 Fed. Rep. 25 (1910), holding also that even though the directors are dummies and have sold their stock to the president, yet this does not invalidate their acts as directors in voting a salary to him, no fraud being shown. Although the president makes a contract with the corporation by which he gets certain of the assets, yet if the stockholders ratify the contract on condition that all the other stockholders be offered a similar amount

of assets, the corporation cannot subsequently repudiate the transaction. *Goss & Co. v. Goss*, 147 N. Y. App. Div. 698 (1911). Where the president acts as general manager, even though not appointed general manager, and credits himself from time to time with a salary, and this is well known, the company is bound. *Blom v. Blom, etc. Co.*, 127 Pac. Rep. 596 Wash. (1912). The president may increase his own salary if the directors consent. *Chabot, etc. Co. v. Chabot*, 84 Atl. Rep. 892 (Me. 1912). The vice-president may be entitled to pay for past work where it was understood that he was to be paid. *Montana, etc. Co. v. Dunlap*, 196 Fed. Rep. 612 (1912). See 165 N. Y. 179.



without any work being done by them, they being insolvent and the salaries being applied on debts which they owe to another corporation, the board of directors may be held personally liable for such salaries.<sup>1</sup> It is legal for a corporation to distribute its profits by the payment of salaries, provided all the stockholders assent thereto.<sup>2</sup>

The rule that a director cannot recover for services unless the charter and by-laws or a resolution of the directors in advance of the services so provide, does not apply to services rendered outside of his duties as director and rendered with the approval of the directors or of a corporate officer on an implied promise that he will be paid.<sup>3</sup> And where a

Cal. 398 (1885). Stock may be issued to the president in payment of past salary and debts. *Reed v. Hayt*, 51 N. Y. Super. Ct. 121 (1884); *aff'd*, 109 N. Y. 659, holding also that though the president himself was one of the three directors voting for the same, yet that long acquiescence cures any right to object. A meeting of four legally elected and three illegally elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. *Waterman v. Chicago, etc. R. R.*, 139 Ill. 658 (1892). In *Bowen v. Carolina, etc. Ry.*, 34 S. C. 217 (1891), the president of a railroad company was allowed to recover from the company what the jury believed his services to have been worth. A president is not entitled to pay for his services unless an agreement in advance to that effect is made. *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348 (1890); *Barril v. Calendar, etc. Co.*, 50 Hun, 257 (1888). The president may be entitled to compensation for extra services performed with the knowledge of the directors, although a former resolution, of which he had no knowledge, prohibited pay, unless voted in advance. *Bartlett v. Mystic River Corp.*, 151 Mass. 433 (1890). A mutual life insurance company having no capital stock cannot make a contract to pay its retiring president a future salary for life. *Beers v. New York L. Ins. Co.*, 66 Hun, 75 (1892). The president cannot enforce the payment of a salary out of the assets of the insolvent corporation, even though the by-laws provided therefor, and the sal-

ary had been voted to him, such vote having been after the services were rendered. *Wood v. Lost Lake, etc. Co.*, 23 Oreg. 20 (1890). A salary voted to the president after the services were performed and the company has become insolvent is not collectible. *McAvity v. Lincoln Pulp, etc. Co.*, 82 Me. 504 (1890). The president of a bank is not entitled to a salary unless it has been voted to him. *Notley v. First State Bank*, 154 Mich. 676 (1908).

<sup>1</sup> *Harrison v. Thomas*, 112 Fed. Rep. 22 (1901).

<sup>2</sup> *Fitchett v. Murphy*, 46 N. Y. App. Div. 181 (1899). Where all the stockholders consent to the payment of large salaries leaving the corporation solvent, creditors cannot subsequently complain. *Watts v. Gordon*, 153 S. W. Rep. 483 (Tenn. 1913). A director may by contract be given a salary and an interest in the profits for a term of years. *Wainwright v. Roots Co.*, 97 N. E. Rep. 8 (Ind. 1912). Where all the stockholders are officers, and, instead of dividends, the corporation distributes its profits by large salaries, there is danger that upon the death of one of them others may continue the payment of such salaries to themselves, even though they are executors of the deceased officer's state. *Matter of Schaefer*, 65 N. Y. App. Div. 378 (1901); *aff'd*, 171 N. Y. 686.

<sup>3</sup> *O'Brien v. O'Brien Boiler Works*, 154 Mo. App. 182 (1910). A director who is also treasurer and manager may recover compensation for his services although none has been agreed upon. It is for the jury to decide what is reasonable. *Fitzgerald, etc.*



reasonable salary was drawn by a managing director without the authority of any resolution, and without any specific notice to the

Co. v. Fitzgerald, 137 U. S. 98, 111 (1890), citing with approval *Pew v. First Nat. Bank*, 130 Mass. 391 (1881); *Eales v. Cumberland, etc. Co.*, 6 H. & N. 481 (1861). Where a corporation brought suit against a promoter for fraud and the suit failed, and a contract was then made by which all the stockholders were given an opportunity to sell their stock to the promoter, and the board of directors ratified the contract and agreed to stop all litigation, a dissenting stockholder cannot have the contract set aside for fraud, even though by the contract the president is paid for his services. *Hallenborg v. Cobre, etc. Co.*, 200 U. S. 239 (1906). The president of a coal company cannot recover for services rendered by him as a mining engineer in surveying and building a railroad and bridge, unless there was an express contract to pay him, made before the work was performed. *Althouse v. Cobaugh, etc. Co.*, 227 Pa. St. 580 (1910). The vice-president may recover pay for services rendered outside of his duties. *Dunlap v. Montana-Tonopah Min. Co.*, 192 Fed. Rep. 714 (1911); *aff'd*, 196 Fed. Rep. 612. A corporation may employ its vice-president as salesman on a reasonable salary. *Friedrichs v. Friedrichs, etc. Co.*, 126 La. 689 (1910). Stock issued to directors, on a vote of themselves, in payment for extra services will be ordered canceled by the court. *Jones v. Johnson*, 86 Ky. 530 (1888); *Collins v. Godefroy*, 1 B. & Ad. 956 (1831), where a director was not allowed to receive a reward offered for the recovery of stolen property. A director may maintain a suit in the form of *quantum meruit* against the company for services performed in good faith for the corporation. *Shively v. Eureka, etc. Co.*, 5 Cal. App. 236 (1907). A director who winds up a corporation after dissolution may be entitled to the same pay he received as an officer before the winding up. *Lindemann v. Rusk*, 125 Wis. 210 (1905). The president who is authorized by the by-laws to em-

ploy persons may agree to pay a director for special work to be done by him. *Hooke v. Financier Co.*, 99 N. Y. App. Div. 186 (1904); *rev'd*, on another point in 184 N. Y. 541. The agreed salary of the president does not continue as against a receiver beyond the year, where the statute fixes his term of office at one year. *Conklin v. United States, etc. Co.*, 143 Fed. Rep. 631 (1906). Reasonable salaries paid to the officers for services rendered cannot be recovered back, although no formal resolution was passed in regard thereto. *McCourt v. Singers-Bigger*, 145 Fed. Rep. 103 (1906). A director may be given back pay for his services as manager. Where his presence at the meeting of the directors so voting is necessary to form a quorum, the action of the directors is illegal. He may be present and vote at the stockholders' meeting ratifying such payment, his vote not being necessary to carry the resolution. *Bassett v. Fairchild*, 132 Cal. 637 (1901). A salary voted to a director by the directors for services as manager is not legal where the charter requires a vote of the stockholders on contracts in which a director is interested. *Re State F. Ins. Co.*, 36 L. J. (Ch.) 634 (1867). In *Benson v. Heathorn*, 1 Y. & C. (Ch.) 326 (1842), the court compelled a director to pay back a salary which he had received for acting as "ship's husband" for the company, whose business was the working of vessels. The president cannot bind the corporation by an agreement to pay a director extra compensation. *Bailey v. Buffalo, etc. Ry.*, 14 Hun, 483 (1878); *Hodges v. Rutland, etc. R. R.*, 29 Vt. 220 (1857). A salary voted by a board of three directors to one of their number as general manager is valid, at least so far as concerns a person who purchases the stock after the salary has been paid. *Clark v. American Coal Co.*, 86 Iowa, 436 (1892). A director who performs services as general manager may recover therefor. *Kryger v. Railway, etc. Mfg. Co.*, 46



stockholders, but the item appeared in the accounts, and every stockholder either knew or had the means of knowing the fact, it was held that the director was not liable to account to the company for the money.<sup>1</sup> It has been held also that a director may recover reasonable compensation for his services as superintendent,<sup>2</sup>

Minn. 500 (1891). A director may recover on a *quantum meruit* for services rendered outside of his duties as director. *Ruby, etc. Co. v. Prentice*, 25 Colo. 4 (1898). It is legal for a corporation to issue stock as full-paid to a person in consideration of his leaving an employment in which he is engaged, and of assuming the presidency of the corporation. *Shannon v. Stevenson*, 173 Pa. St. 419 (1896). A resolution of the stockholder that a managing director should receive a certain salary up to a certain date does not entitle him to a salary beyond that date, and he may be compelled to repay it. *Re Bolt and Iron Co.*, 14 Ont. Rep. (Can.) 211 (1887); *aff'd*, 16 App. Rep. 397. While an officer cannot recover for services performed as an officer unless there is a resolution or by-law to that effect, yet for services performed outside of his official duties, he may recover compensation. *Baines v. Coos Bay, etc. Co.*, 41 Oreg. 135 (1902). An officer is not entitled to pay for performing the ordinary duties of his office, but is entitled to pay for duties outside of those imposed upon him by virtue of his office. *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903). A corporation may legally agree to pay its president a salary for his services as general manager. *Bevier, etc. Co. v. Watson*, 107 Mo. App. 451 (1904). Where a director, who is also general manager, presents a claim for his services to the board of directors, he is not to be counted in making up the quorum or in taking the vote. *Paxton v. Heron*, 41 Colo. 147 (1907). The board of directors may vote compensation to the president who has acted as superintendent, his vote not being necessary to pass the resolution. *Gumaer v. Cripple Creek, etc. Co.*, 40 Colo. 1 (1907). *Cf.* 203 Fed. Rep. 251 (1913).

<sup>1</sup> *Felix, etc. Ltd. v. Hadley*, 77 L. T. Rep. 131 (1897). Where the president and the general manager acting as the executive committee vote salaries to themselves fraudulently they cannot collect the same, but if the manager has drawn the salary for thirteen months it cannot be recovered back. *Gale v. Canada, etc. Co.*, 187 Fed. Rep. 598 (1911). A director who objects to an increase in the salaries of the officers, but participates in their reelection from year to year, cannot maintain a suit to hold them liable. *Klein v. Independent, etc. Assoc.*, 231 Ill. 594 (1907).

<sup>2</sup> The president is entitled to pay for services rendered outside of his duties as president where they are rendered at the request or with the knowledge and acquiescence of the company. *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903). A financier who brings about a settlement between a corporation and its creditors, may be paid for his services in stock, even though he was a director part of the time and even though there was no previous agreement to pay him. *Rosehill Cemetery Co. v. Dempster*, 223 Ill. 567 (1906). A director who, at the request of the president, superintends the construction of the road, may recover pay therefor. *Henry v. Rutland, etc. R. R.*, 27 Vt. 435 (1855); *Chandler v. Monmouth Bank*, 13 N. J. L. 255 (1832), where there was even a charter prohibition. A general manager of a coal company may employ a person to supervise the business, and the latter is entitled to pay, even though he is also a director. *Ruttle v. What Cheer, etc. Co.*, 153 Mich. 300 (1908). A director acting as manager may collect for his services as manager. *Mount Nebo, etc. Co. v. Martin*, 86 Ark. 608 (1908). The president and superintendent of a corporation is not entitled to any salary,



or attorney in a suit;<sup>1</sup> or secretary and agent;<sup>2</sup> or cashier;<sup>3</sup> but not for services as a promoter;<sup>4</sup> nor for acting as president and master-builder;<sup>5</sup> but may recover for acting as agent of the company.<sup>6</sup> Where

neither is he entitled to reimbursement of expenses incurred in inducing people to purchase stock. *Ebner v. Alaska, etc. Co.*, 167 Fed. Rep. 456 (1909). A director may recover for services rendered as superintendent. *Severson v. Bimetallic, etc. Co.*, 18 Mont. 13 (1896). The president of the club may recover for his services in acting as janitor and collecting debts. *Flynn v. Columbus Club*, 21 R. I. 534 (1900).

<sup>1</sup> Where the president of a railroad renders services in litigations and obtaining loans on the agreement of the board of directors to pay him therefor, he may recover payment for the same, even though there was no formal resolution of the directors, and even though the by-laws were silent as to the duties of the president and as to his salary. *Bagley v. Carthage, etc. R. R.*, 165 N. Y. 179 (1900), aff'g 25 N. Y. App. Div. 475. A director may recover compensation for services rendered by him as an attorney. *Taussig v. St. Louis, etc. R. R.*, 186 Mo. 269 (1905). Even though an attorney is one of the directors, yet if he performs services at the request of the directors and managing officers he may recover therefor. *Taussig v. St. Louis, etc. Ry.*, 166 Mo. 28 (1901). A lawyer may recover for his services to a corporation, even though he is president and a director thereof. *Kenner v. Whitelock*, 152 Ind. 635 (1899). On this point see also § 707, *infra*, and *Jackson v. New York Cent. R. R.*, 2 Thomp. & C. (N. Y.) 653. (1874); aff'd, 58 N. Y. 623. *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389 (1878); *Ten Eyck v. Pontiac, etc. R. R.*, 74 Mich. 226 (1889). An attorney may recover for services, even though he is a director, it being agreed that he should be paid as soon as the company was able, and an agreement prior to incorporation having been ratified. *Arapahoe Inv. Co. v. Platt*, 5 Colo. App. 515 (1895). A director who acts as attorney for

the company cannot collect fees therefor unless there was an express contract to that effect. *Re Mimico, etc. Co.*, 26 Ont. Rep. 289 (1895). A lawyer having a contract with the corporation that he should receive five per cent. of its net earnings may enforce the agreement by a suit in equity where net earnings exist and the directors ignore the contract. *Dupignac v. Bernstrom*, 76 N. Y. App. Div. 105 (1902).

<sup>2</sup> *Rogers v. Hastings, etc. Ry.*, 22 Minn. 25 (1875). As to secretary, *Talcott v. Olcott Mfg. Co.*, 11 N. Y. Week. Dig. 141 (1880). *Contra*, *Fraylor v. Sonora Min. Co.*, 17 Cal. 594 (1861). A director who is also a secretary is not entitled to pay as secretary. *Silverton, etc. Co. v. Haughwout*, 44 Colo. 173 (1908). Neither the president, treasurer, nor secretary can recover the value of their services, where they are also directors, unless there was an express contract to pay them or the by-laws so provide. The decisions in Pennsylvania to this effect control services there rendered, though suit is brought elsewhere. *Crumlish v. Central Imp. Co.*, 38 W. Va. 390 (1893). A secretary may recover for real services, even though he is also a director. *Chamberlain v. Detroit Stove Works*, 103 Mich. 124 (1894).

<sup>3</sup> *First Nat. Bank v. Drake*, 29 Kan. 311 (1883).

<sup>4</sup> *Rockford, etc. R. R. v. Sage*, 65 Ill. 328 (1872). See *Eakins v. American, etc. Co.*, 75 Mich. 568 (1889).

<sup>5</sup> *Levisse v. Shreveport City R. R.*, 27 La. Ann. 641 (1875).

<sup>6</sup> In the case *Taussig v. St. Louis, etc. Ry.*, 166 Mo. 28 (1901), the court said: "The rule applicable to such a case, to be deduced from the modern and best-considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation entirely outside of the line and scope of his duties as



directors are paid an annual sum as remuneration, they cannot collect for traveling expenses in going to and from meetings, but one director is not liable to the company for amounts paid to other directors for such traveling expenses unless he signed the check.<sup>1</sup> Although a director of a holding company serves as a director in a subsidiary company, his fees therefor do not belong to the holding company, even though

such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood." Where the vice-president performs services which are not incumbent on him by reason of his office, he may recover pay for the same on a *quantum meruit*, even though there was no contract to pay him. *Brown v. Creston Ice Co.*, 113 Iowa, 615 (1901). Services rendered by a director after he had subscribed for stock are a good consideration in payment therefor, in accordance with an agreement to that effect. *Doak v. Stahlman*, 58 S. W. Rep. 741 (Tenn. 1899). Even though the president of a corporation brings about a sale of all its stock, under a contract by which the corporation is to pay him a certain sum, nevertheless he cannot collect that sum from the corporation itself. *Wood v. Manchester, etc. Co.*, 54 N. Y. App. Div. 522 (1900). Where a company is in financial trouble and a committee of the directors is authorized to sell the property, their expenses to be paid by the company, and the committee abandon the effort, and certain directors then take up the work and complete the sale, and a majority of the stockholders vote that their expenses shall be paid, a dissenting stockholder cannot prevent such payment. *Huffaker v. Krieger's Assignee*, 107 Ky. 200 (1899). A director may collect a reasonable compensation for services and materials given to his company. *Greensboro, etc. Co. v. Stratton*, 120 Ind. 294,

(1889). A *bona fide* holder of a street railway company's note is protected, even though it was given to a director in payment for services in procuring the franchise. *Kneeland v. Braintree Street Ry.*, 167 Mass. 161 (1896). A director who performs extra services is entitled to pay therefor. *Zellerbach v. Allenberg*, 99 Cal. 57 (1893). The president may collect a salary legally voted to him, even though he failed to fulfill his promise to make the business a success. *Paducah, etc. Co. v. Hays*, 24 S. W. Rep. 237 (Ky. 1893). The president may collect pay for his services if they were outside of his official duties, and he was actually employed by the corporation, and the services were rendered with the knowledge and consent of the corporation. *Outtersen v. Fonda Lake Paper Co.*, 20 N. Y. Supp. 980 (1892). A director may recover for services rendered. *McDowall v. Sheehan*, 13 N. Y. Supp. 386 (1891); *rev'd* on another point, in 129 N. Y. 200. A salary payable when bonds are sold is collectible in cash if they are not sold within a reasonable time. *Indianapolis, etc. R. R. v. Hyde*, 122 Ind. 188 (1890). In general, see also *Cheaney v. Lafayette, etc. Ry.*, 68 Ill. 570 (1873); *Shackelford v. New Orleans, etc. R. R.*, 37 Miss. 202 (1859); *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389 (1878), where a director obtained patents and negotiated their sale.

A director may be paid eight per cent. interest for his services and advances in purchasing claims against the corporation, such rate not being usurious. *Kroegher v. Calivada, etc. Co.*, 119 Fed. Rep. 641 (1902).

<sup>1</sup> *Young v. Naval, etc. Soc., Ltd.*, 92 L. T. Rep. 458 (1905), [1905] 1 K. B. 687.



the holding company provided him with qualification shares.<sup>1</sup> The directors are entitled to reasonable pay for winding up the affairs of the corporation.<sup>2</sup> The directors of a trading company may pension a retiring officer or servant.<sup>3</sup>

A salary which takes all the profits and part of the capital stock is unreasonable.<sup>4</sup> The voting of a salary or compensation must be entirely free from fraud, actual or constructive. The vote is illegal if it is carried only by including the vote of the director who receives the salary or pay.<sup>5</sup> A salary paid to a director for

<sup>1</sup> *Re Dover, etc. Ltd.*, [1908] 1 Ch. 65.

<sup>2</sup> *Gund v. Ballard*, 80 Neb. 385 (1907).

<sup>3</sup> *Normandy v. Ind., etc. Co. Ltd.*, [1908] 1 Ch. 84.

<sup>4</sup> *Decatur, etc. Co. v. Palm*, 113 Ala. 531 (1896).

<sup>5</sup> *Butts v. Wood*, 37 N. Y. 317 (1867), where the vote was set aside, although the salary was for services by the director as secretary and treasurer; *Ward v. Davidson*, 89 Mo. 445 (1886), where increased pay was voted to the president of the corporation. Where a board of directors of three vote salaries to two of themselves, the vote is illegal, and they can recover nothing on a *quantum meruit* where they did nothing outside of the ordinary duties of their office. *Steele v. Gold, etc. Co.*, 42 Colo. 529 (1908). *Gardner v. Butler*, 30 N. J. Eq. 702 (1879); *Jones v. Morrison*, 31 Minn. 140 (1883); *Kelsey v. Sargent*, 40 Hun, 150 (1886). Where the president votes in favor of a salary to himself and his presence is necessary to make a quorum, the resolution is void, and as against corporate creditors he will be allowed nothing, especially where he was practically the corporation itself. *Re McCarthy, etc. Co.*, 196 Fed. Rep. 247 (1912). Where there are only five stockholders and all of them are directors, three of them cannot, either at a stockholders' or directors' meeting, vote to themselves exorbitant salaries nor the entire profits made by the company on articles manufactured under patents owned by them. In this case the court decreed that one third of the profits from articles

manufactured under such patents should belong to the company. The minority stockholders in a suit to compel the declaration of a dividend may bring into the fund moneys so illegally paid out. *Crichton v. Webb Press Co.*, 113 La. 167 (1904). An officer while acting as a director cannot fix his own salary if it is objected to. *Figge v. Bergenthal*, 130 Wis. 594 (1907). An increase of salary to the president is not legal when his own vote is necessary to pass the resolution. *Shaffhauser v. Arnholt & Schaefer, etc. Co.*, 67 Atl. Rep. 417 (Pa. 1907). The president, secretary, and treasurer cannot vote salaries to themselves, the company being in bad financial condition. *Hardee v. Sunset Oil Co.*, 56 Fed. Rep. 51 (1893). Where the directors vote a salary to themselves, partly for services, but largely in fraud, the court will compel them to refund the whole salary. *Eaton v. Robinson*, 19 R. I. 146 (1895). In *McNulta v. Corn Belt Bank*, 164 Ill. 427 (1897), the president sued to recover a two and a half per cent. commission which had been voted by the directors to him in unissued stock for services. The suit failed on several grounds of illegality, particularly that his vote was necessary to carry the same. A ratification by the same directors as stockholders does not cure the defect. A salary voted to the president by a quorum of three directors, the two other directors being absent, and the president being one of the three, is not enforceable. *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235 (1888). *MacNaughton v. Osgood*, 41 Hun, 109 (1886), holds that a stock-



nominal services when the corporation was insolvent may be recovered back.<sup>1</sup> Illegal back pay may be embezzlement.<sup>2</sup>

holder cannot cause the vote of salary to be set aside and repayment made merely by proving that the officers voted it to themselves. He must prove actual fraud. This decision, however, may well be doubted. It was reversed on another point in 114 N. Y. 574. Where the president presides over a meeting which votes a future salary to himself for life, the salary is illegal, although he did not vote. *Beers v. New York L. Ins. Co.*, 66 Hun, 75 (1892). Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for five years is fatal. *U. S. Ice, etc. Co. v. Reed*, 2 How. Pr. (N. S.) 253 (1885). In the case *Francis v. Brigham-Hopkins Co.*, 108 Md. 233 (1908), the court sustained a salary of \$16,000 to the president and \$11,000 to the treasurer, although the profits were only about \$89,000, where the president personally indorsed the company's paper even though his vote was necessary in authorizing such salary, the by-laws providing that the directors should fix the salaries. A stockholder may compel the president to refund a salary voted to himself at an illegal meeting of a part of the directors. Back pay is illegal. Where the president takes part in the proceeding, or his vote is essential, the vote of salary to him is illegal. *Wickersham v. Crittenden*, 93 Cal. 17 (1892). A salary to the president, his own vote being necessary, is illegal. *Wickersham v. Crittenden*, 106 Cal. 327 (1895). The board of directors of a California corporation cannot fix the salary of its president when his vote is necessary to pass the resolution. *Re McCarthy, etc. Co.*, 201 Fed. Rep. 923 (1913). A salary

voted by the aid of the vote of an officer receiving the same may be validated by subsequent vote of the board. *Wickersham v. Crittenden*, 110 Cal. 332 (1895). A salary voted to the president at a meeting at which he presides, the minutes showing no dissenting vote, is illegal where he had performed no substantial service, even though he swears that he did not vote. *Ashley v. Kinnan*, 2 N. Y. Supp. 574 (1888). A director cannot collect a salary voted to him as general manager, even in advance of the services, where there were only three directors, and the other two were voted salaries, one as vice-president and the other as assistant treasurer. Delay in objecting thereto for some months is no bar to this defense. *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131 (1891). Where a company is prosperous, the directors may vote increased salaries to themselves, each one refraining from voting when the resolution affecting himself is voted upon. *McNab v. McNab, etc. Co.*, 62 Hun, 18 (1891); *aff'd*, 133 N. Y. 687. In *Bagaley v. Pittsburgh, etc. Iron Co.*, 146 Pa. St. 478 (1892), a salary to the president, fixed by the president and another director, was upheld where the company was a close corporation. Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyance and the resolutions authorizing the salaries, and will order the books to be opened to the other di-

<sup>1</sup> *Putnam v. Gunning*, 162 Mass. 552 (1895). A salary paid to an officer after corporate insolvency may be retained by him if received in good faith. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905). The president and manager of a bankrupt company may

be compelled to refund any excess of salary paid to him while it was insolvent. *Atherton v. Emerson*, 199 Mass. 199 (1908).

<sup>2</sup> *Le Master v. People*, 131 Pac. Rep. 269 (Colo. 1913).



Where the board of directors vote large pay to themselves, evidently in bad faith, and with a view to depriving the corporation of more than a reasonable proportion of its net earnings, a dissenting stockholder may file a bill in equity to have the amount recovered back.<sup>1</sup> And where the chief stockholder, who is president, induces the directors, his "dummies," to vote a large salary to him, the corporation may defeat the officer's action at law to recover it.<sup>2</sup> It has been held also, where

rector, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756 (1893), rev'g *Fougeray v. Cord*, 50 N. J. Eq. 185; rev'd on another point in 57 N. J. Eq. 318. Where three out of five directors are present at a board meeting and vote one of themselves a salary as secretary, it is illegal. The action of the full board subsequently in increasing the salary does not validate the first vote. *Martin v. Santa Cruz, etc. Co.*, 36 Pac. Rep. 36 (Ariz. 1894). Where three persons, being the owners of a majority of the stock, agree that they will vote their stock to elect as directors three persons to be named by one of them and two persons to be named by the others, and that one of them who had received a salary of \$2,500 should receive a salary of \$5,000, and that two of such directors should receive a salary of \$500 each, the agreement is illegal. *Snow v. Church*, 13 N. Y. App. Div. 108 (1897). A trustee holding stock and electing himself the president of a company and receiving a salary must not allow his personal interest in the salary to conflict with his duty as a stockholder to favor the sale of the corporate property at a high price. *Elias v. Schweyer*, 13 N. Y. App. Div. 336 (1897); s. c., 27 N. Y. App. Div. 69. Where the president is the chief stockholder, and causes the directors to vote him a large salary, it is illegal, especially where he votes for it and his vote is necessary. *Adams v. Burke*, 102 Ill. App. 148 (1902); s. c., 201 Ill. 395.

<sup>1</sup> Quoted and approved in *Crocker*

*v. Cumberland, etc. Co.*, 139 N. W. Rep. 783, 785 (S. Dak. 1913), and *Bixler v. Summerfield*, 195 Ill. 147 (1902). In this last case a minority stockholder maintained a bill in equity for an accounting against the president, who owned a majority of the stock and who had voted himself and wife exorbitant salaries. In the case *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905), directors were held liable for unlawfully taking corporate funds in excess of their salaries or the value of their services. Where during eight years all the profits of a turnpike company, amounting to \$20,000, are used to pay exorbitant salaries to the treasurer and secretary, the court will order a repayment of the same with interest. *Wayne Pike Co. v. Hammons*, 129 Ind. 368 (1891); *Blatchford v. Ross*, 54 Barb. 42 (1869); *Ziegler v. Hoagland*, 52 Hun. 385 (1889), where \$86,000 in salaries was voted to three persons. A stockholder may cause to be set aside a resolution whereby the board of directors vote large salaries to themselves, thereby depriving him of his share of the profits. *Miller v. Crown, etc. Co.*, 57 N. Y. Misc. Rep. 383 (1908); rev'd on another point in 125 N. Y. App. Div. 881. In *Hedges v. Paquett*, 3 Oreg. 77 (1869), the court refused to interfere, though fraud was charged, in that the directors credited large bills to themselves, and paid themselves large sums for services, had destroyed the business and had wasted the funds and property. This case, however, has met with universal disapproval, and must be considered as contrary to law.

<sup>2</sup> Quoted and approved in *Adams v. Burke*, 201 Ill. 395 (1903). *Davis v. Memphis City Ry.*, 22 Fed. Rep. 883 (1885). In *Hubbard v. New York, etc. Co.*, 14 Fed. Rep. 675 (1882);



the majority of the stock of a corporation was held by one family, who voted away the corporate profits for salaries, that the minority might call upon a court of equity to remedy the fraud.<sup>1</sup> Unreasonable salaries voted by a majority of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased.<sup>2</sup> Where an insurance company has reinsured all its risks and is doing no business, but the officers are drawing large salaries, a stockholder may have a receiver appointed.<sup>3</sup> It is illegal for trustees owning stock in a corporation to use the stock to obtain large salaries for themselves.<sup>4</sup>

In another case, where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company and caused the board to vote a large salary to himself as president and manager, and leased to the company his property at a large rental, the salary and rental were held to be illegal and voidable.<sup>5</sup>

Again, where persons buying a majority of the stock thereupon take control and vote to the retiring president a large salary for past services, he being one of the persons selling the stock to them, and such salary so paid is credited to the vendees on the purchase price

aff'd, 119 U. S. 696, wherein a person contracted in advance to become a director and superintendent at a remuneration of one third of the profits of the business, the court refused to uphold the agreement, and said the contract is to be "construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director." The court will scrutinize carefully a salary voted by the board of directors to one of their number as superintendent, where such vote is by those representing him in the board, but if the salary is reasonable the court will sustain it. *Harris v. Lemming, etc. Works*, 43 S. W. Rep. 869 (Tenn. 1896).

<sup>1</sup> Quoted and approved in *Greathouse v. Martin*, 91 S. W. Rep. 385 (Tex. 1906). *Sellers v. Phoenix Iron Co.*, 13 Fed. Rep. 20 (1881). "Where a salary or compensation is voted to an officer, the resolution is illegal if it is carried by his vote or produced by his influence, where he has

a controlling interest." *Adams v. Burke*, 201 Ill. 395 (1903).

<sup>2</sup> *Jacobson v. Brooklyn, etc. Co.*, 184 N. Y. 152 (1906). A majority of the stockholders in interest cannot ratify the officers, unlawfully taking for their own use its moneys in excess of their salaries or the value of their services. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905).

<sup>3</sup> *Treat v. Pennsylvania, etc. Co.*, 203 Pa. St. 21 (1902).

<sup>4</sup> See § 612, *supra*.

<sup>5</sup> Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. *Miner v. Bell Isle Ice Co.*, 93 Mich. 97 (1892). Where a director and his dummies vote an unreasonable salary to the treasurer to be elected and he then is elected treasurer and is paid the money, it may be recovered back. *Greathouse v. Martin*, 100 Tex. 99 (1906).



of the stock, the vendees are liable to restore the money so paid.<sup>1</sup> Even though the salaries paid to directors are excessive, yet they may be entitled to a reasonable salary.<sup>2</sup> The court may reduce unreasonable salaries of the directors.<sup>3</sup>

Upon dissolution the president is not entitled to any further salary as president.<sup>4</sup> An officer cannot prove in bankruptcy a salary accruing after such bankruptcy.<sup>5</sup> A creditor cannot complain of salaries paid prior to his becoming a creditor.<sup>6</sup> Excessive salaries may be recovered back by the receiver to apply to the debts.<sup>7</sup> If stock has been issued illegally as a salary to a director, a receiver may hold him liable therefor.<sup>8</sup> A receiver may hold directors liable for excessive salaries, even though paid when the corporation was solvent, and may also hold them liable for collusion by which another corporation, which they control, obtained judgment and absorbed the assets of the former corporation. The receiver represents the stockholders as well as creditors, and may also maintain the suit to pay the costs of the receivership.<sup>9</sup> Questions relative to the compensation of trustees, receivers, stockholders and bondholders and their counsel are considered elsewhere.<sup>10</sup>

A person who is appointed and acts as secretary, and is neither a director nor a stockholder, is entitled to pay although the corporation never agreed to pay him.<sup>11</sup>

<sup>1</sup> *Ellis v. Ward*, 137 Ill. 509 (1890); s. c., 20 N. E. Rep. 671, holding the president not liable where he knew nothing of it. Where the directors have been paid for their services, majority stockholders on the winding up cannot vote the sum of £7,800 to them as a gratuity as against the dissent of a minority stockholder. *Stroud v. Royal*, etc., 89 L. T. Rep. 243 (1903). See also § 681, *infra*.

<sup>2</sup> *Miller v. Doyle*, 211 Pa. St. 59 (1905).

<sup>3</sup> *Raynolds v. Diamond*, etc. Co., 69 N. J. Eq. 299 (1905). A court of equity has power to reduce salaries paid to corporate officers, especially when paid to a majority stockholder. *Lillard v. Oil*, etc. Co., 70 N. J. Eq. 197 (1903).

<sup>4</sup> *Sullivan*, etc. Co. v. *Black*, 159 Ala. 570 (1909).

<sup>5</sup> *Re Voorhees*, etc. Co., 187 Fed. Rep. 611 (1911). Cf. s. c., 188 Fed. Rep. 425.

<sup>6</sup> *Commercial*, etc. v. *Warthen*, 119 Ga. 990 (1904). A person entitled to stock for services rendered is not considered a creditor upon the insol-

veney of the company. *Villere v. New Orleans*, etc. Co., 122 La. 717 (1908). Directors voting stock to themselves in compensation for selling corporate stock are liable for the value of the stock upon corporate insolvency. *Freeman v. Stine*, 15 Phila. 37 (1881).

<sup>7</sup> *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

<sup>8</sup> Where a South Dakota corporation issues 2,500 shares of stock to a director for his services as a director, corporate creditors may hold him liable for the par value thereof at common law for fraud. *Randall Printing Co. v. Sanitas*, etc. Co., 139 N. W. Rep. 606 (Minn. 1913). The directors cannot issue \$5,000 of stock to each of themselves in payment for services to be performed. They may be held liable to corporate creditors. *Shipman*, etc. Co. v. *Portland Const. Co.*, 128 Pac. Rep. 989 (Oreg. 1913).

<sup>9</sup> *Hays v. Pierson*, 65 N. J. Eq. 353 (1904).

<sup>10</sup> See § 879, *infra*.

<sup>11</sup> *Smith v. Long Island R. R.*, 102



Even though a large stockholder of a corporation renders valuable services to it for several years, yet he is not entitled to pay therefor from the corporation unless there is a contract to that effect, especially where the circumstances showed that he expected his pay from the increased value of his investment.<sup>1</sup>

N. Y. 190 (1886); *Edwards v. Fargo*, etc. Ry., 4 Dak. 549 (1887); *Greenleaf v. Norfolk Southern R. R.*, 91 N. C. 33 (1884); *Missouri River R. R. v. Richards*, 8 Kan. 101 (1871). The secretary and president cannot, by their own votes, cause the board to vote them a salary for past services. *Graves v. Mono Lake*, etc. Co., 81 Cal. 303 (1889). The secretary is generally entitled to pay, but if he takes part in a sale of the property subject to the debts and he does not assert any claim for past services he cannot collect. *Dodge v. Lansing*, etc. Co., 152 Mich. 100 (1908). An understanding between the president and secretary, who is also a director, by which the latter was to have a commission on the sale of land, the business of the corporation being that of buying land and selling it in lots, is not binding on the corporation, but the secretary is entitled to reasonable pay for what work he did. *Louisville, etc. Assoc. v. Hegan*, 49 S. W. Rep. 796 (Ky. 1899). Where no work is done by the secretary he is not entitled to a salary, even though the previous secretary received a salary. *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 572 (1911). A secretary, after he ceases to be such, cannot claim pay where he has been receiving pay during all the time as general manager. *Fowler v. Great*, etc. Co., 104 La. 751 (1901). Where by oral agreement between the president and secretary the secretary was to receive a certain monthly salary, and at the end of the year the directors approved the accounts, including the payment of such salary, and the secretary holds over, he may recover the same salary for the entire time. *Mobile, etc. R. R. v. Owen*, 121 Ala. 505 (1899). A secretary is not entitled to pay for his services as secretary unless there is

an express contract to that effect; but where he gives up his whole time to the company's business, one half as secretary and one half in doing engineering work, he is entitled to pay. *Talcott v. Olcott*, etc. Co., 11 N. Y. Week. Dig. 141 (1880). In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence a contract, before incorporation, as to the secretary's salary, is unenforceable. He can recover only on a *quantum meruit*. *Re Dale*, 61 L. T. Rep. 206 (1889). The salary of a secretary, where it consists of a fixed sum and also dividends on certain stock not owned by him, continues as to both until stopped on notice. *Crane, etc. Co. v. Adams*, 142 Ill. 125 (1892). A sale of all the corporate property stops the salary of the secretary where he was subject to removal at any time by the directors. *Union Compress Co. v. Douglass*, 60 Ark. 591 (1895). A secretary and treasurer elected for a year cannot be arbitrarily removed and his salary stopped, if the salary is by the year. Even if he takes part in selling out the company, yet if it is understood that the new company was to continue him he may collect the salary. *Daspit v. Holmes Co.*, 120 La. 86 (1907).

<sup>1</sup> *Ritchie v. McMullen*, 79 Fed. Rep. 522 (1897). The cashier of a bank cannot collect money for his services while collecting the dividends and coupons of a depositor and stockholder in a bank, where there was no agreement to pay. *Wright v. Sheldon*, 24 R. I. 336 (1902). Although a corporation is heavily in debt and its stockholders give their stock to a corporate creditor by a writing which recites that the corporation owes them



The treasurer's salary may be fixed for past as well as future time.<sup>1</sup> Although a treasurer is presumed to be entitled to compensation, yet if he is a stockholder and his firm have the banking business of the company, and nothing has ever been said about compensation, he cannot afterwards claim or obtain it.<sup>2</sup>

A contract of a director, officer, or president that he will not ask any compensation for his services cannot be insisted upon by the company if it was not a party to the contract.<sup>3</sup> The treasurer and general manager cannot recover for past services where he was appointed on an agreement that he would not be paid therefor, he being largely interested in the company.<sup>4</sup>

nothing, they may offset unpaid compensation for services rendered as against any debt they owe the corporation. *Argo Mfg. Co. v. Parker*, 52 Wash. 100 (1909).

<sup>1</sup> *Robson v. Fenniman Co.*, 85 Atl. Rep. 356 (N. J. 1912).

<sup>2</sup> *Mather v. Eureka, etc. Co.*, 118 N. Y. 629 (1890); 44 Hun, 333 (1887). The question may be one for the jury. *Pendelton v. Empire, etc. Co.*, 19 N. Y. 13 (1859). A treasurer may recover for services actually rendered by him, even though he was a director and there was no agreement as to his pay for services as treasurer. *Reeve v. Harris*, 50 S. W. Rep. 658 (Tenn. 1897). The secretary and treasurer and curator of a scientific institute is not entitled to back salary where the facts show that no such salary was contemplated. *Whittemore v. Kent Scientific Institute*, 128 Mich. 518 (1901). "No duties, no pay." A treasurer's salary ceases upon the sale of all of its assets even though there is no dissolution; but if substantial duties continue, the salary continues. *Rodney v. Southern R. R. Assoc.*, 3 N. Y. St. Rep. 564 (1886), distinguishing *Long Island Ferry Co. v. Terbell*, 48 N. Y. 427 (1872). A salary to a treasurer does not continue while he is sick, it appearing that during that time he sold his stock and never performed any further services. *Raley v. Victor Co.*, 86 Minn. 438 (1902).

<sup>3</sup> An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It

was not a party to the agreement. *Thompson Co. v. Brook*, 14 N. Y. Supp. 370 (1891). An agreement of the president with certain creditors that he would not take a salary until other claims were paid cannot be enforced by the receiver. The president may come in as a creditor. *Snow v. Russell Coe, etc. Co.*, 58 Hun, 134 (1890); *Lambert v. Northern Ry.*, 18 W. R. 180 (1869), holds that a promise by directors to perform their duties gratuitously is *nudum pactum*, and does not prevent them from recovering upon a previous binding agreement for salaries. Where the vendor of property agrees by contract with the vendee and accepted by the company that he, the vendor, will for five years give his personal supervision to the business of the company, he, the vendor, cannot recover compensation from the company for such services. *Wetmore v. Wetmore Co.*, 113 Cal. 321 (1896). The conduct of an officer may be such as to preclude the idea that he was to have a salary. *Simonson v. New York City Ins. Co.*, 25 N. Y. Week. Dig. 90 (1886).

<sup>4</sup> *Harvard, etc. Co. v. Pratt*, 185 Mass. 406 (1904). A stockholder who renders services to his corporation and states that he does not intend to charge therefor, cannot afterwards claim pay therefor. *Sidway v. Missouri, etc. Co.*, 187 Mo. 649 (1905). A director and vice-president is not entitled to pay for extra services where it was understood that he should not receive any pay, even though the services were rendered



Various decisions in regard to other officers of the company are given in the notes below.<sup>1</sup> An executive committee has no power to make a contract appointing a sole selling agent for five years and giving him six per cent. on all goods sold by him or any one else. Moreover,

under a resolution passed by the board of directors. *Stout v. Security, etc. Co.*, 82 N. Y. App. Div. 129 (1903). Where several officers have agreed to waive their salary, the corporation may set that up as a defense to a suit by one of them for salary. *Riera v. Salo, etc. Co.*, 134 N. Y. App. Div. 497 (1909). No pay will be allowed to the president where there was no contract and it was understood that none of the officers should charge for their services. *Red Bud Realty Co. v. South*, 96 Ark. 281 (1910). Where a majority stockholder who also controls the board of directors induces subscription on representations that the corporate expense would not exceed a certain amount a month, and he then votes himself a salary in excess of that amount, the court may compel him to repay the excess and may order a dividend to be paid therefrom. *Ritchie v. People's Tel. Co.*, 22, S. Dak. 598 (1909). Where the treasurer who is also a director serves for a year at an agreed price, and then states that he cannot serve further for the same pay, and no arrangement is made, he may recover what his services are worth thereafter. *Stacy v. Cherokee, etc. Works*, 70 S. C. 178 (1904). Where promoters agree that they will not charge the corporation anything for their services, they cannot afterwards collect from the corporation. *Powell v. Georgia, etc. Ry.*, 121 Ga. 803 (1905).

<sup>1</sup> It may be shown by parol that a resolution gave the vice-president a certain salary, where such resolution was not entered on the record and he performed services other than those pertaining to his office. *Selley v. American, etc. Co.*, 119 Iowa, 591 (1903). A receiver need not turn his fees over to the trust company that caused him to be appointed, even though he is president of the trust company and received a salary. *Citizens', etc. Co. v. Tompkins*, 97 Md.

182 (1903). A corporate contract to give an attorney "permanent employment" is satisfied by a year's employment. *Sullivan v. Detroit, etc. Ry.*, 135 Mich. 661 (1904). The president may employ the vice-president, his brother, to do work for which the company will pay him. *McDowell v. New York, etc. R. R.*, 12 N. Y. St. Rep. 877 (1887). When it is understood by the directors that the officers are to be paid for their services, and at the end of the year a note is given for services to the superintendent, who is also a director, he may collect it. *Stewart v. St. Louis, etc. R. R.*, 41 Fed. Rep. 736 (1887). Where the vice-president sues for services as general manager, he must prove services clearly outside of his duties as an officer, and that there was no contrary agreement (citing many cases). *Toponce v. Corinne, etc. Co.*, 6 Utah, 439 (1890). A contract with directors for their services ceases upon the winding up of the company. *Frames v. Bulfontein Min. Co.*, [1891] 1 Ch. 140. *Cf. Rodney v. Southern R. R. Assoc.*, 3 N. Y. St. Rep. 564 (1886). For the services of ordinary clerks, etc., the corporation is of course liable. *Legrand v. Manhattan, etc. Assoc.*, 80 N. Y. 638 (1880); *Pollok v. Shultze*, 1 Hun, 320 (1874); *Bard v. Banigan*, 39 Fed. Rep. 13 (1889); *aff'd*, 134 U. S. 291; *Gowen Marble Co. v. Tarrant*, 73 Ill. 608 (1874). Where an excessive salary is paid to an employee in order to induce him to subscribe for stock, he may be liable for the excess upon the corporation becoming insolvent. *Deppen v. German-American, etc. Co.*, 70 S. W. Rep. 868 (Ky. 1902); *s. c.*, 72 S. W. Rep. 768. An express agreement as to the salary to be paid to a general manager for past services does not entitle him to the same salary for the future, even though there is no further express agreement. *Bell v. Peper, etc. Co.*, 205 Mo. 475 (1907).



such a contract is unilateral and not binding when the agent does not agree to sell any goods.<sup>1</sup> Where the salary of a salesman is a proportion of the profits, salaries paid to directors are to be deducted from the receipts before arriving at the profits.<sup>2</sup>

§ 658. *Contracts between corporations having one or more directors in common.* — It has been difficult to determine whether a stockholder in one corporation could cause to be set aside a contract or agreement between two corporations having one or more directors in common. As a rule, even though the boards of directors of two corporations are the same, and one buys the property of the other, yet the transaction is not void, and will not be set aside at the instance of a stockholder unless he shows damage.<sup>3</sup> A contract between two corporations will not be declared invalid because the corporations have common directors, where its fairness is manifest.<sup>4</sup> But a contract between corporations having directors in common must be "open and free from any suspicion of secret dealing in favor of one principal while acting as the representative of the other."<sup>5</sup> Thus where two corporations have a director in common who largely controls both, and one proposes to buy out the other in exchange for stock of the former, the minority stockholders of the latter may enjoin the transaction until it is proved to the satisfaction of the court that the proposed sale is fair and free from fraud.<sup>6</sup> A mortgage by an insolvent corporation to a creditor corporation, the two corporations having a majority of their

<sup>1</sup> Commercial, etc. Co. v. Northampton, etc. Co., 115 N. Y. App. Div. 388 (1906); aff'd, 190 N. Y. 1. The treasurer and general manager has no power to agree to give to the vice-president a commission on purchases and sales by the corporation, but this does not prevent his recovering reasonable compensation therefor. Waters v. American, etc. Co., 102 Md. 212 (1905). See also § 534, *supra*.

<sup>2</sup> Gaul v. Kiel, etc. Co., 199 N. Y. 472 (1910).

<sup>3</sup> Smith v. Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897). Even though two corporations have the same officers and majority stockholders and one sells its product to the other, a minority stockholder cannot complain unless he shows dishonesty or fraud. Smith v. Chase, etc. Co., 197 Fed. Rep. 466 (1912).

<sup>4</sup> Evansville, etc. Co. v. Bank of Commerce, 144 Ind. 34 (1896).

<sup>5</sup> Mercantile, etc. Co. v. Pittsburgh,

etc. Assoc., 173 Pa. St. 30 (1896). Where the managing officers of a corporation secretly form a new corporation for a similar business and control it, and cause the two corporations to enter into a contract, such contract cannot be enforced by the latter corporation. Attalia, etc. Co. v. Virginia, etc. Co., 111 Tenn. 527 (1903). A stockholder may cause to be set aside a sale of all the property of the corporation at an inadequate price to another corporation having the same officers and directors. Hinds v. Fishkill, etc. Co., 96 N. Y. App. Div. 14 (1904). A manager of one oil company cannot turn over its property to another oil company of which he is president and thus enable the latter to claim adverse title. McCullough v. Ford, etc. Co., 213 Pa. St. 110 (1905).

<sup>6</sup> Geddes v. Anaconda, etc. Co., 197 Fed. Rep. 860 (1912).



directors in common, has been declared to be illegal.<sup>1</sup> A guaranty where there are directors in common may be voidable.<sup>2</sup> Such contracts as these, however, are not void, and they may be validated by a unanimous vote of the stockholders,<sup>3</sup> or by long delay in objecting.<sup>4</sup> More-

<sup>1</sup> *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep. 496 (1894). In *Barrie v. United Rys. Co.*, 125 Mo. App. 96 (1907), it is held that a contract between two corporations having practically the same directors and officers would be presumed to be fraudulent, especially where it involved a transfer of the property of one to the other, without the creditors of the former being paid.

<sup>2</sup> *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891); *Metropolitan Elev. Ry. v. Manhattan Ry.*, 15 Am. & Eng. R. R. Cas. 1 (1884). A contrary conclusion was reached by the federal court on the same facts. *Flagg v. Manhattan Ry.*, 10 Fed. Rep. 413 (1881). For other cases connected with this litigation, see *Metropolitan Elev. Ry. v. Manhattan Ry.*, 14 Abb. N. Cas. 152, n. (1884); *Manhattan Ry. v. New York Elev. Ry.*, 29 Hun, 309 (1883), rev'g N. Y. D. Reg., Dec. 2, 1882; *People v. Metropolitan Elev. Ry.*, 26 Hun, 82 (1881); *Harkness v. Manhattan Ry.*, 54 N. Y. Super. Ct. 174 (1886). See also *St. James' Church v. Church of Redeemer*, 45 Barb. 356 (1865), where one religious corporation gratuitously conveyed property to another, the directors being common. A consolidation of two religious corporations having a director in common is illegal and may be set aside. *Stokes v. Phelps Mission*, 47 Hun, 570 (1888). "It is undoubtedly a well-settled rule of law that executory contracts entered into by corporations having common directors are voidable at the instance of either corporation, and the court will not inquire into the question whether or not it is beneficial to the corporation seeking to avoid it." But this right is vested in the corporation and not in any stockholder, and a stockholder cannot obtain an injunction against such contract being carried out, unless actual fraud is shown. *Burden v. Burden*, 159 N. Y. 287, 307 (1899).

<sup>3</sup> If the stockholders unanimously ratify a contract between two corporations having directors in common, the contract is legal. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). A sale of property by one corporation to another, all of the directors except one being in common, is legal where such sale is subsequently ratified by a meeting of the stockholders. *Grant v. United, etc. Ry.*, L. R. 40 Ch. D. 135 (1888). A sale of property by one corporation to another is not fraudulent merely because there was one director common to both, where the directors and stockholders assented thereto. *Leathers v. Janney*, 41 La. Ann. 1120 (1889). A lease of one railroad to another, ratified by the stockholders as required by the statute, is legal, even though the same persons were directors in both companies. *Jones v. Concord, etc. R. R.*, 67 H. N. 119 (1891); s. c., 67 N. H. 234. Where a land company agreed to pay a railroad company a certain sum in installments, if the railroad company would extend its road to the land company's land, it is immaterial that four of the five directors of the land company were also directors of the railroad company, it being shown that all acts of the directors were expressly ratified at a stockholders' meeting, and it being shown also that the railroad had been constructed and a part of the installments paid. *San Diego, etc. R. R. v. Pacific Beach Co.*, 112 Cal. 53 (1896).

<sup>4</sup> Even though a bridge company, which has made a long-time contract with a railroad company, and which has the same officers and directors and majority stockholders as the railroad company, modifies the contract so as to reduce the income of the bridge company, yet if for nineteen years the minority stockholders of the bridge company acquiesce therein, such modification is legal. *Pittsburg, etc. Ry. v. Dodd*, 115 Ky. 176 (1903).



over, if the minority stockholders object to the contract, the court will consider it, and will sustain it if fair, and set it aside if unfair.<sup>1</sup>

<sup>1</sup> Even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment. *Continental Ins. Co. v. New York, etc. R. R.*, 187 N. Y. 225 (1907). Even though a railroad lease is perpetual and provides that the lessee shall pay certain interest and dividends, yet, any saving by reason of a refunding of the bonds of the lessor belongs to the stockholders of the lessor and they may recover such saving as has been made within the time of the statute of limitations, especially where it has directors in common, and the fact that the guaranty of dividends was indorsed on the stock certificates is immaterial. *Ætna Ins. Co. v. Albany, etc. Co.*, 156 Fed. Rep. 132 (1907). If a contract between two corporations is a fair one the courts will sustain it, even though there was a director in common. *Hiles v. Hiles & Co.*, 120 Ill. App. 617 (1905). A contract between companies having a majority of directors in common is not void, but may be set aside for unfairness. *City Nat. Bank v. Merchants', etc. Bank*, 105 S. W. Rep. 338 (Tex. 1907). A deed from one unincorporated association to another association in payment of a debt is not invalid merely because they had one director in common. *Stradley v. Cargill, etc. Co.*, 135 Mich. 367 (1904). A contract between two corporations is not void, even though it is made by an officer in common. *Render v. Arkansas, etc. Co.*, 196 Fed. Rep. 1 (1912). A stockholder who has voted for dissolution cannot thereafter complain that it was brought about by another stockholder having directors in common with the dissolved corporation. *Bijur v. Standard, etc. Co.*, 74 N. J. Eq. 546 (1908).

A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata*. The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of \$25 worth of stock cannot enjoin a sale by those owning ninety-three per cent. of the entire capital stock. Such a sale is valid, although there were directors in common. *Pitcher v. Lone, etc. Co.*, 39 Wash. 608 (1905). A stockholder cannot cause to be set aside a contract between two corporations having a majority of directors in common, unless he shows damage. *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900). A debt from one corporation to another is not invalid, although they have directors in common. *Salina, etc. Bank v. Prescott*, 60 Kan. 490 (1899). The fact that two of the directors in a vendor corporation are also directors in a vendee does not render the sale fraudulent *per se*. *Hagerstown, etc. Co. v. Keedy*, 91 Md. 430 (1900). A pledge of bonds by one corporation to another is not invalid, even though there is one director in common. *Rawlings v. New Memphis, etc. Co.*, 105 Tenn. 268 (1900). Even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. *Lagunas, etc. Co., Ltd. v. Lagunas Syndicate, Ltd.*, [1899] 2 Ch. 392. In the case *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673 (1903), the court said: "I incline strongly to believe that the safe rule in most cases, in the end, will be found to be that the presence of a



§ 659. *Foreclosure of mortgage on corporate property, and collusion with directors, whereby no defense is made to the foreclosure.* —

director or directors on both sides of the transaction under investigation does not give the dissenting stockholder an arbitrary right to an injunction, but may give him a most ample right to subject the transaction to the scrutiny of the court, and may cast upon the corporations or directors concerned the burden of disclosing and justifying the transaction. To give the dissenting stockholder the arbitrary right to an injunction in this class of cases often will put a deadly weapon in the hands of the blackmailer and the corporation 'striker.' Such a rule tends to drive the actual wrong-doers to cover, — to induce them to seek concealment while the corporate action is accomplished through apparently impartial directors, who are in fact only agents or 'dummies.' The court in this case held that where all the directors are personally interested in the matter, aside from their interest as stockholders, the court at the instance of a minority stockholder may compel the directors to prove that the proposed action is advantageous to the corporation, inasmuch as it has not received the approval of an impartial board of directors. Where a rolling-stock company by its board of five directors makes a contract with a railroad company having thirteen directors, five of whom are the same as the directors of the rolling-stock company, and the railroad company makes the contract at a meeting of eight directors, two of whom are of the five, and for two years the railroad company lives up to the contract, it cannot then repudiate. The majority of its directors were not in common, and it should have objected before. *U. S. Rolling-Stock Co. v. Atlantic, etc. R. R.*, 34 Ohio St. 450 (1878). *Cf. Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14 (1883), where the illegality was clear, since the directors common to both corporations constituted a majority of the directors of one of them. In *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb.

374 (1894), where the same persons formed a majority of the boards of directors of a construction company and also of a railroad company, to which latter company the construction company had agreed to turn over the stock of another railroad company; and where, by the contract between the two companies having a majority of the board of directors in common, the railroad company was to transport freight at a certain price, and to deliver to the construction company its bonds to a certain amount; and where subsequently this contract was changed so as to reduce the amount going to the construction company by upwards of \$700,000, — it was held that the minority stockholders and directors of the construction company might file a bill on behalf of the construction company and compel the railroad company to pay to the construction company the amount mentioned above. It was also held that where these directors controlled both boards, and sold a part of the bonds going to the construction company to themselves at ninety cents on the dollar, when the bonds were worth par, the construction company could hold the railroad company liable for the loss. The decision was modified in 44 Neb. 463 (1895), reducing the decree to \$300,906.33. An appeal to the supreme court of the United States was dismissed in *Missouri Pac. Ry. v. Fitzgerald*, 160 U. S. 556 (1896). The fact that a minority of the directors are directors in another contracting company does not render a contract voidable at the instance of one of the companies or of a dissenting stockholder. *Ziegler v. Lake Street El. R. R.*, 69 Fed. Rep. 176, 182 (1895). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the latter, through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve



This subject is considered elsewhere.<sup>1</sup> Where the directors of a corporation have misappropriated the funds of the company, created

of the insolvency of the former. *Bridgens v. Dollar Sav. Bank*, 66 Fed. Rep. 9 (1895). The fact that a railroad company and a construction company have mainly, though not entirely, the same officers and stockholders, does not render them legally identical, but merely requires a more careful scrutiny of their dealings with each other where the interests of outside parties are affected. Hence a contract by which the construction company takes stock and bonds and agrees to do certain work will be upheld if it is a reasonable and fair contract, and the construction company may enforce claims against the railroad company. *Davidson v. Mexican Nat. R. R.*, 58 Fed. Rep. 653 (1893). A mortgage by one corporation to another is not void because they have the same president. *Roy v. Scott, etc. Co.*, 11 Wash. 399 (1895). An insurance policy issued by an agent to a corporation in which he is an officer is not enforceable. *Greenwood, etc. Co. v. Georgia, etc. Ins. Co.*, 72 Miss. 46 (1895). A sale of iron by one corporation to another which is fair is not illegal simply because the company has directors in common. *Burden v. Burden*, 8 N. Y. App. Div. 160 (1896); *aff'd*, 159 N. Y. 287 (1899). In *Hart v. Ogdensburg, etc. R. R.*, 89 Hun, 316 (1895), where two railroads having directors in common were consolidated, the court held that the minority stockholders could not object, inasmuch as the act was not so clearly against the interest of the minority as to be a wanton and fraudulent destruction of their rights, nor a clear, substantial, flagrant violation thereof. Moreover the court held that six years' delay in suing was fatal. A city is liable on a gas contract although the same man is mayor and is also president of the gas company. *Capital, etc. Co. v. Young*, 109 Cal. 140 (1895). A sale of all the assets to another corporation may be set

aside at the instance of minority stockholders, especially where both corporations have directors in common. *McLeod v. Lincoln, etc.*, 69 Neb. 550 (1904). In *Santa Fé Electric Co. v. Hitchcock*, 9 N. Mex. 156 (1897), the court held a lease to be void between two companies having the same directors, there being actual fraud. A note by one corporation to another is valid although the same person is president of both. *St. Joe, etc. Co. v. First Nat. Bank*, 10 Colo. App. 339 (1897). Where a town board of three are authorized to make a grant to a railroad, and two of them, one being a director of the railroad, made the grant the court will set it aside. *San Diego v. San Diego, etc. R. R.*, 44 Cal. 106 (1872). The fact that two directors out of eight of one packet company are also directors out of six directors of a competing packet company does not render them liable for fraud, although the former company loans the latter company much money and takes a chattel mortgage and closes out its property. *Booth v. Robinson*, 55 Md. 419 (1880). In England contracts between companies having directors in common are void by statute, unless they are ratified by vote of the stockholders, and may be so ratified, although the by-laws prohibit the directors from making contracts in which they are interested. *Grant v. United, etc. Ry.*, L. R. 40 Ch. D. 135 (1888); *Ernest v. Nicholls*, 6 H. L. Cas. 401 (1857). *Cf. Griffin v. Inman*, 57 Ga. 370 (1876), where the town officers merely executed bonds to a railroad company of which they were directors. The bonds were held to be valid. In *Wallace v. Long Island R. R.*, 12 Hun, 460 (1877), *held*, that a dissenting stockholder could not sue to set aside a lease made between two railroads having directors in common, but that a majority of the stockholders might have objected. A conveyance

<sup>1</sup> See § 848, ch. XLIX, *infra*.



fraudulent debts, levied assessments upon the stock, caused the stock to be forfeited for non-payment, and judgment to be entered on said debts and the property to be sold out, a stockholder may file a bill to set aside all the transactions and to compel the directors to account and to wind up the company.<sup>1</sup> A fraudulent decree of foreclosure may subsequently be attacked by the corporation itself after it has passed into other hands, even though the officers, directors, and stockholders who were such at the time of the foreclosure acquiesced therein.<sup>2</sup> Where the officers of a corporation fraudulently cause mortgages on its property to be foreclosed and then buy it in and form a new corporation to take over the assets, all for the purpose of eliminating preferred stockholders

of all the property of an insolvent corporation to one of its creditors, a corporation having two directors in common with the insolvent corporation, such conveyance being to secure the latter corporation's debt, is *prima facie* fraudulent and voidable. If free from actual fraud, and if reasonable, it is sustained. *Sweeny v. Sugar Ref. Co.*, 30 W. Va. 443 (1887). The fact of having stockholders in common is immaterial. *Warfield v. Marshall, etc. Co.*, 72 Iowa, 666 (1887). The fact that a construction contract is assigned by the contractor to a corporation having directors in common with the railroad does not render the contract fraudulent *per se*. *Union Pac. R. R. v. Credit Mobilier*, 135 Mass. 367 (1883). A contract between two corporations having directors in common is voidable, but equity will cause such payments to be made for work done as are just, irrespective of the written contract. *Thomas v. Peoria, etc. Ry.*, 36 Fed. Rep. 808 (1888). Where one director is a director also in another company with which a contract is being made, he cannot be counted in making up a quorum. *Metropolitan, etc. Co. v. Domestic, etc. Co.*, 44 N. J. Eq. 568 (1888). A contract between corporations having common directors is voidable, not void. If it is fair it will not be disturbed. *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38 (1889); *Alexander v. Williams*, 14 Mo. App. 13 (1888). A lease of one railroad to another by directors who are directors in both companies is invalid.

*Thouren v. East, etc. Ry.*, 5 Ry. & Corp. L. J. 77 (Tenn. 1888). In *Pearson v. Concord R. R.*, 62 N. H. 537 (1883), the court, in setting aside a contract made by corporations having common directors, said: "Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion."

<sup>1</sup> *Jellenik v. Huron, etc. Co.*, 177 U. S. 1 (1899). In the case *Lefi v. Nachod*, 64 N. Y. Misc. Rep. 497 (1909), it is held that a stockholder cannot redeem corporate property from its mortgages which are not being foreclosed.

<sup>2</sup> *Pacific R. R. of Mo. v. Missouri, etc. Ry.*, 111 U. S. 505 (1884). A corporation may file a bill in equity to enjoin the foreclosure of a mortgage securing bonds which have been issued to the stockholders as a dividend illegally, and to compel the surrender of the bonds for cancellation, it appearing that no other rights have intervened. *Gunnison, etc. Co. v. Whitaker*, 91 Fed. Rep. 191 (1898). Where the chief stockholders put the corporation into bankruptcy in order to defraud the creditors by a compromise and succeed in doing so by settling with the creditors at fifty cents on the dollar and then the bankruptcy proceedings are dismissed and they are about to take the property themselves, a minority stockholder may bring suit against them in behalf of the corporation. *Weber v. Wallerstein*, 111 N. Y. App. Div. 693 (1906).



and certain creditors in the old corporation, a preferred stockholder may hold the new corporation liable for the value of an equal amount of preferred stock in the new corporation, including dividends already paid.<sup>1</sup> A stockholder cannot maintain a suit against a foreign corporation to impeach a judgment against the corporation in the state where it is incorporated, where the only allegations are general ones of fraud and collusion.<sup>2</sup>

§ 660. *Directors' purchases of property needed by the corporation, and purchases of outstanding debts or claims against the corporation.* — It is an abuse of trust for a corporate director to purchase property which he knows the corporation will need, and then to sell the same to the corporation at an advanced price. This generally occurs where the director purchases in his own name land which the corporation must purchase for its enterprise, or over which it will need a right of way.<sup>3</sup> Where, however, the director offers the land to the

<sup>1</sup> *Sparrow v. Bement & Sons*, 142 Mich. 441 (1905).

<sup>2</sup> *Kelly v. Thomas*, 83 Atl. Rep. 307 (Penn. 1912). See also § 750, *infra*.

<sup>3</sup> *Blake v. Buffalo Creek R. R.*, 56 N. Y. 485 (1874). See *Buffalo, etc. R. R. v. Lampson*, 47 Barb. 533 (1867); *Blair, etc. Co. v. Walker*, 50 Iowa, 376 (1879); *Taylor v. Salmon*, 4 Myl. & C. 134 (1838), where the corporate agent took in his own name a lease which the company desired and had instructed him to obtain for itself. See also *Mitchell v. Reed*, 61 N. Y. 123 (1874). Where a director, who afterwards became a contractor for the construction of the railroad, purchased land for a right of way and also lots for terminals, he may be compelled to turn over to the company such lots upon repayment to him of the price therefor. *Seacoast R. R. v. Wood*, 65 N. J. Eq. 530 (1903). A promoter is not bound to turn over to the company a property which he tried to purchase for the corporation before it was organized, but was unable to do so, on account of certain conditions, but which he thereafter purchased for himself. *Tompkins v. Sperry, etc. Co.*, 96 Md. 560 (1903). The corporate treasurer cannot purchase stock at a discount and sell to the corporation at par, where such stock is needed by the corporation

to fulfill its contracts. *East New York, etc. R. R. v. Elmore*, 5 Hun, 214 (1875). Where the business of a corporation requires the construction of a railroad and steamship line, and the company has no power to construct them, and consequently the officers with others take out a separate charter and own the stock of the new company and construct the line, and then propose to consolidate the companies on a plan which will give to the new stock an interest in the consolidated company which will represent a large profit, a stockholder of the old company may enjoin the consolidation upon proving that the new franchises were necessary to the old company and were intended for the benefit of the old company, the same officers being in control of the two companies. *Miller v. Consolidated, etc. Co.*, 110 Fed. Rep. 480 (1901). Where a corporation has a lease of and option to purchase land, and the officers purchase the land for themselves in violation thereof, the corporation is entitled to the property at the price paid by the officers, but as to land which the company merely wished to purchase, but had made no contract in respect thereto, the company is not entitled to the benefit of purchase of such land by an officer. *Lagarde v. Anniston, etc. Co.*, 126 Ala. 496 (1900). Where the president is



corporation at the price which he paid for it, and the corporation refuses it, he cannot long subsequently be compelled to accept that price.<sup>1</sup> The president of a company may as a member of a firm purchase land which might have been purchased by the company and even sell land to the company if his acts are open and fair and known to the directors and stockholders.<sup>2</sup>

A director may construct works to compete with the works of the corporation in which he is a director. He is not disqualified from so doing.<sup>3</sup> Directors, who are also officers, of a manufacturing corporation, if acting in positive good faith towards the corporation and their co-stockholders, are not precluded from engaging in the building and operation of other distinct works in the same general business; and they do not stand, in respect to said works, in any trust relation to the corporation.<sup>4</sup>

directed to buy the boats of a rival company, and does so by buying them for another corporation which he controls, and credits himself with an advance, he may be made to refund. *Ward v. Davidson*, 89 Mo. 445 (1886). A director cannot take a contract in his own name for himself where such contract really should belong to the corporation. The president of a packet company may take a contract for carrying mails, and may have the service performed by the packet company, he paying it therefor. He is not liable to it for his profits, he having endeavored first to get the contract for the company. *Keokuk, etc. Co. v. Davidson*, 95 Mo. 467 (1881). A treasurer is not liable for profits in coal sold by himself to the corporation, where he purchased the coal with no intent of selling to the company. *Parker v. Nickerson*, 137 Mass. 487 (1884). A director who takes to himself an assignment of a patent that ought to have been assigned to his corporation must account for all profits that he has received. *Averill v. Barber*, 6 N. Y. Supp. 255 (1889). A corporate creditor cannot complain that a director has purchased property needed by the corporation. *Cornell v. Clark*, 104 N. Y. 451 (1887). See also § 652, *supra*, on sales by directors to the cor-

poration. A majority stockholder in a corporation may purchase property adjoining the property of the corporation and is not bound to turn it over to the corporation at cost, even though he had stated he intended to do so, the corporation having parted with nothing by reason thereof, and even though he had caused the corporation to stop operations in order that he might purchase such outside property more cheaply. *Zeckendorf v. Steinfeld*, 12 Ariz. 245 (1909).

<sup>1</sup> *Sandy River R. R. v. Stubbs*, 77 Me. 594 (1885). A president and treasurer who purchase land as agents for a railroad company, and allow it to pay part of the purchase price, and obey its direction to sell part, whereby the purchase price is repaid, are liable to convey to the company the remainder, the title to which is in their names. *Church v. Sterling*, 16 Conn. 388 (1844).

<sup>2</sup> *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509 (1910).

<sup>3</sup> *Barr v. Pittsburgh, etc. Co.*, 51 Fed. Rep. 33 (1892). See also *Ward v. Davidson*, 89 Mo. 445 (1886). *Cf. Keokuk, etc. Co. v. Davidson*, 95 Mo. 467 (1888). A director in a corporation may engage in a similar business on his own account or as a director in a competing corporation. *New York, etc. Co. v. Franklin*, 49

<sup>4</sup> *Barr v. Pittsburgh, etc. Co.*, 57 Fed. Rep. 86 (1893), *aff'd* 51 Fed. Rep. 33.



Where a director and officer of an amusement park company five years before its lease expires takes a renewal in his own name, the company may compel him to turn it over on its assuming the obligations.<sup>1</sup> And where the president takes a renewal of a corporate lease in his own name, and admits that he takes it for his company, he cannot claim any of the profits arising from it, even though, in order to get the lease from him, a contract is made that he have a part of the profits.<sup>2</sup> A director cannot take a contract in his own name for himself, where such contract really should belong to the corporation.<sup>3</sup> The directors of an insolvent gas company may purchase for themselves a franchise to furnish gas to the city.<sup>4</sup> A director, who is also an engineer and is paid for his services in an irrigation company, must transfer to the company an application to the government for water rights which are necessary to the company's business and which he could not in equity take for himself.<sup>5</sup>

It is a fraud on the corporation and on corporate creditors for the

N. Y. Misc. Rep. 8 (1905). The president of a water irrigation company cannot acquire an interest in the property hostile to the interest of the stockholders. *Center, etc. Co. v. Lindsay*, 21 Utah, 192 (1900).

<sup>1</sup> *Pikes Peak Co. v. Pfuntner*, 158 Mich. 412 (1909).

<sup>2</sup> *Robinson v. Jewett*, 116 N. Y. 40 (1889). A managing director of a grocery company cannot legally take a renewal in his own name of a lease which the company has, in order to go into the business for himself. *Acker, etc. Co. v. McGaw*, 106 Md. 536 (1907). Even though a director takes a renewal of a lease for himself when it should be for the corporation, yet if the lease provides against assignment and the lessor had refused to make a lease to the corporation and the lessor was not made a party, the court will not put the corporation in possession. *Jacksonville Cigar Co. v. Dozier*, 53 Fla. 1059 (1907). Even though a corporation has applied for the renewal of a lease, and afterwards a director applies and the lease is given to the director, the corporation cannot compel the director to turn over the lease where the lease contains a provision against sub-letting. *Crittenden, etc. Co. v. Cowles*, 66 N. Y. App. Div. 95 (1901). Where there

are but two stockholders in a corporation which conducts two theaters on leases, and one of them trusts the other as president to conduct the business, and the latter on the expiration of the leases forms a new corporation and takes the leases in the name of such new corporation, the other stockholder may compel an assignment of the leases to the first corporation and have an accounting for profits. *McCourt v. Singers-Bigger*, 145 Fed. Rep. 103 (1906).

<sup>3</sup> *Richardson v. Green*, 133 U. S. 30 (1890). Where a corporation has forfeited its right to buy a mining claim, a director may subsequently buy it in good faith from a person who has relocated it. *McDermott, etc. Co. v. McDermott*, 27 Mont. 143 (1902). Where the president of a mining company prospects land at the expense of the company, and receives a salary, and takes leases of the land in his own name, he may be compelled to assign them to the corporation on the corporation's paying the rent. *De Bardeleben v. Bessemer, etc. Co.*, 140 Ala. 621 (1904).

<sup>4</sup> *Jasper v. Appalachian Gas Co.*, 153 S. W. Rep. 50 (Ky. 1913).

<sup>5</sup> *Nebraska Power Co. v. Koenig*, 139 N. W. Rep. 839 (Neb. 1913).



directors to buy up at a discount the outstanding general debts of the corporation, and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for the same.<sup>1</sup>

<sup>1</sup> Quoted and approved in *Bonney v. Tilley*, 109 Cal. 346 (1895). A stockholder who is also a director cannot buy up claims against the insolvent company and offset them at their face value. *Bulkley v. Whitcomb*, 121 N. Y. 107 (1890); *Duncomb v. New York*, etc. R. R., 84 N. Y. 190, 202 (1881); *Re Imperial Land Co.*, L. R. 4 Ch. D. 566 (1877). See also *Davis v. Rock Creek*, etc. Co., 55 Cal. 359 (1880), where a mortgage given to a director to secure debts purchased by him at a discount was defeated in foreclosure. If the corporation managers buy up corporate debts with corporate funds, a corporate creditor may compel them to give up the claims so purchased. *Thomas v. Sweet*, 37 Kan. 183 (1887). Where the president purchases corporate debts at a discount he cannot enforce them at full value. *Bramblet v. Commonwealth*, etc. Co., 83 S. W. Rep. 599 (Ky. 1904). It is illegal for the president to buy a debt of the corporation at a discount. *Bramblet v. Commonwealth*, etc. Co., 84 S. W. Rep. 545 (Ky. 1905). Where the treasurer buys a claim against the corporation and secretly pays it out of the corporate funds, he is liable to the corporation for the profit he made. *The Telegraph v. Lee*, 125 Iowa, 17 (1904). While an ordinary corporate debtor may offset claims against the corporation which he has purchased, yet officers, stockholders, or persons occupying a trust relationship cannot do so. *Nix v. Ellis*, 118 Ga. 345 (1903). Directors who authorize acts by the corporation infringing on a patent cannot afterwards buy the patent and enforce the right to damages. *New York*, etc. Co. *v. Buffalo*, etc. Co., 24 Fed. Rep. 604 (1885). A corporate creditor cannot complain that a director has purchased property needed by the corporation. *Cornell v. Clark*,

104 N. Y. 451 (1887). Where the notes of a corporation are offered to it at less than par and the directors manage so that the majority stockholders purchase them at less than par, the notes can be enforced only for the amount so paid by the majority stockholders. *Young v. Columbia*, etc. Co., 53 Oreg. 438 (1909). And where by connivance with the other directors, a director purchases mortgage notes of the company at a discount, and no provision is made for them, the company is entitled to the benefit of the discount. *Young v. Columbia*, etc. Co., 53 Oreg. 438 (1909). Majority stockholders may purchase stock in another corporation which their company needs, but has no money with which to purchase. The majority stockholders may sell such stock to the corporation after two months' time and keep the profit, there being no actual fraud. *Baker v. Seattle*, etc. Co., 61 Wash. 578 (1911). Where an insurance company absorbs another company *ultra vires* and gives notes therefor, and the president acquires and collects the notes, he may be compelled to refund. *McClure v. Levy*, 147 N. Y. 215 (1895). Where a company has assigned, and its directors have bought claims at a discount, a suit to compel them to turn in the claims at cost should be instituted by the assignee. *Moulton v. Connell*, etc. Co., 93 Tenn. 377 (1894). Payment of corporate notes by a director may entitle him to preference in the distribution of the assets. *Atkinson's Appeal*, 11 Atl. Rep. 239 (Pa. 1887). English debentures may be issued to directors at a discount. *Campbell's Case*, L. R. 4 Ch. D. 470 (1876). Where a corporation is without funds, its president may purchase for himself its overdue bond, and may agree with the corporation that the rate of interest of the bond shall be



But a director may buy corporate bonds from third parties at a discount and enforce them at par, where there are no special equities against such a purchase, and no present duty in regard to them from him as a director.<sup>1</sup> Moreover, the corporation must claim the benefit at once, if at all.<sup>2</sup>

increased. There was no proof that he purchased at a discount. *Bradly v. Marine, etc. Co.*, 3 Hughes, 26 (1879); s. c., 3 Fed. Cas. 1172; aff'd, 105 U. S. 175. As to the rule that where a director or officer of an insolvent corporation obtains a preference in the payment of his debt it is illegal, see § 692, *infra*. Officers occupy a quasi-fiduciary relation to the corporation and cannot profit by purchasing claims against it. *Hill v. Frazier*, 22 Pa. St. 320 (1853). Also *Lingle v. National Ins. Co.*, 45 Mo. 109 (1869); *Holland v. Heyman*, 60 Ga. 174 (1878), holding that the purchased claims are good only for the amount paid.

Where a corporation is a going concern, although embarrassed for ready money, it is legal for the president to purchase its outstanding notes at a discount, and the corporation cannot maintain a bill in equity to pay such notes at such discount. *Glenwood, etc. Co. v. Syme*, 109 Wis. 355 (1901).

*Perry on Trusts* (3d ed.), § 428, lays down the rule as follows: "A trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase. But if a trustee buys up an outstanding debt for the benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves. Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust*. The better opinion, how-

ever, is that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity. So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits for the sale himself."

Where a director is one of the committee appointed by the board of directors to settle claims against the corporation, and he buys some of the claims, he must turn them in at the price he paid, and even though the stockholders and directors intended to allow him the profit, yet this does not estop the corporation from objecting. *Kroegher v. Calivada, etc. Co.*, 119 Fed. Rep. 641 (1902). Directors who have obtained a judgment against the corporation on claims against it, which they have purchased, may purchase corporate property sold on execution to satisfy such judgment, the purchase being in good faith to protect their interest, and it appearing that the plaintiff refused to contribute his share towards redeeming from the sale. *Snediker v. Ayers*, 146 Cal. 407 (1905). After a corporation has ceased business a director may purchase its obligations and enforce them. *Stanton v. Gilpin*, 38 Wash. 191 (1905). A director may buy a claim against the corporation if other creditors are not injured. *McIntyre v. Ajax, etc. Co.*, 28 Utah, 162 (1904).

<sup>1</sup> Quoted and approved in *Cunningham v. Klamath, etc. R. R.*, 54 Oreg. 13 (1909).

<sup>2</sup> *Seymour v. Spring Forest Cem.*



An attachment and execution sale of railroad bonds on a judgment obtained by a director was disregarded and declared void, where the director himself purchased at the sale, and the whole transaction was tainted with a fraudulent control exercised by the director over the company.<sup>1</sup>

§ 661. *Loans by directors to the corporation; mortgages by the corporation to the directors, and the right of an insolvent corporation to give a mortgage or assignment of its property to a director*

Assoc., 144 N. Y. 333 (1895); s. c., 157 N. Y. 697. See also § 655, *supra*. A director of a corporation may purchase its mortgage bonds at their market value, and enforce them at their full value. *Camden, etc. Co. v. Citizens', etc. Co.*, 69 N. J. Eq. 718 (1905). In *Higgins v. Lansingh*, 154 Ill. 301 (1895), the court said that if a director acts fairly and for the interest of the corporation, he may buy up at a discount a debt of the corporation and enforce such debt at its full face value, provided the corporation was given an opportunity itself to become the purchaser and could not or would not purchase. The court held, however, in the case before it that the purchase on the part of the director was fraudulent, and that the director could collect only the amount he paid. The fact that a director buys up the securities of an insolvent corporation for the purpose of using them in reorganization is not fraudulent or a breach of his duty, he having paid all that the securities were worth. *Powell v. Willamette Valley R. R.*, 15 Oreg. 393 (1887). In *Inglehart v. Thousand Island Hotel Co.*, 109 N. Y. 454 (1888), 32 Hun, 377, the assignee of a judgment from a director who purchased it at a discount was allowed to enforce it for the full amount. After the corporation has assigned for the benefit of creditors, and all its property has been sold, a director may buy up claims against it, and participate in the distribution of assets. *Hammond's Appeal*, 123 Pa. St. 503 (1889); *Craig's Appeal*, 92 Pa. St. 396 (1880). The case *St. Louis, etc. R. R. v. Chenault*, 36 Kan. 51 (1886), holds that a corporate treas-

urer may buy up outstanding notes against the corporation, and may then pay such notes out of the corporate funds in his possession. Where the directors issued bonds as collateral to the company's note, and, upon the sale of the bonds by the pledgee for non-payment of the note, purchased the bonds at five cents on the dollar, a foreclosure based chiefly on such bonds will be set aside. *James v. Railroad Co.*, 6 Wall. 752 (1867). The complicated principles of law growing out of directors owning corporate debts are considered in §§ 692, 693, *infra*. As to the issue by the corporation of its bonds to directors at less than par, see § 766, *infra*.

<sup>1</sup> *Richardson v. Green*, 133 U. S. 30 (1890). Where the president pledges \$100,000 of the company's bonds for a corporate debt of \$21,500 and then allows them to be sold for non-payment, and the nominal purchaser purchases secretly for a director, secretary and attorney of the company and for a former president of the company and the company becomes bankrupt, they will be allowed only the amount they paid with interest. *Canton, etc. Co. v. Rolling Mill Co.*, 168 Fed. Rep. 465 (1909). Where the president of a coal company contracts in his own name to supply coal to parties, and the board of directors, a majority of whom are his relatives, contract to furnish the company's coal to him on a royalty, a stockholder may compel him to turn into the corporation the profits of his contract. An assignee of his interest who took with notice is not protected. *Davis v. Gemmell*, 70 Md. 356 (1889). See *Davis v. Gemmell*, 73 Md. 530.



*in order to prefer the payment of his debt.* — These questions are considered elsewhere.<sup>1</sup>

§ 662. *Frauds by a majority of the stockholders on the minority — Directors owning stock in another corporation with which a contract is made — Stockholders' ratification of the voidable acts of directors — One corporation voting stock in another competing corporation — Majority managing or selling in fraud of the minority.* — It often happens that a consolidation, lease, sale, or contract between two corporations is made where, first, the directors of one of the corporations are largely interested in the stock of the other; or, second, one corporation owns a majority of the stock of the other; or, third, the same person or persons own a majority of the stock of both corporations. There then is likely to arise a conflict between interest and duty. Such contracts as these are investigated very closely by the courts. They are not necessarily void, and are not constructively fraudulent. But if there is actual fraud, or if there has been an undue advantage taken or an unconscionable bargain made, the court will set it aside. If the transaction is fair the court will sustain it; if it is unfair the court will undo it.<sup>2</sup>

First, where the directors of one corporation are stockholders in another corporation, and a lease, sale, consolidation, or contract is made between the two. Such transactions are of constant occurrence. They are not fraudulent in law unless they are unfair. The court has power to set them aside, however, at the instance of a dissenting stockholder, if in the conflict between interest and duty interest has prevailed.<sup>3</sup>

<sup>1</sup> See §§ 692, 693, *infra*.

<sup>2</sup> Quoted and approved in *Mack v. Engel*, 165 Mich. 540 (1911), and *Hill v. Gould*, 129 Mo. 106 (1895), where a sale of coal was upheld, although at about cost, and a majority of the directors were elected by and represented the railroad company that bought the coal.

<sup>3</sup> Where two corporations have a director in common, who largely controls both, and one proposes to buy out the other in exchange for stock of the former the minority stockholders of the latter may enjoin the transaction until it is proved to the satisfaction of the court that the proposed sale is fair and free from fraud. *Geddes v. Anaconda, etc. Co.*, 197 Fed. Rep. 860 (1912). Where a majority of the directors of an irrigation com-

pany are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. *Goodell v. Verdugo, etc. Co.*, 138 Cal. 308 (1903), the court saying: "The publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid."

Where the officers and owners of a majority of the stock of a company vote as stockholders and officers to



Nevertheless a court of equity will not, at the instance of minority stockholders in a corporation, enjoin that corporation from taking a

lease its property to another corporation, all of whose stock they own, the minority stockholders in the first corporation may cause it to be set aside. *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48 (1883). See also *Brewer v. Boston Theater*, 104 Mass. 378 (1870); *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894).

A lease made by a majority of the board of directors, of which majority one is interested in another corporation taking the lease, and his vote being necessary to authorize the lease, is voidable at the instance of a stockholder of the lessor. *Parsons v. Tacoma, etc. Co.*, 25 Wash. 492 (1901). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of the stock. *Geer v. Amalgamated, etc. Co.*, 61 N. J. Eq. 364 (1901). Where the business of a corporation requires the construction of a railroad and steamship line and the company has no power to construct them, and consequently the officers with others take out a separate charter and own the stock of the new company and construct the line, and then propose to consolidate the companies on a plan which will give to the new stock an interest in the consolidated company which will represent a large profit, a stockholder of the old company may enjoin the consolidation upon proving that the new franchises were necessary to the old company and were intended for the benefit of the old company, the same officers being in control of the two companies. *Miller v. Consolidated, etc. Co.*, 110 Fed. Rep. 480

(1901). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. *Farmers', etc. Co. v. Penn. etc. Co.*, 103 Fed. Rep. 132, 157 (1900); *aff'd*, 186 U. S. 434. A lease will not be set aside even though a majority of the directors of the lessor are interested in the lessee, and even though after the lease was made they became stockholders and directors of the lessee, it being shown that the lessor had a floating and bonded debt and no funds, and had never paid a dividend, and that as a result of the lease the stock advanced fifty per cent. in value, and the complaint is not made until eighteen months after the lease was made. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902); *aff'd*, 119 id. 871. The fact that directors loaned money to the corporation on its purchase of property from another corporation in which they are interested does not postpone their claims to the claims of other creditors. *In re Estate, etc.*, 202 Pa. St. 589 (1902). Even though the general manager is a stockholder in another company which is selling articles to his company, yet where the board of directors of his company knew the facts and monthly statements were made, and no actual fraud is shown, the sales cannot be set aside after they have been completed. *Aldine Mfg. Co. v. Phillips*, 129 Mich. 240 (1902). Where a director dominates the board and induces the board to purchase worthless securities of other companies in which he is interested, and he thereby makes a large individual



lease of another railroad, even though the same persons are the officers and majority stockholders in both companies, unless actual unfairness

profit, he may be compelled by a receiver of the corporation to account for his profits, and it is immaterial whether he did or did not vote therefor as a director. *Pepper v. Addicks*, 153 Fed. Rep. 383 (1907). Where the directors who own a majority of the stock of a grocers' and bakers' corporation discontinue the business in consequence of a fire destroying the plant, and permit their sons to organize a separate corporation which takes the trademarks and good-will of the old corporation, such directors may at the instance of a minority stockholder be held liable in damages for the value thereof. *Godley v. Crandall, etc. Co.*, 153 N. Y. App. Div. 697 (1912). Where the directors owning a majority of the stock increase their salaries, the burden is on them to show that the increase is reasonable; otherwise a minority stockholder may compel them to repay it. *Godley v. Crandall, etc. Co.*, 153 N. Y. App. Div. 697 (1912). Where the chairman of the executive committee who owns but little stock takes part in having the company make a contract with another corporation in which he is the largest single stockholder to furnish power for practically nothing, the court will cancel the contract. *Globe Woolen Co. v. Utica Gas, etc. Co.*, 151 N. Y. App. Div. 184 (1912). Where the officers and directors of a lessee railroad are largely interested in the stock of the lessor and would be personally benefited by the lease being broken, and are really acting in the interest of the lessor, and settle accounts between the two companies without the ratification of the stockholders of the lessee, the lessee is not bound by such settlement. Ratification by the stockholders of such a settlement must be with knowledge and acquiescence or retention of benefits. *Brooklyn Heights R.R. v. Brooklyn City R.R.*, 151 N. Y. App. Div. 465 (1912). Where the president of one company is general manager of another, and the former defrauds the latter through him, the latter may have an accounting. *Can-*

*delaria Min. Co. v. Juarez Co.*, 157 Fed. Rep. 315 (1907). Where the by-laws expressly provide that a director shall not be liable for the profits received by him as a stockholder in another corporation by reason of a contract between the two corporations, he cannot be held liable. *Costa Rica Ry. v. Forwood*, [1900] 1 Ch. 756; *aff'd*, [1901] 1 Ch. 746.

Where the directors let a contract, and then the contractor assigns his rights to a corporation the majority of whose stock is owned by the directors, the court will not aid the contractor as a stockholder in the second corporation. *Wardell v. Union Pac. R.R.*, 103 U. S. 651 (1880). See § 649, *supra*. Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on a suit by the stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. *Hitchcock v. Barrett*, 50 Fed. Rep. 653 (1892). Although a lessee railroad company has directors, a minority of whom are largely interested in the stock and bonds of the lessor railroad, and such bonds and stock are largely "water," yet this does not necessarily vitiate the lease. The court will not set the lease aside if no undue advantage was taken and no actual fraud involved. *Jesup v. Ill. Cent. R.R.*, 43 Fed. Rep. 483 (1890). Where a gas company is under contract to furnish gas to several concerns, and its business is so managed as to favor a concern in which the officers are interested, there being an insufficient supply of gas, a minority stockholder may complain. *Clark v. Pittsburgh, etc. Co.*, 184 Pa. St. 188 (1898). Although certain persons, being directors and



and injustice are proven. Moreover, the court cannot prescribe the terms of a lease. It can merely enjoin or set aside a fraudulent or *ultra vires* one.<sup>1</sup> Again, where one corporation buys out another, a stock-

owners and in control of a railroad company, cause it to make a construction contract with a company which they also control, yet, if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below par and was fraudulently and illegally issued. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. *Wilbur v. Stoepel*, 82 Mich. 344 (1890). It is illegal for directors to be stockholders in a construction company to which a construction contract is let. *Gilman, etc. R. R. v. Kelly*, 77 Ill. 426 (1875). As to directors' secret profits, see §§ 650, 320, *supra*.

In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. *Holst v. Sydney, etc. Ry.*, 69 L. T. Rep. 132 (1893). A contract of a corporation that a patentee shall have forty-eight per cent. of an increase of stock does

not apply to the capital stock of a consolidated company, although the former corporation is one of those entering into the consolidation. *Einstein v. Rochester, etc. Co.*, 146 N. Y. 46 (1895).

Sometimes an underwriting syndicate is brought into the deal. The following decision may then be applicable: Where unissued shares of the par value of £1 each are worth about £4 each and a portion thereof are offered to the stockholders at £2 10s. each and an option on the balance is given to underwriters at the same price in consideration of the underwriters agreeing to take such of the stock as is offered to the stockholders and is not taken by the latter, a minority stockholder may enjoin the carrying out of such option to the underwriters, it being in violation of the English statute prohibiting the payment of a commission for underwriting subscriptions. *Burrows v. Matabele, etc. Co.*, [1901] 2 Ch. 23. The fact that one of the trustees of a voting trust is an officer in a certain railroad does not render illegal the voting of the stock in favor of consolidating with that railroad, there being no proof of wrong-doing or unfair terms. *Dady v. Georgia, etc. Ry.*, 112 Fed. Rep. 838 (1900). The fact that a minority of the directors own stock in a corporation, which latter owns stock in a corporation with which the first corporation is about to contract, does not invalidate such con-

<sup>1</sup> *Shaw v. Davis*, 78 Md. 308 (1894). The court held that no actual fraud was proven in this case. A stockholder may have a preliminary injunction against a sale of all the property to a new corporation for cash and the right to subscribe for stock in the new company, the new company being controlled by the directors of the old company. *Mitchell v. United, etc. Co.*, 72 N. J. Eq. 580 (1907). Even though certain

stockholders control both corporations which are dealing with each other, the courts will not interfere unless there has been fraud. *Smith v. Stone*, 128 Pac. Rep. 612 (Wyo. 1912). Under the English statute a reorganization is legal if there is no bad faith or fraud, even though the entire property is sold on a cash basis to a new corporation controlled by a majority. *Castello v. London, etc. Co. Ltd.*, 107 L. T. Rep. 575 (1912). See 142 N. W. Rep. 434.



holder of the former cannot complain, even though a large amount of watered stock was issued in payment, and even though the directors of the purchasing company were personally interested in the selling company and had made large profits in the construction of the work, it appearing that the purchasing company had no property at all at the time of the purchase. In such a case no damage is done to the stockholder, and hence suit by him does not lie.<sup>1</sup> But where a lease is made, and the directors of the lessee railroad company are also directors of the lessor company, and own a majority of the stock of both companies, a stockholder of the lessee company alleging that the lease is at an exorbitant rent and unlawfully depletes the funds and earnings of the lessee company, and injures him as a stockholder, and alleging also that the directors have unlawfully paid large sums to themselves on account of alleged loans, may by a bill in equity compel them to account.<sup>2</sup>

Where the officers of a lessee corporation, which has leased the property of the lessor corporation, control a majority of the stock of the latter, and conspire to compel the minority to sell their stock by refusing to pay the rent due on the lease, a court of equity, on the application of the minority, will compel a payment of the rent.<sup>3</sup> A minority stockholder in a railroad company may hold the directors personally responsible to the corporation for issuing increased capital stock in exchange for the stock of a terminal company which has little or no value,

tract. *Pierce v. Old Dominion, etc. Co.*, 67 N. J. Eq. 399 (1904). A contract between a corporation and a municipality, where one of the commissioners of the latter making the contract is a stockholder in the former, will be set aside. *Brown v. Street, etc.*, 71 N. J. L. 79 (1904). The fact that a school district trustee is a stockholder in a lumber corporation does not render illegal a purchase of lumber from such corporation by a contractor to build the schoolhouse. *Escondido, etc. Co. v. Baldwin*, 2 Cal. App. 606 (1906). A contract by which one railroad company guarantees the bonds of another railroad company in consideration of a majority of the capital stock of the latter is not necessarily illegal, although ten directors of the former are interested in the minority stock of the latter, it being shown that the transaction was a fair one and was desirable and that there was no concealment. *Teller v. Tonopah, etc. R. R.*, 155 Fed. Rep. 482 (1907).

<sup>1</sup> *Smith v. Ferries, etc. Ry.*, 51 Pac. Rep. 710 (Cal. 1897).

<sup>2</sup> *Sage v. Culver*, 147 N. Y. 241 (1895).

<sup>3</sup> *Barr v. New York, etc. R. R.*, 96 N. Y. 444 (1884). Where directors in a corporation cancel without consideration a mortgage from a corporation in which they are interested, a stockholder in the former company may hold them liable for any loss. *Brinkerhoff v. Roosevelt*, 131 Fed. Rep. 955 (1904); *aff'd*, 143 Fed. Rep. 478. Where a lessee railroad is insolvent and in the hands of a receiver, and the rent is not paid, and it controls the board of directors of the lessor railroad, a stockholder of the latter may have a receiver appointed of such of the lessor's property as is not already in the hands of a receiver, and such second receiver may be authorized to sue for the rent due, and the court may also authorize him to issue receiver's certificates to pay the expense of prosecuting such suit. *Town of Vandalia v. St. Louis, etc. R. R.*, 209 Ill. 73 (1904).



it being shown that the terminal company was to transfer the stock without consideration to a syndicate in which the directors were personally interested.<sup>1</sup> The question, however, as to the liability of a director who is interested as a stockholder in a contracting construction company is considered elsewhere.<sup>2</sup>

A much more difficult question arises as to whether the stockholders in meeting assembled may ratify and legalize, notwithstanding the protest of the minority, dealings where the majority have interests different from those of the minority. Here again the courts refuse to lay down any hard and fast rules. Such a ratification is futile if there is unfairness in the transaction, amounting to actual fraud; otherwise the courts will not interfere. Thus a lease to a director is not necessarily illegal, even though a stockholder objects thereto, where a majority of the stockholders have ratified the lease.<sup>3</sup> Where a corporation sells all its property to its president at a price less than a minority stockholder is willing to pay, he may have the sale set aside, even though a majority in interest of the stockholders have approved it, the decree being that the sale shall be void only in case such higher price is paid.<sup>4</sup> It is in fact the proper rule that all such transactions should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair and if he is prompt in his application to the court.<sup>5</sup>

Where a director has sold his property to the corporation, or has committed some other act which is voidable and not void, and where a majority of the stock can ratify and validate that act, it being not actually fraudulent, but merely voidable at the option of the stockholders, the important question arises whether, in taking the vote of the stockholders on such a question, the stock held by the director himself is to be counted. The well-settled rule is that his stock is to be counted even though the vote would have failed if his stock had not been voted.<sup>6</sup> It is to be borne in mind, however, that the majority can-

<sup>1</sup> Pollitz v. Wabash R. R., 207 N. Y. 113 (1913).

<sup>2</sup> See § 649, *supra*.

<sup>3</sup> The court refused, at the instance of a dissenting stockholder, to set aside such a lease, in the case *Nye v. Storer*, 168 Mass. 53 (1897). See also § 649, *supra*.

<sup>4</sup> *Wheeler v. Abilene, etc. Co.*, 159 Fed. Rep. 391 (1908).

<sup>5</sup> See note 1, p. 2120, *infra*.

<sup>6</sup> A director may sell property to the corporation where the purchase is

adopted at a meeting of the stockholders. Such director may vote in favor of such purchase all the stock that he owns; but if the result is "so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of



not bind the minority by ratifying a contract which is actually fraudulent

the rights of such minority," then a court of equity will set the act aside. *Gamble v. Queen's, etc. Co.*, 123 N. Y. 91 (1890). The court said: "In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders." Two directors and officers may at a stockholders' meeting vote their stock in favor of confirming a resolution of the board of directors increasing the salary of the former and a minority stockholder cannot complain, the transaction in itself being a fair one. *Russell v. Patterson Co.*, 232 Pa. St. 113 (1911). Where one railroad purchases the entire capital stock of another railroad upon credit, the stock being deposited with a trustee to secure payment of the purchase price, such stock may be voted by the purchaser in ratification of a traffic contract whereby the selling railroad and the purchasing railroad guarantee to a third railroad, in which the purchasing railroad is interested, traffic enough to pay the interest on the bonds and dividends of the stock of the third railroad. Such ratification is legal, even though a minority of the selling stockholders object. *Kissel v. Chicago, etc. Co.*, 126 N. Y. App. Div. 852 (1908). Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 807 (1903). The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied the right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the

company." The court further said: "In *Leavenworth v. Chicago Railway Co.*, 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case *Nye v. Storer*, 168 Mass. 53, and *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." A purchase of a steamboat from one who is a director and owns a majority of the stock is valid where ratified by a majority vote at a stockholders' meeting. The director may vote his stock. *Northwest Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589 (1887). It was said, in effect, that in such case the ratification must not be brought about by unfair or improper means, nor be illegal or fraudulent or oppressive toward those shareholders who oppose it. A rule excluding stockholders from the right to vote, merely because they might be personally interested to vote in a particular way, contrary to the interests of the other stockholders, would be likely to lead to great confusion. *Beatty v. Northwest Transp. Co.*, 5 Can. L. T. 277 (1885) (rev'g s. c., 4 Can. L. T. 85), holding that a purchase by the directors of a vessel from one of the directors could not be set aside by a dissenting stockholder where a majority of the stock had ratified the purchase, even though the director himself held and voted that majority. A stockholder may vote on a question in which he has a personal interest other than his interest as a stockholder. *Middleton v. Arastraville, etc. Co.*, 146 Cal. 219 (1905). Even if stock has been issued for services, it may be voted on a question as to whether it is legally issued. *Blinn v. Riggs*, 110 Ill. App. 37 (1903). Where the board of directors have purchased at an excessive price real estate in which the dominating directors are personally interested, the latter may be held liable at the instance of a stockholder. Ratification of the trans-



lent or so unfair as in a conflict of interest to amount to fraud.<sup>1</sup> More-

action at a stockholders' meeting, which the dominating directors control, does not validate the transaction. *Klein v. Independent, etc. Assoc.*, 231 Ill. 594 (1907). Stock owned by a party interested may be voted. *Independent Brewing Assoc. v. Klein*, 135 Ill. App. 234, 246 (1907).

A stockholder may vote to ratify a purchase of property from a corporation by the directors, although such stockholder is a director himself. The court said: "The fact that he may have a personal interest separate from the others or from that of the corporation in the matter to be voted upon does not affect his right to vote. It is not to be understood that the majority stockholders may use their power of voting for the purpose of defrauding the minority." *Bjornsgaard v. Goodhue County Bank*, 49 Minn. 483 (1892); *Foss v. Harbottle*, 2 Hare, 461 (1843), where the directors sold their property to the corporation. Inasmuch as the majority of stockholders could ratify the purchase, the court refused to entertain a stockholder's suit until they had voted. Where a person fraudulently misrepresented a mine in its sale to the company for shares of stock, a suit by the company against him does not lie where a majority of the stock

voted against the suit, although the shares obtained by the vendee were voted by him and were necessary to make the majority, and although he was a director of the company at the time. *East, etc. Co. v. Merryweather*, 2 Hem. & M. 254 (1854). This case goes much further than the modern rule would uphold. See *Mason v. Harris*, L. R. 11 Ch. D. 97 (1879), holding explicitly that where a director is guilty of fraud as a promoter, a dissenting stockholder may bring him to an accounting, although the director controls the directorate and a majority of the shares of stock. Also *Atwood v. Merryweather*, L. R. 5 Eq. 464, note (1867), where a dissenting stockholder sued to set aside a sale of property to the company by the defendant, who divided the profits with one of the directors. Although a majority of the stockholders had voted not to bring the action, yet this majority was made up by counting the stock of the guilty parties, and hence was not binding. In a stockholder's vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. *Graves v. Mono Lake, etc. Co.*, 81 Cal. 303 (1889). A creditor who is also a stock-

<sup>1</sup> See § 649, *supra*. Unreasonable salaries voted by a majority of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased. *Jacobson v. Brooklyn, etc. Co.*, 184 N. Y. 152 (1906). Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock. *Booth v. Land, etc. Co.*, 68 N. J. Eq. 536 (1905). A

majority of the stockholders in interest cannot ratify the officers unlawfully taking for their own use its moneys in excess of their salaries or the value of their services. *Von Arnim v. American Tube Works*, 188 Mass. 515 (1905). The president and general manager of an insurance company who controls it by proxies and who has a contract giving him a percentage of the insurance premiums for twenty-five years and who four years before its expiration becomes incapacitated and sells the contract to another party, and causes the corporation to ratify it, may be compelled to pay over such price to the company. *Moulton v. Field*, 179 Fed. Rep. 673 (1910). Cf. § 730, *infra*, in general.



over, the majority cannot legalize an act prohibited by law or contrary to public policy.<sup>1</sup> Hence, in a stockholder's suit to hold directors to account for stock practically given away, it is no defense that a majority of the stockholders had ratified the fraudulent transaction.<sup>2</sup>

holder may vote his stock in favor of a mortgage to himself. *Rittenhouse v. Winch*, 11 N. Y. Supp. 122 (1890). Even though in financing an insolvent railroad company the directors receive stock as a bonus, yet if the transaction was fair and in good faith and in aid of the company, a majority of the stockholders may ratify it. *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1913). Where a mortgage deed of trust securing debentures authorizes a majority in interest of the debenture holders to bind all by an agreement to accept other securities in lieu of the debentures, a court of equity will not interfere unless there is unfairness or oppression, and the fact that some of the debenture holders are personally interested in making such change does not constitute unfairness justifying interference by the court. *Goodfellow v. Nelson Line, Ltd.*, 107 L. T. Rep. 344 (1912). See also *Northern, etc. Co. Ltd. v. Farnham, etc. Ltd.*, [1912] 2 Ch. 125. Works built by a director in opposition to the corporation may be purchased by the latter and new stock issued therefor. Such a transaction is certainly legal where a majority of the minority stockholders, not including the parties interested, vote in favor of it. *Barr v. Pittsburgh, etc. Co.*, 51 Fed. Rep. 33 (1892). In *Cumberland Coal Co. v. Sherman*, 30 Barb. 553 (1859), the court held that a unanimous vote of the stockholders was necessary to confirm. A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." *Farmers' L. & T. Co. v. San Diego, etc. Co.*, 45 Fed. Rep. 518 (1891), holding also that the directors holding a majority of stock cannot by its vote ratify a preference to them by the corporation, which is insolvent. A stockholder may vote on the propriety of a sale to the corporation in which he is interested as vendor. *Worth, etc.*

*Co. v. Bingham*, 116 Fed. Rep. 785 (1902).

<sup>1</sup> The power of the majority of the stockholders "to ratify and confirm the acts of boards of directors is confined to acts voidable by reason of irregularities in the make up of the board or otherwise or by reason of the directors or some of them being personally interested in the subject matter of the contract or act, or for some other similar reason which makes the action of the directors voidable. No such authority exists in case of an act of the board of directors which is prohibited by law or which is against public policy." *Continental Securities Co. v. Belmont*, 206 N. Y. 7 (1912).

<sup>2</sup> *Continental Securities Co. v. Belmont*, 206 N. Y. 7 (1912). Although the president makes a contract with the corporation by which he gets certain of the assets, yet if the stockholders ratify the contract on condition that all the other stockholders be offered a similar amount of assets, the corporation cannot subsequently repudiate the transaction. *Goss & Co. v. Goss*, 147 N. Y. App. Div. 698 (1911). A dissenting stockholder in a going corporation may enjoin it from selling its stock to another corporation in exchange for the stock of the latter, which stock is then to be offered to the subscribers of the former for subscription. This is practically increasing the stock and forcing the stockholders to subscribe or lose their present interest in the corporation; in other words, putting upon them a forced assessment under penalty of total loss. Such a transaction is not legal, even though ratified by a majority of the stockholders, inasmuch as they cannot ratify an illegal act. *Schwab v. Potter Co.*, 129 N. Y. App. Div. 36 (1908); *aff'd*, 194 N. Y. 409. See also § 884, *infra*. "The direct or indirect misappropriation of assets of the corporation to his own use or benefit by an officer is incapable of



Second, a similar situation arises where one corporation owns a majority of the stock of another, and hence controls it, and brings about a lease, consolidation, sale, or contract between the two.<sup>1</sup> This is very much the same as where a corporation sells property to one of its directors,<sup>2</sup> or buys property from him.<sup>3</sup> The courts will scrutinize the transaction very closely and will set it aside, at the instance of a stockholder, if it is unreasonable, unfair, and practically fraudulent.<sup>4</sup> The

being authorized or ratified by a vote or any act or omission of the majority of the stockholders." *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1913).

<sup>1</sup> This is practically a private sale of the corporate property to one of the stockholders and may be objected to. See *Mason v. Pewabic Min. Co.*, 133 U. S. 50 (1890). See also § 671, *infra*.

<sup>2</sup> See § 653, *supra*.

<sup>3</sup> See § 652, *supra*.

<sup>4</sup> A minority stockholder in a railroad company may enjoin a sale of its property to another railroad corporation which owns a majority of the stock of the former, the price of his stock being fixed in the deal and it being shown that there were certain accounts between the companies which were being litigated and which might materially increase the value of his stock. The court, however, did not enjoin the second company from voting its stock in the former company and thus controlling the board of directors, no fraud being shown. *South, etc. R. Co. v. Gray*, 160 Ala. 497 (1909). Where one railroad owns a majority of the stock and controls the board of directors of another railroad, and causes the latter to lease its road to the former, a stockholder of the former may file a bill in equity to set aside such lease on the ground that its terms were so inequitable as to constitute fraud. In such case no demand need be made to the board of directors to bring suit, if the facts alleged in the bill show that the board of directors is controlled by the guilty party. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). Where one mining company owns the majority of the stock of another mining company and elects the directors of the latter, and causes its

property to be sold out to the former on its own terms, the minority stockholders of the latter may cause the sale to be set aside, even though no actual fraud is shown. *Glengary, etc. Co. v. Boehmer*, 28 Colo. 1 (1900). This would seem to be the logical rule under the decision of the supreme court of the United States in *Mason v. Pewabic Min. Co.*, 133 U. S. 50 (1889), which held that a majority of the stockholders could not sell out all the property of the company to themselves at a fixed price at a private sale, even though the minority stockholders were given an opportunity to participate in such sale the same as the majority stockholders. See on this subject § 671, *infra*.

Where one corporation has taken a lease of the property of another and guarantees dividends on the stock of the latter, and then acquires a majority of the stock of the latter and proposes to rescind such an agreement, a minority stockholder may enjoin such action. *McLeary v. Erie, etc. Co.*, 38 N. Y. Misc. Rep. 3 (1902). Even though one railroad company owns the majority of the stock of another railroad company and purchases the property of the latter at a foreclosure sale thereof, yet, if there was no actual fraud, the minority stockholders of the insolvent company cannot complain, especially where they waited seventeen months and allowed large expenditures to be made in reliance on the sale. *Rothchild v. Memphis, etc. R. R.*, 113 Fed. Rep. 476 (1902). Where an insolvent savings bank is really controlled by a national bank, although they have not the same directors, yet the former cannot prefer the latter. It is an illegal preference in behalf of the directors. *Slack v. Northwestern, etc. Bank*, 103



New York court of appeals has well said that where "a majority of the stock is owned by a corporation or a combination of individuals, and

Wis. 57 (1899). In a stockholders' suit to set aside a consolidation on the ground that it was *ultra vires* and also fraudulent in that one company controlled the other, a *preliminary* injunction will not be granted if the consolidation has already been completed. *Stevens v. Missouri, etc. Ry.*, 106 Fed. Rep. 771 (1901). As to one corporation voting stock in another corporation, see § 615, *supra*.

Where one street railway owns all the stock of another street railway (excepting five shares, the owner of which does not object), and the former makes a contract authorizing a third street railway to run its cars over the tracks of the company whose stock is so owned, such contract is legal and will be enforced. *South, etc. Ry. v. Second Ave. etc. Ry.*, 191 Pa. St. 492 (1899). The provision in a lease that any differences arising shall be decided by arbitration cannot be avoided by a minority stockholder, even though the lessee owns a majority of the stock of the lessor and controls its board. *Wolf v. Pennsylvania R. R.*, 195 Pa. St. 91 (1900). A cotton mill manufacturing company which once was prosperous but by reason of competition is making no profit may be leased to a company that has combined two or three other similar concerns, and even though a majority of the stock of the lessor is owned by the lessee itself as a holding company, yet if the lease is ratified at a meeting of the stockholders, the court will uphold the lease, it being a fair transaction in itself, although the holding company as the owner of the majority of the stock of the lessor was interested on both sides. *Dominion Cotton Mills Co. v. Amyot, etc.*, [1912] A. C. 546 (Privy Council, 1912), *rev'g* the Quebec court. In the case *Forrest v. Nebraska, etc. Co.*, 137 N. W. Rep. 839 (Neb. 1912), the court sustained a transfer by the corporation of a part of its assets to a director in exchange for his stock in the company, the board of directors and a majority of the stockholders in meeting assembled having

approved the transaction and the exchange being a fair one. The court held that a minority stockholder could not complain. Even though bondholders agree that the lessee of a railroad need not pay the interest on the bonds unless the earnings are sufficient for that purpose, yet if the lessee owns a majority of the stock of the lessor and diverts the earnings of the lessor and pays no interest, the bondholders may compel an accounting. *Hubbard v. Galveston, etc. Ry.*, 200 Fed. Rep. 504 (1912). Where a holding company increases the capital stock of one of its subsidiary companies and then causes it to purchase the common stock of the holding company, thereby creating a conflict of interest between the preferred stockholders of the holding company and the subsidiary company, which by the plan would control the holding company itself, minority stockholders may enjoin such a reorganization, it being a part of the plan that the holding company shall sell its various stocks to such subsidiary company. *Robinson v. Holbrook*, 148 Fed. Rep. 107 (1906). Even though a corporation is in debt to its directors, yet if its income is sufficient to pay the interest, the directors cannot legally sell their holdings of stock to a competing concern, together with such debt, whereby the competing concern obtains a majority of the stock, even though the minority are offered the same price, such action being followed practically by the new corporation taking a lease of the assets of the old corporation, and doing all the business. The minority stockholders may hold the directors personally liable, and may have a receiver appointed, and may have the mortgage securing the directors' debts canceled, and the business itself continued by the receiver. The former directors who resigned, as well as new directors who took their place, are proper parties defendants. *Jacobus v. Diamond, etc. Co.*, 94 N. Y. App. Div. 366 (1904). A



it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders."<sup>1</sup> Hence, one railroad controlling another cannot elim-

stockholder in a corporation entitled to certain bonds, which by reason of an act of the legislature have been canceled in exchange for stock, may attack a fraudulent agreement by which the company does not get the stock, especially where he alleges that the statute was unconstitutional. *Edwards v. Mercantile, etc. Co.*, 124 Fed. Rep. 381 (1903), involving the complicated transactions of the Bay State Gas Company.

In the case *Colgate v. United States, etc. Co.*, 73 N. J. Eq. 72 (1907), it is held that where a consolidation is to be ratified by a vote of the stockholders, it is immaterial that one of the companies owns the majority of the stock of the other, and that the two companies have directors in common, the court declaring that such consolidation being statutory, it was different from an ordinary contract, and, moreover, that any other rule would lead to the "more objectionable feature of 'dummy' directors in place of directors actually representing stockholders' interests." But see same case, 75 N. J. Eq. 229 (1909). Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation

corresponding to the earnings over and above the five per cent. Four years' delay is no bar. *Sabre v. United, etc. Co.*, 156 Fed. Rep. 79 (1907). Where a construction company owning the bonds and stocks of street railway companies sells the same to a trust company on the agreement of the latter to complete the work, and by the contract a majority of the directors of the construction company resign, and appointees of the trust company are substituted, a stockholder of the construction company cannot compel the trust company to account for the value of the stocks and bonds, unless he shows actual fraud, even though a part of the agreement was made after the appointees of the trust company had been installed in office. *Kidd v. New Hampshire, etc. Co.*, 74 N. H. 160 (1907).

Where a majority of the stock of a railroad company is held by another company, and the latter company uses its control to acquire all the property of the former company fraudulently, a minority stockholder may bring the latter company to account therefor. *Pondir v. New York, etc. R. R.*, 72 Hun, 384 (1893). In *Hunter v. Baker Motor, etc. Co.*, 190 Fed. Rep. 665 (1911), a corporate creditor claimed to have recourse to another corporation that owned a majority of the stock and had taken all the assets of the insolvent corporation.

<sup>1</sup> *Farmers' L. & T. Co. v. New York, etc. Ry.*, 150 N. Y. 410, 430 (1896), the court saying also (p. 434): "There are circumstances under which the majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors would occupy towards the stockholders it represents." This decision was followed in a stockholders'



inate the stockholders of the latter by bringing about a default in the mortgage of the latter resulting in a foreclosure sale.<sup>1</sup> A consolidation is not illegal from the fact that one of the companies owns a majority of the stock of the other and they have directors in common.<sup>2</sup> Minority stockholders in a corporation engaged in manufacturing telephone supplies, a business impressed with a public character, may cause to be set aside a sale of a majority of the stock to a competing telephone supply company where the purchase is for the purpose of establishing a monopoly. Even though the purchaser is a foreign corporation with a charter giving it express power to purchase stock, yet it cannot exercise that power in Illinois where no corporation can purchase stock unless it is necessary to carry into effect the objects of the corporation. The decree will not merely enjoin the purchaser from voting the stock and receiving dividends, but may order the stock to be returned to the vendors and the money repaid. The monopoly may be proved by proving that the purchaser owned the stock of a competing manufac-

suit in the federal court to remedy the same wrong in *De Neufville v. New York, etc. Ry.*, 81 Fed. Rep. 10 (1897). A stockholder in one railroad corporation cannot maintain a suit at law against another railroad corporation for damages to his shares of stock on account of the latter railroad corporation owning a majority of the stock of the former, and so managing the former as to cause a mortgage to be foreclosed resulting in a purchase of the property by the latter railroad corporation. *Niles v. N. Y. etc. R. R.*, 35 N. Y. Misc. Rep. 69 (1901), *aff'd* 69 N. Y. App. Div. 144, and 176 N. Y. 119, involving the same transaction as the preceding two cases. Even though one electric light company buys a majority of the stock of a competing company and uses the plant of the latter upon the former's plant being burned, and does many acts which are for the benefit of the former company, yet unless actual damage is shown the minority stockholders cannot complain. *Cannon v. Brush, etc. Co.*, 96 Md. 446 (1903). Even though a bridge company, which has made a long-time contract with a railroad company, and which has the same officers and directors and majority stockholders as the railroad company, modifies the contract so as

to reduce the income of the bridge company, yet if for nineteen years the minority stockholders of the bridge company acquiesce therein, such modification is legal. *Pittsburg, etc. Ry. v. Dodd*, 115 Ky. 176 (1903).

<sup>1</sup> *Farmers' L. & T. Co. v. New York, etc. Ry.*, 150 N. Y. 410 (1896), the court saying (pp. 425, 426): "In determining the correctness of the rulings made by the trial court, it becomes necessary to determine incidentally whether a corporation, purchasing a majority of the stock of another competing corporation, may thus obtain control of its affairs, cause it to divert the income from its business, or to refuse business which would enable it to pay the interest for which it was in default, and then institute an action in equity to enforce its obligations for the purpose of obtaining control of its property at less than its value to the injury of the minority stockholders, and they have no remedy. Or, in other words, whether a court of equity, with those facts established, would lend its aid to such a stockholder by enforcing the mortgage and decreeing a foreclosure and sale of the mortgaged premises, at its request, in its behalf, and to accomplish such a purpose."

<sup>2</sup> *Bonner v. Terre Haute & I. R.*, 151 Fed. Rep. 985 (1907).



turing company.<sup>1</sup> But a stockholder in a telephone company cannot maintain a suit for treble damages under the anti-trust act of July 2nd, 1890, against another telephone company which obtained control of the former company and forced it into a receiver's hands, even though thereby the stockholder's stock was rendered worthless. The injury was to the corporation and the receiver of that corporation is the proper party to institute such a suit.<sup>2</sup> Where one corporation having a contract with another obtains control of the latter and then defaults on the contract and prevents the latter bringing suit, a minority stockholder of the latter may maintain such suit.<sup>3</sup>

Third, the same principles of law apply where an individual or several individuals, instead of a corporation, own the majority of the stock of another corporation and bring about a sale, lease, consolidation, contract, or foreclosure, to their own personal gain, at the expense of minority stockholders. The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders.<sup>4</sup> Hence, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter.<sup>5</sup> Where the officers of a company, which has paid from nine

<sup>1</sup> *Dunbar v. American Tel. etc. Co.*, 238 Ill. 456 (1909).

<sup>2</sup> *Ames v. American, etc. Co.*, 166 Fed. Rep. 820 (1909).

<sup>3</sup> *Just v. Idaho, etc. Co.*, 16 Idaho, 639 (1909). Where a parent company so dominates the subsidiary company that the latter will not properly enforce a claim which it has against the parent company, a minority stockholder of the subsidiary company may have a receiver appointed to institute such suit and the receiver may have an ancillary receiver appointed in another district to prosecute such claim. *Bluefields S. S. Co. v. Steele*, 192 Fed. Rep. 23 (1911).

<sup>4</sup> Quoted and approved in *Continental Ins. Co. v. New York, etc. R. R.*, 187 N. Y. 225, 238 (1907), and *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160 (1907), the former case holding that even though a lessor railroad and a lessee railroad have

directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment.

<sup>5</sup> Quoted and approved in the case *Farmers' L. & T. Co. v. New York, etc. Ry.*, 150 N. Y. 410, 430 (1896).

In the case *Flynn v. Brooklyn, etc. R. R.*, 158 N. Y. 493 (1899), the court said that a lease of one railroad to another is illegal, even though made by vote of the stockholders in accordance with the statutes, where it is shown that the same parties controlled both corporations, and the lease itself was unfair in that the lessee was a dummy corporation without responsibility, and the rental con-



to fourteen per cent., "freeze out" minority stockholders by reducing the dividends and increasing their salaries and misrepresenting the con-

sisted of a guarantee of dividends to a certain amount, and the right to purchase a certain amount of stock of the lessee for \$15 per share; but the court further held that a proper request to the board of directors to bring suit had not been made. A minority stockholder may object to a consolidation where the same parties control both companies, but only when the consolidation is so far opposed to the true interests of his company as to lead to the clear inference that the majority did not have an honest desire to secure that company's interest; and hence where every two shares earning twenty-five per cent. are exchangeable for one share in a consolidated company, which will probably earn forty-eight per cent., this is not so unconscionable as to invalidate the consolidation. *Colby v. Equitable Trust Co.*, 124 N. Y. App. Div. 262 (1908); *aff'd*, 192 N. Y. 535. Where the majority of the stockholders in one corporation are the sole stockholders in another and they consolidate the two on a basis unfair to the minority stockholders of the first corporation, a court of equity will set aside the transaction unless the complaining stockholders are paid the value of their stock. *Jones v. Missouri, etc. Co.*, 199 Fed. Rep. 64 (1912). A minority stockholder in a railroad company may prevent a sale or lease of a part interest in its right of way, whereby two companies will operate its trains on a schedule to be agreed upon, where the effect would be to render worthless the stock of the first-named company, and it is shown that the majority stockholders are the same in both companies. *Robinson v. New York, etc. R. R.*, 55 N. Y. Misc. Rep. 516 (1907); *aff'd*, 123 N. Y. App. Div. 339 (1908). Minority stockholders may maintain a bill in equity against majority stockholders for an accounting where the latter have misapplied the corporate assets. *Harvey v. Meigs*, 17 Cal. App. 353 (1911). Even though at a meeting of the stockholders of an insolvent railroad corporation the majority vote to sell the property to a company of which they are officers and stockholders, with no consideration except that the latter company shall pay the debts of the former, yet if the property was worth no more than that the minority stockholders can claim only nominal damages for the technical breach of trust. *Thoman v. Mills*, 159 Mich. 402 (1909). Where by consent of all the stockholders in a corporation doing a losing business its president is authorized to sell its property and pay the debts, and he does sell it to one of the stockholders at its full value, the other stockholders, having notice of the sale and an opportunity to purchase, one of them cannot afterwards object on the ground that the directors had not authorized the sale. *Ebelhar v. Nave*, 119 S. W. Rep. 1176 (Ky. 1909). Where the majority stockholders of an insolvent corporation turn all of its assets over to a new company for a sum sufficient to pay the debts of the old company, all the stockholders being given an opportunity to become stockholders of the new company, the minority stockholders cannot object. *Marks v. Merrill, etc. Co.*, 188 Fed. Rep. 850 (1911). In the case *Carson v. Allegany, etc. Co.*, 189 Fed. Rep. 791 (1911), it was held that although a corporation might avoid a contract on account of the fraud of its president and a majority stockholder, yet that this might not be sufficient to sustain a bill in equity by a minority stockholder for that purpose. Where the majority stockholders carry the assets out of the state, a minority stockholder may maintain a suit in behalf of himself and others to make the former account for such assets. *Kent v. Honsinger*, 167 Fed. Rep. 619 (1909). A person entitled to stock may after obtaining it commence suit to set aside a fraudulent lease of all the property by a majority of the stockholders to another corporation controlled by themselves. *Citizens', etc. Trust Co. v. Illinois Cent. R.*, 182 Fed.



dition of the company, and then after buying the minority stock increase the dividend, the minority stockholders may hold them liable by

Rep. 607 (1910). An agreement of the majority stockholders in four newspaper corporations, by which one of them is to be manager and conduct all four newspapers, each to be managed for the benefit of all, and the manager was to be allowed to purchase certain of the stock at its appraised value which was much less than its real value, is against public policy and void. *Scripps v. Sweeney*, 160 Mich. 148 (1910). A majority stockholder in a corporation may purchase property adjoining the property of the corporation and is not bound to turn it over to the corporation at cost, even though he had stated he intended to do so, the corporation having parted with nothing by reason thereof, and even though he had caused the corporation to stop operations in order that he might purchase such outside property more cheaply. *Zeckendorf v. Steinfeld*, 12 Ariz. 245 (1909). Where the notes of a corporation are offered to it at less than par and the directors manage so that the majority stockholders purchase them at less than par, the notes can be enforced only for the amount so paid by the majority stockholders. *Young v. Columbia, etc. Co.*, 53 Oreg. 438 (1909). A reduction of capital stock is not illegal, even though the plan contemplates the voluntary retirement of all the stock of some of the stockholders leaving the control in the hands of one stockholder who does not turn in any of his stock, the dissenting stockholder being given the privilege of turning in his proportion of the stock to be retired or any less proportion he might desire. *Allen v. Francisco, etc. Co.*, 193 Fed. Rep. 825 (1912). Majority stockholders may purchase stock in another corporation which their company needs, but has no money with which to purchase and the majority stockholders may sell such stock to the corporation after two months' time and keep the profit, there being no actual fraud. *Baker v. Seattle, etc. Co.*, 61 Wash. 578 (1911). Where the majority, who are in control of the corporation, cause it

to give illegal rebates to themselves and others, and another corporation then recovers judgment for a similar rebate, the minority may compel the majority to make good to the corporation the amount. *Dodd v. Pittsburg, etc. R. R.*, 127 Ky. 762 (1908).

Where a corporation sells or leases all its property to another corporation, which the majority of the stockholders of the former corporation own or control, the contract is not illegal in itself, but it will be scrutinized carefully by the court, and if unfair, will be set aside. *Mumford v. Ecuador, etc. Co.*, 111 Fed. Rep. 639 (1901). See also § 671, *infra*, as to the majority buying the property at private sale on dissolution. A lease of all the corporate property made by a majority vote of the stockholders and directors may be set aside at the instance of a dissenting stockholder, where the lessee owned a majority of the stock and controlled the board of directors of the lessor. *Parsons v. Tacoma, etc. Co.*, 25 Wash. 492 (1901). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. *Treadwell v. United, etc. Co.*, 47 N. Y. App. Div. 613 (1900). Even though a New York mining company dissolves and sells its property to a West Virginia company in order to avoid New York taxes, a share of stock and some bonds in the new company being given for each share of stock in the old company, and even though a dissenting stockholder is entitled to have a public sale of the property, yet if when the time for depositing the stock is about to expire he sells most of his stock to a business associate who makes the ex-



an action on the case for damages, even though they might have brought suit in behalf of the corporation. If the stock has no market value,

change, he cannot then insist on a public sale, especially where such sale would destroy a profitable concern, but the court will order that he be allowed to participate, notwithstanding that the time has expired, or that he be paid the value of his stock. *Treadwell v. United, etc. Co.*, 134 N. Y. App. Div. 394 (1909). See also § 629, *supra*. Where the same person controls two corporations in the same line of business, and is conducting one at the expense of the other, a minority stockholder of the latter may have relief. *Jacobus v. American, etc. Co.*, 38 N. Y. Misc. Rep. 371 (1902). In the case *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899), *aff'd* 94 N. Y. App. Div. 367, where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

The holder of seventy-five shares cannot enjoin the holder of three thousand six hundred and seventy-five shares from making a private sale of the corporate assets at a fair price, where the corporate business is unprofitable and each stockholder has an opportunity of participating in the purchase. *Phillips v. Providence, etc. Co.*, 21 R. I. 302 (1899). It has been held that where a majority stockholder buys the property at foreclosure sale and sells it to a new company for stock and bonds, a minority stockholder has a right to his proportion of the new stock subject to a lien

of the majority stockholder for claims owned by him against the old company which have not been paid by bonds of the new company, no actual fraud being involved. *Cutting v. Baltimore, etc. R. R.*, 35 N. Y. Misc. Rep. 616 (1901). The minority stockholders appealed from this decision, but the judgment was affirmed in 65 N. Y. App. Div. 514; appeal dismissed, 177 N. Y. 552.

Where a person controls a majority of the stock of a ferry and also a railroad company, and puts his "dummies" in as directors, and leases all the property of the former to the latter at an unfair price, the court will set the lease aside at the instance of a minority stockholder. *Meyer v. Staten Island Ry.*, 7 N. Y. St. Rep. 245 (1887). Where a lessor and a lessee company are controlled by the same person, and the lessor company is insolvent, and the lessee company is advancing large sums of money to pay interest on the bonds of the lessor company, with no hope of repayment; the minority stockholders of the lessee company may enjoin such payments. *Jeans v. Pittsburgh, etc. Ry.* (Com. Pl. Ohio, 1885), *stated in Moran v. Pittsburgh, etc. Ry.*, 32 Fed. Rep. 882 (1885). See *Menier v. Hooper's Tel. Works*, L. R. 9 Ch. 350 (1874); also *Peabody v. Flint*, 88 Mass. 52 (1863), where, however, laches barred the remedy; *Gorham v. Gilson*, 28 Cal. 479 (1865), where, however, the action failed because the stockholders sued to compel a conveyance to each of his proportionate part. Where the majority of the stockholders vote to make a lease of the whole corporate property to themselves, a dissenting stockholder may have the lease set aside. *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48 (1883); *Rice's Appeal*, 79 Pa. St. 168, 204 (1875). Where, however, corporate property has been sold and the proceeds retained by one stockholder, another stockholder cannot sue him for money had and received. The action must be in equity and for the benefit of the cor-



the value may be proved by estimating the good-will, as shown by the net profits, and it is for the jury to decide how many years' net profits

poration. *Hodsdon v. Copeland*, 16 Me. 314 (1839). Equity will set aside a lease which the directors make of a mine to the minority stockholders in order to take it from the control of incoming directors who were elected by the majority. *Mahoney Min. Co. v. Bennett*, 5 Sawyer, 141 (1878); s. c., 16 Fed. Cas. 497. The mere fact that a person owns a majority of the stock does not raise a legal inference that he dominates the board of directors. *Porter v. Pittsburg, etc. Co.*, 120 U. S. 649, 670 (1887). The sale of all corporate assets to the majority, where others offer a higher price, is fraudulent. *Wilson v. Central Bridge*, 9 R. I. 590 (1870); *Gregory v. Patchett*, 33 Beav. 595 (1864), where a sale of all the corporate assets to two of the stockholders on the purchase of their stock by the company was set aside as a fraud on the remaining stockholders. Where the stockholders enter into a contract by which they give a certain amount of their stock to a person who agrees to do certain work for the corporation in consideration of the stock, the remedy for a breach of contract on his part is an action for damages, unless by the contract the stock was to be returned in case of non-payment. *Gillett v. Bowen*, 23 Fed. Rep. 625 (1885). If the action is to recover back the stock, the corporation is a proper party in order to obtain a transfer. *Johnson v. Kirby*, 65 Cal. 482 (1884). See also *Cates v. Sparkman*, 73 Tex. 619 (1889); §§ 334, 350, *supra*. Where a branch corporation faithfully performs its duty as agent, the contract of agency cannot be set aside on the ground that individuals supposed to be hostile to the principal own a majority interest in a corporation which in turn owns a majority interest in the agent corporation. *Brush Electric Co. v. Brush-Swan, etc. Co.*, 49 Fed. Rep. 8 (1892). Minority stockholders cannot have an accounting on the ground that the company is managed in the interest of one stockholder, who owns a majority of the

stock; also that the corporation is insolvent, and that under different management it would be profitable, no fraud being alleged. *Wheeler v. Pullman Iron, etc. Co.*, 143 Ill. 197 (1892). A majority of the members of a corporation organized not for profit cannot vote a part of the assets to themselves. Another member may prevent it. *Ashton v. Dashaway Assoc.*, 84 Cal. 61 (1890). Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. *Grand Rapids, etc. Co. v. Cincinnati, etc. Co.*, 45 Fed. Rep. 671 (1891). Where the stockholders in a power company sell their stock and then obtain control of water rights on which the company had an option, which option has expired, the party purchasing the stock may by a suit in equity compel them to turn over such water rights. *Valentine v. Berrien, etc. Co.*, 128 Mich. 280 (1901). The largest stockholder in a corporation may, as the holder of its purchase-money, bonds, and mortgage, foreclose the same, and may join as party defendant the person to whom the corporation, subsequently to the execution of the mortgage, contracted to sell the property. *Blair v. Silver Peak Mines*, 93 Fed. Rep. 332 (1899). Where there are only five stockholders and all of them are directors, three of them cannot, either at a stockholders' or directors' meeting, vote to themselves exorbitant salaries nor the entire profits made by the company on articles manufactured under patents owned by them. In this case the court decreed that one third of the profits from articles manufactured under such patents should belong to the company. The minority stockholders in a suit to compel the declaration of a dividend may bring into the fund moneys so illegally paid out. *Crichton v. Webb Press Co.*, 113 La. 167 (1904). Where two stockholders have sold land to the company and received



shall be considered in obtaining the average. The balance sheets are also admissible.<sup>1</sup> And where the majority freeze out the minority by turning the corporate property over to another corporation, which they own, without consideration, a minority stockholder may file a bill in equity for relief and the court may set the transaction aside or may give a money judgment in favor of the minority stockholder.<sup>2</sup> A minority stockholder in a railroad company may cause to be set aside its contract with contractors who agreed to change it into an electric railway and furnish rolling stock, etc., but who obtained control of the corporation and misappropriated its bonds, and made other corporate contracts for their personal benefit.<sup>3</sup> The contractors, however, are entitled to the actual worth to the company of the additions and improvements, irrespective of what they cost, they being of permanent value to the railroad as a steam road.<sup>4</sup>

stock in payment and devise a reorganization plan and cause a third stockholder to agree to it on condition that a bank discount certain notes for him and receive the stock as collateral and renew the notes from time to time, and such latter agreement is repudiated, such outside stockholder may bring suit to set the whole transaction aside as a fraud. *Baker v. Berry Hill, etc. Co.*, 109 Va. 776 (1909). Majority stockholders are not liable for the act of the directors in discharging an employee in breach of his contract, even though they acquired some of their stock in connection with that contract. *Badere v. Goodrich*, 63 Wash. 650 (1911). Even though two persons own all the stock of a company and one of them converts its funds, yet a settlement, by which he pays a certain amount to the other stockholder, is not enforceable. *Reinecke v. Bailey*, 112 S. W. Rep. 569 (Ky. 1908). A corporation cannot defend against a debt on the ground that its creditor had owned the entire capital stock and had sold it on misrepresentations that the company was free from debt. *Erickson v. Revere, etc. Co.*, 110 Minn. 443 (1910). The agreement of a stockholder to bring about a sale of the stock and corporate assets to a third person may be enforced by such stockholder, and the third person cannot repudiate on the ground that it was a breach of trust for a stockholder to make such a contract. Only the corporation could raise such

objection. *Briggs v. Chamberlain*, 47 Colo. 382 (1910). Where a company has been dissolved because there were only two directors by the charter and one had resigned and the stockholders divided evenly and could not elect a successor, one faction cannot hold the other responsible in damages for the result. *Weymouth v. Oudin*, 56 Wash. 315 (1909). Even though a prosperous eight-hundred-mile railroad (Chicago & Alton) is consolidated with a short railroad heavily in debt, yet if the consolidation agreement gives to minority stockholders of the former the right to retain their stock, and provides for the earnings of the prosperous road being kept separate, a minority stockholder may compel the keeping of the books in that way and the payment of dividends from the profits. *Miller v. Chicago, etc. R. R.*, 171 Fed. Rep. 253 (1909). See also s. c., 204 Fed. Rep. 436 (1913). The fact that the majority stockholders cause all the property to be sold to another corporation at a profit to themselves, is not a fraud on the new corporation. *Schlesinger v. Fisk*, 60 N. Y. Misc. Rep. 442 (1908).

<sup>1</sup> *Von Au v. Magenheimer*, 126 N. Y. App. Div. 257 (1908); *aff'd*, 196 N. Y. 510.

<sup>2</sup> *Backus v. Brooks*, 195 Fed. Rep. 452 (1912).

<sup>3</sup> *Callanan v. Keeseville, etc. R. R.*, 199 N. Y. 268 (1910).

<sup>4</sup> *Callanan v. Keeseville, etc. R. R.*, 199 N. Y. 268 (1910).



The principle of law has been laid down that "when a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders."<sup>1</sup>

Thus, the majority of stockholders cannot cause the corporate property to be sold to themselves at private sale at a price agreed upon by them and the directors whom they placed in office. The minority are entitled to a public sale.<sup>2</sup> A minority preferred stockholder may cause to be set aside the consolidation of his company with another company which the majority of the stockholders of his company own, where before the consolidation his preferred stock represented an amount equal to one half of the combined value of the two companies, and after consolidation less than five thirty-seconds, and before consolidation the assets of the other company represented six thirty-sevenths of the combined assets and after consolidation it represented four fifths. This is an abuse of trust by the majority stockholders.<sup>3</sup> Where the directors

<sup>1</sup> *Ervin v. Oregon R. & Nav. Co.*, 27 Fed. Rep. 625 (1886); s. c., 20 Fed. Rep. 577. In *Lowe v. Pioneer Threshing Co.*, 70 Fed. Rep. 646 (1895), the court enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but the court refused to appoint a receiver. Where a person in control of a company obtains control of a rival company and allows judgments against the latter, and the sale of its bonds on execution at nine cents on the dollar, and executes a mortgage and controls the business, all for the benefit of the former corporation, he and the dummy directors and third persons may be joined in a bill filed by a minority stockholder to enjoin their acts and obtain a personal judgment. *Gray v. Fuller*, 17 N. Y. App. Div. 29 (1897). An able New Jersey court, in the case of *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673 (1903), called attention to the fact that the persons holding a majority of the stock occupied no fiduciary relations towards the minority, but if the majority caused the directors to commit a breach of duty then the minority may complain of the acts of the majority. In the case *Colgate v. United States, etc. Co.*, 73 N. J.

Eq. 72 (1907), the court declared that a majority of the stockholders are not trustees for all the stockholders, and the majority may vote their stock on a statutory consolidation, even though they control both companies. But see s. c., 75 N. J. Eq. 229 (1907).

<sup>2</sup> *Mason v. Pewabic Min. Co.*, 133 U. S. 50 (1890). See also § 671, *infra*. A corporation owning a majority of the stock of another company may legally take the latter's bonds at a fair price, ninety cents on the dollar in this case. *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). On the dissolution of a national bank its assets may be conveyed to a new bank from which some of the minority are excluded, and they cannot complain if the full value and the best price was thereby obtained. *Green v. Bennett*, 110 S. W. Rep. 108 (Tex. 1908).

<sup>3</sup> *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906). In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and this joinder does not make the bill multifarious. The suit may



allow another corporation in which they are interested to appropriate the good-will of the corporation of which they are directors, a minority stockholder may hold them personally liable.<sup>1</sup>

Where two stockholders own two thirds of the capital stock, and cause the directors to sell all the corporate property to a person who buys for them, the owner of the other one third may cause the sale to be set aside, even though a stockholders' meeting has authorized it.<sup>2</sup> And where a stockholder is under contract to carry along the corporate debt, and instead of doing so obtains control of the board of directors, and causes a mortgage to be given to a confederate, and thereby causes the corporate property to be foreclosed and sold, and wrecks the corporation, he is liable in damages to other stockholders.<sup>3</sup> Where the

be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906). Where the statutes authorize a lease it may be for nine hundred and ninety-nine years, unless it actually constitutes a fraud on the rights of minority stockholders. *Wormser v. Metropolitan, etc. R. R.*, 98 N. Y. App. Div. 29 (1904); *aff'd*, 184 N. Y. 83. Even though two corporations are neither of them legally incorporated, yet if they are consolidated a stockholder in the consolidated company cannot claim that the stockholders are partners, although the consolidated company is not a legal corporation; neither are the officers of the consolidated company merely agents for the stockholders, no partnership being intended. Hence any question of fraud on the part of the majority stockholders will be determined by the principles of corporation law. *Cannon v. Brush, etc. Co.*, 96 Md. 446 (1903). A sale of all the assets to another corporation may be set aside at the instance of minority stockholders, especially where both corporations have directors in common. *McLeod v. Lincoln, etc.*, 69 Neb. 550 (1904). A preferred stockholder of a constituent company who by a consolidation is entitled to bonds in the new company having a par value one and one third times the par value of his preferred stock, cannot object thereto, it being shown that the bonds were worth more in the market than

the stock had been worth, and the new company offering to pay him the present value of his stock at the time of the consolidation or the present value with future preferred dividends discounted. *Beling v. American, etc. Co.*, 72 N. J. Eq. 32 (1907). Where the same party controls two corporations and causes one to issue stock and bonds fraudulently to the other, a minority stockholder may maintain suit to have them canceled. *O'Connor v. Virginia, etc. Co.*, 46 N. Y. Misc. Rep. 530 (1905), *rev'd* on another point in 184 N. Y. 46.

<sup>1</sup> *Godley v. Crandall, etc. Co.*, 153 N. Y. App. Div. 697 (1912).

<sup>2</sup> *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320 (1892).

<sup>3</sup> *Hanley v. Balch*, 94 Mich. 315 (1892). In *Ritchie v. McMullen*, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that, although the damage was directly to the corporation, yet that, indirectly, it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the



majority stockholders, through directors who are their tools, having sold property to the corporation and agreed to pay a mortgage on such property, afterwards cause the corporation to assume and pay the mortgage, the minority stockholders may have the transaction set aside.<sup>1</sup>

A contract by which a purchaser of a majority of the stock of three corporations agrees that the corporations should employ the seller of the stock at a fixed salary for a certain time, and after a certain time should give him a salary and allow him to name one half of the directors, is illegal and cannot be enforced by the vendor as against the vendee, even though the stock has been delivered and paid for under such agreement.<sup>2</sup> A sale of the business of one steel manufacturing company to another steel manufacturing company on a guaranty of dividends on the stock of the former, may be enjoined by a minority stockholder of the former where the majority stockholders in both companies are the same and the contract itself is unfair.<sup>3</sup>

Nevertheless, although a person holds a majority of the stock and causes his friends to be made directors, he may sell property to the corporation and take stock in payment, if the transaction is a fair one.<sup>4</sup> And the fact that the holders of a majority of the stock are stockholders in another contracting corporation does not render the contract voidable.<sup>5</sup> "There is no law which makes it impossible for a majority stockholder to enter into a contract with his company."<sup>6</sup> A stockholder

difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

<sup>1</sup> *Woodroof v. Howes*, 88 Cal. 184 (1891), holding also that where the majority stockholders cause the directors to purchase stock from themselves for the corporation at a price higher than the market price, the minority may cause the transaction to be set aside.

<sup>2</sup> *Fennessy v. Ross*, 5 N. Y. App. Div. 342 (1896). On this subject, see § 622, *supra*.

<sup>3</sup> *Devine v. Frankford, etc. Co.*, 205 Pa. St. 114 (1903).

<sup>4</sup> *Russell v. Rock, etc. Co.*, 184 Pa. St. 102 (1898). Where a mining corporation makes a contract with a person holding a majority of its stock, and who has furnished the qualification shares for the directors, by which contract the stock is issued to him for

work to be done on the mine, minority stockholders may cause the contract to be set aside, and the decree may provide that the stock shall be delivered back upon the repayment of the money. *Jones v. Green*, 129 Mich. 203 (1901). A mining company may make a contract with some of its stockholders for the transportation and milling of the ore, even though such stockholders own a large amount of the stock of the company. *Fox v. Mackay*, 125 Cal. 57 (1899).

<sup>5</sup> *Ziegler v. Lake Street El. R. R.*, 69 Fed. Rep. 176, 182 (1895).

<sup>6</sup> *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753, 767 (1893). It is legal for a corporation to purchase property from a woman who owns the majority of the stock, even though she is the wife of the manager. *Figge v. Bergenthal*, 130 Wis. 594 (1906). A majority stockholder who purchases property from a corporation is not liable on a claim that the corporation acquired such property by conversion, he having no knowledge of such con-



may vote for the dissolution of the corporation as allowed by the statute, even though his object is to terminate a contract which he has with the corporation.<sup>1</sup> A stockholder has a right to sell his stock at any time unless he has specifically agreed otherwise.<sup>2</sup> A stockholder in a railroad, the majority of the stock of which is held by another alleged competing railroad, cannot enjoin the latter from selling such majority of the stock.<sup>3</sup> On a reorganization involving a purchase of the cor-

version. *Liebardt v. Wilson*, 38 Colo. 1 (1906). A suit does not lie against an individual to enjoin the violation of a contract between the plaintiff and a corporation, even though it is alleged that the individual controls the corporation, it not being alleged that he owns all or a majority of its stock. *Aberthaw, etc. Co. v. Ransome*, 192 Mass. 434 (1906). A promoter may sell properties to a corporation even though he owns all the stock at the time of the sale. *Tompkins v. Sperry, etc. Co.*, 96 Md. 560 (1903). A stockholder may contract with the corporation the same as a stranger. *Bramblet v. Commonwealth, etc. Co.*, 83 S. W. Rep. 599 (Ky. 1904).

<sup>1</sup> *Windmuller v. Standard, etc. Co.*, 115 Fed. Rep. 748 (1902). A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists. *Windmuller v. Standard, etc. Co.*, 114 Fed. Rep. 491 (1902). Compare the comments on this case in *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673 (1903). A guarantee of dividends on stocks, so long as the certificates are outstanding, but not to exceed the period for which the company was incorporated, ceases upon the dissolution of the company, even though the guarantor owns a majority of the stock of the company and brings about the dissolution, unless the dissolution was for the purpose of escaping this liability. *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903). A stockholder may vote on a question in which he has a personal interest other than his interest as a stockholder. *Middleton v. Arastra-*

*ville, etc. Co.*, 146 Cal. 219 (1905). See also § 629, *supra*.

<sup>2</sup> "We do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of the negotiations then pending. . . . We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits." *Farmers', etc. Co. v. Chicago, etc. Ry.*, 163 U. S. 31 (1896). See § 622, *supra*. A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. *Ingraham v. National Salt Co.*, 36 N. Y. Misc. Rep. 646 (1902); *aff'd*, 72 N. Y. App. Div. 582; appeal dismissed, 172 N. Y. 644. Even though the court at the instance of a dissenting stockholder has enjoined a corporation from issuing stock in payment for the property of another corporation to be purchased at a high valuation, this does not prevent the majority of the stockholders forming a holding corporation in another state and issuing the stock of the latter in exchange for the stock of the two former corporations at a price equivalent to the above-mentioned valuation. The court has no power to enjoin such a transaction at the instance of a dissenting stockholder. The fact that the holding company may name the directors of both companies is not objectionable in itself. *Pierce v. Old Dominion, etc. Co.*, 67 N. J. Eq. 399 (1904).

<sup>3</sup> *Hunnewell v. New York, etc. Ry.*,



porate property at a public sale, the majority of the stockholders may, by bidding the highest price, purchase without allowing the minority to participate in their purchase.<sup>1</sup>

Where a lease of its property is made by a corporation, it is legal for the lessee to pay secretly to one of the stockholders of the lessor a sum of money to induce such stockholder to favor the lease.<sup>2</sup> It has been held, however that a secret agreement by which a vendor of land to a corporation pays half of the price above a certain sum to one of the stockholders on the condition that he secures the votes of other stockholders to the purchase, is fraudulent and cannot be enforced.<sup>3</sup> Even though three persons who own all the stock of a corporation, enter into a contract to sell it, and one of them secretly re-

196 Fed. Rep. 543 (1911). A minority stockholder in a railroad cannot enjoin the majority stockholder from selling its holdings to another railroad company, even though the purchaser refuses to purchase the minority stock at the same price, and even though such majority stockholder is a railroad company itself, no damage to the minority stockholder being shown. The claim that the sale would be to a competing railroad in violation of the anti-trust act of Congress cannot be sustained in the state court. *Delavan v. New York*, etc. R. R., 154 N. Y. App. Div. 8 (1912).

<sup>1</sup> See § 653, *supra*, and § 886, *infra*. Where a stockholder of a railroad which has been foreclosed and reorganized attacks the foreclosure on the ground of fraud, he cannot on appeal change his complaint and claim that inasmuch as the plan of reorganization allowed the majority stockholders to come in on a more favorable basis than the minority, he was entitled to come in on the same terms as the majority. *MacArdell v. Olcott*, 189 N. Y. 368 (1907). The dissenting opinion is to the effect that on the merits the majority stockholders should have allowed the minority stockholders to come in on the same basis as the former came into the reorganization. A sale of the assets of a bank at public auction with the consent of the stockholders will not be set aside when the price was a fair one and there was no fraud, even

though the liquidators were directors in the company that purchased. *In re Liquidation*, etc., 118 La. 664 (1907). A purchaser at foreclosure sale is under no obligation to allow the stockholders or bondholders to take part in his purchase. Their interest in the property itself is eliminated by the sale. *Sullivan v. Applebaum*, 164 Mich. 432 (1911). Stockholders owning corporate bonds secured by a mortgage may foreclose the same, and cannot be held guilty for conspiracy by other stockholders, especially where they did not purchase the property at the foreclosure sale. *Kelly v. Fahrney*, 242 Ill. 240 (1909).

<sup>2</sup> But where subsequently the stockholder becomes a director and takes part in reducing the rent paid to the corporation, it was his duty to disclose the extra price which he was continually receiving, and for failure so to do he must account to the corporation and pay over an equal percentage of his secret profit subsequently received, it being presumed that a reduction on his secret profit would have been made for the benefit of the corporation. *Bird, etc. Co. v. Humes*, 157 Pa. St. 278 (1893). It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto. *Lamkin v. Palmer*, 24 N. Y. App. Div. 255 (1897); *aff'd*, 164 N. Y. 201.

<sup>3</sup> *Dieckmann v. Robyn*, 162 Mo. App. 67 (1911).



ceives a higher price for his holdings of the stock, yet the other vendor cannot by an action in *assumpsit* claim a part of such extra price. His remedy, if he has any, is in equity for an accounting, or an action for deceit.<sup>1</sup> But where the president knows that he can sell the corporate property for a certain price and accordingly he buys a majority of the stock and then sells such stock at an advance, thus enabling the purchaser to buy the property from the corporation, the president is liable to the other stockholders for the profit he has made, even though the price at which the corporate property has been sold was a fair price, the price paid for the stock being really a part of the price paid for the corporate property, and the court may order the president to divide such profit among the stockholders.<sup>2</sup>

The employment by the corporation of a person as general manager is not proved by proving that the person who owned all the stock of the corporation so employed him.<sup>3</sup>

Where two companies in litigation pass under the same control, the court will no longer retain the case, inasmuch as the same parties control both sides, but, in order to protect the minority stockholders, the case will be left open.<sup>4</sup>

Where on a winding up the court decrees a sale of the corporate mining property at public sale, any one or more of the stockholders may bid, and the court will not readily set the sale aside on the ground that after the property was struck off some one offered a higher price.<sup>5</sup>

<sup>1</sup> *Cummings v. Synnott*, 120 Fed. Rep. 84 (1903). See also §§ 650, 320, 321, *supra*. Where a party desires to purchase a majority of the stock of a corporation and makes an offer to all the stockholders to purchase their stock, provided a majority in interest will sell, and agrees to pay the amount so offered a specified sum per share, he may legally pay more than that price for a portion of the stock, and need not divulge that fact to the others who sell at the price first mentioned. *Newman v. Mercantile T. Co.*, 189 Mo. 423 (1905).

<sup>2</sup> *Commonwealth, etc. Co. v. Seltzer*, 227 Pa. St. 410 (1910).

<sup>3</sup> *Hammond v. Hammond, etc. Co.*, 72 Conn. 130 (1899). See also § 709, *infra*.

<sup>4</sup> *South Spring, etc. Co. v. Amador, etc. Co.*, 145 U. S. 300 (1892). Where an insolvent corporation passes into a receiver's hands and the receiver acquires all the interests of the parties to the suit, an outside creditor

may file a new bill to reach certain equitable assets of the corporation. *Harp v. Abbeville, etc. Co.*, 108 Ga. 168 (1899). A decree entered in regard to a patent after the complainant has acquired control of the defendant is not valid. *McElroy v. American, etc. Co.*, 122 Fed. Rep. 441 (1903).

<sup>5</sup> *Pewabic Min. Co. v. Mason*, 145 U. S. 349 (1892). A stockholder may bid for the property at a public sale, even though he owns a majority of the stock. *Wilson v. Central Bridge*, 9 R. I. 590 (1870). The person owning a majority of the stock of a failing corporation may at the public sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves." *Price v. Holcomb*, 89 Iowa, 123 (1893). A company which is in debt and unable to raise funds to continue its business may, under the Wisconsin statute



Sales of property by a corporation may be valid although made at the instigation of stockholders whose stock really belongs to others.<sup>1</sup> Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown.<sup>2</sup> A minority stockholder cannot have a receiver appointed, even though the president has used corporate funds to purchase a majority of the company's stock, and the officers are fraudulently misusing the funds, inasmuch as an accounting may be sufficient, the officers being solvent.<sup>3</sup> A New York stockholder in a Connecticut railroad corporation cannot sue in the New York courts on behalf of himself and other stockholders to hold liable another Connecticut railroad corporation for acquiring a majority of the stock of the former railroad and fraudulently acquiring its assets where the first-named corporation has ceased to exist, and hence its assets should be administered in Connecticut by a suit brought there.<sup>4</sup>

A corporate creditor cannot complain of the acts specified above to the same extent that a stockholder may complain.<sup>5</sup>

§§ 663, 664. "*Dummy*" corporations — *The courts will ignore the corporate existence where it is fraudulently used to do what the stockholders cannot legally do — An individual or corporation owning all the stock of another corporation is not ordinarily liable for the debts of the latter.* — A corporation is in law a person or entity entirely distinct from its stockholders and officers. It may become insolvent and yet not make them insolvent. It may commit fraudulent or *ultra vires* acts and yet they be not liable therefor. It may do acts which its stockholders as individuals may be under contract not to do, and the stockholders may do acts which the corporation cannot do. The dis-

authorizing corporations on a majority vote of their stockholders to sell all their property, make such sale at public auction, giving the stockholders the first opportunity to purchase, and if one stockholder purchases at such sale he may associate with him such other stockholders as he sees fit. *Werle v. Northwestern, etc. Co.*, 125 Wis. 534 (1905). Even though the owner of a majority of the mortgage bonds of the corporation owns also a majority of the stock, yet he may purchase the property at foreclosure sale, and minority stockholders cannot hold him liable as a trustee. *Mac-Ardell v. Olcott*, 104 N. Y. App. Div. 263 (1905); *aff'd*, 189 N. Y. 368.

<sup>1</sup> *Gottfried v. Miller*, 104 U. S. 521 (1881).

<sup>2</sup> *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901). See also § 681, *infra*.

<sup>3</sup> *Hayes v. Jasper Land Co.*, 147 Ala. 340 (1906).

<sup>4</sup> *Howe v. New York, etc. R. R.*, 142 N. Y. App. Div. 451 (1911).

<sup>5</sup> See § 735, *infra*. A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet subcontractors cannot. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893).



abilities of the corporation are not disabilities of the stockholders, nor are the disabilities of the stockholders the disabilities of the corporation. Hence it is that a corporation is often organized to act as a "cloak" for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud.<sup>1</sup> Thus, it has been held that, where a person has contracted that he will not do a certain act, he cannot form and control a corporation and have the corporation do that act.<sup>2</sup> And where a bankrupt practically owns the entire capital stock of a corporation, the bankruptcy court will consider the corporation as merely an agent of the partnership, and will extend its jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns.<sup>3</sup> The mere fact, however, that a person has contracted to sell a patent-right does not affect the title of a corporation to whom he transfers such patent.<sup>4</sup>

<sup>1</sup> Quoted and approved in *Donovan v. Purtell*, 216 Ill. 629 (1905). See § 6, *supra*.

<sup>2</sup> *Beal v. Chase*, 31 Mich. 490 (1875). When a person sells a trade-mark and then sells an infringement upon it to a corporation organized and controlled by himself, the latter may be enjoined from using it. *Le Page Co. v. Russia Cement Co.*, 51 Fed. Rep. 941 (1892). Unless there is a positive allegation and proof that the corporation was fraudulently formed to violate the individual contract, the suit will fail. *Moore, etc. Co. v. Towers Hardware Co.*, 87 Ala. 206 (1888). A contract by a person to sell all lumber manufactured by him through certain agents cannot be evaded by his forming a corporation and manufacturing and selling through it. *Hagy v. McGuire*, 147 Pa. St. 187 (1892).

<sup>3</sup> *In re Rieger, etc.*, 157 Fed. Rep. 609 (1907). The court said: "The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on a part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankruptcy act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to cir-

cumvent fraud." Where an insolvent business man transfers all his property to a corporation for \$1,500, although it is worth much more, the purpose being to shield the property from his creditors, the court will order the trustee in bankruptcy to seize the property as assets of the bankrupt estate until its ownership can be regularly determined. *Re Berkowitz*, 173 Fed. Rep. 1013 (1908). Even though a paper company and a pulp company have nearly the same stockholders, and one owns shares in the other, and they have mutual dealings, this does not prevent one proving a claim in bankruptcy against the other, separate organizations having been maintained. *Re Watertown, etc. Co.*, 169 Fed. Rep. 252 (1909). Where a manufacturer is unwilling to trust a firm with which it is dealing and hence causes the firm to incorporate a company and give security for the payment of the capital stock, and then the manufacturer deals with that company as a mere dummy of the firm, goods delivered to that company are not subject to the firm's debts upon bankruptcy. *Ludvig v. American Woolen Co.*, 188 Fed. Rep. 30 (1911).

<sup>4</sup> *Davis, etc. Co. v. Davis, etc. Co.*, 20 Fed. Rep. 699 (1884); *Averill v. Barber*, 6 N. Y. Supp. 255 (1889). See also § 727, *infra*, on Notice. The vendor of a good-will who agrees not



But where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.<sup>1</sup> Although a lessee corporation has a right to payment for improvements, if the lessor does not renew, such payment need not be made, if the new lease is to a new corporation organized by the same stockholders as are in the old.<sup>2</sup> Where it would be illegal for two or more corporations to unite in regulating the production and price of an article; it is illegal to accomplish that result by placing all the shares of stock of those corporations in the hands of trustees and thereby securing coöperating boards of directors.<sup>3</sup>

to engage in the same business again in a certain territory cannot evade his agreement by becoming a stockholder in, or organizing, or managing a competing corporation; but, there being other stockholders in the corporation, an injunction will not be granted against the corporation or such other stockholders. *Kramer v. Old*, 119 N. C. 1 (1896). A foreign corporation cannot prevent a domestic corporation from using the same name, especially where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trade-marks. He then incorporated a company under the name of the trade-mark. *Hazelton Boiler Co. v. Hazelton, etc. Co.*, 142 Ill. 494 (1892). In *Gormully, etc. Co. v. Bretz*, 64 Fed. Rep. 612 (1894), where a firm, being under contract to manufacture and sell only certain bicycle patents and machines, formed a corporation to manufacture and sell other machines, the court held that if the holdings of stock showed that the two concerns were practically one, then that the corporation would be enjoined. See also *Pratt v. Wilcox Mfg. Co.*, 64 Fed. Rep. 589 (1894). Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company. *Dennison v. Chapman*, 105 Cal. 447 (1895). See also *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894), to the effect that the corporation is liable for the fraud of its board of directors against

another corporation which the same board controlled. Where defendant employed plaintiff to assist in building up a business, the plaintiff to be paid necessary expenses, and the balance of his pay to be determined at a future time, and plaintiff to have half the business, and eleven years thereafter the defendant organizes a corporation and turns over the business to the latter, the defendant becoming the owner of the stock, the plaintiff may hold him liable, not only for services before the corporation was organized, but for those rendered afterwards. *Bonsall v. Platt*, 153 Fed. Rep. 126 (1907).

<sup>1</sup> *National, etc. Co. v. Connecticut, etc. Co.*, 73 Fed. Rep. 491 (1896). See also § 727, *infra*. Where an attorney in fact for the sale of a patent causes his friends to organize a corporation, and then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement. *Young, etc. Co. v. Young, etc. Co.*, 72 Fed. Rep. 62 (1896).

<sup>2</sup> *New York, etc. Ferry Co. v. New York*, 146 N. Y. 145 (1895).

<sup>3</sup> See ch. XXIX, *supra*. The Missouri anti-trust act was applied in *State v. Standard Oil Co.*, 218 Mo. 1 (1909), *aff'd*, 224 U. S. 270, which was a proceeding to forfeit the charter of a local company and at the same time revoke the licenses of two foreign companies doing business in the state, and



There are many other instances in which the corporate existence will not suffice to evade liabilities, disabilities, and frauds. An individual or partnership cannot transfer all of his or its property to a corporation for shares of stock and thereby defraud the creditors of the partnership.<sup>1</sup> The officers and agents of a corporation who cause the corporation to defraud its creditors or subscribers to its stock by means of fraudulent misrepresentations are liable to the persons so defrauded.<sup>2</sup> The stockholders and officers of a corporation which was not properly organized may be liable as partners for all of its debts,<sup>3</sup> but this liability is not based on fraud.

A few cases hold that a corporation incorporated in one state for the purpose of doing all its business in another state is a fraud on the law, and is only a partnership; but the weight of authority holds otherwise.<sup>4</sup> If the promoters or officers or a majority of stockholders defraud the corporation itself or the minority stockholders, a court of equity will give full and ready relief.<sup>5</sup> Where persons in control of a corporation use that control to defraud persons with whom they have contracted in reference to stock, a court of equity will aid the persons so defrauded.<sup>6</sup> The stockholders of a corporation are distinct from the corporation itself,<sup>7</sup> and may of course transact business irrespective of its contracts or obligations; but an injunction against their doing a specified act is violated if they cause or aid the corporation to do that act.<sup>8</sup> On the other hand a stockholder, even though he owns a majority

the court held that the fact that a holding company owned a majority of the stock of the defendants does not prove absolutely an unlawful combination but tends to prove that fact. A churn manufacturing company which buys out its competitors may be attacked by the state even though its competitors continue to do business in their own names. *State v. Creamery, etc. Co.*, 110 Minn. 415 (1910).

<sup>1</sup> See § 672, *infra*.

<sup>2</sup> See § 48; also chs. IX and XX, and § 243, *supra*.

<sup>3</sup> See ch. XIII, *supra*.

<sup>4</sup> See §§ 237-240, *supra*.

<sup>5</sup> See the previous sections of this chapter for many instances of such frauds.

<sup>6</sup> See § 350, *supra*, and the notes thereto. A stockholder who desires to have the corporation purchase certain property may purchase a mortgage against that property and compel

the owner to sell to the corporation under threat of foreclosure. *Martin v. New Rochelle Water Co.*, 11 N. Y. App. Div. 177 (1896); *aff'd*, 162 N. Y. 599.

<sup>7</sup> See § 709, *infra*. In a suit against the corporation a stockholder who practically owns the corporation may be examined as though he were the defendant. *North American Restaurant v. McElligott*, 227 Ill. 317 (1907). Where a corporation and a person are sureties on a bond and he owns practically the entire capital stock and is the "body, breeches, and soul" of the corporation, his action in its behalf in modifying the bond binds him personally also as a surety. *Deming v. Maas*, 18 Cal. App. 330 (1912).

<sup>8</sup> See *King v. Barnes*, 113 N. Y. 476 (1889). An injunction against certain directors of the corporation from using patented articles is violated by their forming a new corporation to do the same acts, they being directors



of the stock, is not bound individually as a party or privy by a decree in a suit against the corporation where he has not intervened or controlled the defense to the suit nor made a separate defense.<sup>1</sup> Where one family own all the stock of a mercantile corporation, and one of them is president and has entire control and management of its affairs, and he willfully fires the property in order that the insurance may be collected, the insurance company is not liable.<sup>2</sup>

Where a corporation secures a rebate from a railroad company, not only on shipments made by the former, but on shipments made by other parties, the active agents of such corporations receiving such moneys may be held personally liable for them. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense."<sup>3</sup> If a person organizes several real estate corporations and owns or controls their entire capital stock and uses them merely to cover up fraudulent real estate transactions he may be held personally liable on a note given by one of them.<sup>4</sup> Where persons engaged in a real estate and loan business organize a corporation to take over the business and they hold all the stock and the corporation is merely a formal intermediary, they may be criminally liable for taking in money in the name of the corporation at a time when the corporation is insolvent, thus causing the money to be lost, and it is no defense that they acted in their capacity as officers of the corporation.<sup>5</sup>

The subject of the personal liability of officers and directors of corporations is more fully considered elsewhere.<sup>6</sup>

The above illustrations, however, are merely exceptions to the general rule that a corporation is an entity that exists independently of its

also of the latter. *Iowa, etc. Wire Co. v. Southern, etc. Wire Co.*, 30 Fed. Rep. 123 (1887). Where suit is brought by a riparian owner to enjoin a riparian owner higher up the stream from diverting the water, and the latter pending the suit conveys his rights to a corporation organized for that purpose, and owns all its stock, such corporation is bound, although not a party to the suit. *Miller & Lux v. Rickey*, 146 Fed. Rep. 574 (1906); aff'd, 152 Fed. Rep. 11 and 22 and 218 U. S. 258.

<sup>1</sup> *Victor etc. Co. v. American, etc. Co.*, 189 Fed. Rep. 359 (1911); s. c., 190 Fed. Rep. 1023.

<sup>2</sup> *Meily Co. v. London, etc. Co.*, 142

Fed. Rep. 873 (1906); aff'd, 148 Fed. Rep. 683.

<sup>3</sup> *Brundred v. Rice*, 49 Ohio St. 640 (1892). A brewing company is not responsible for rebates given to a refrigerator company that handles the former's product, even though a minority of the stock of the brewing company is owned by the owners of a majority of the stock of the refrigerator company. *United States v. Milwaukee, etc. Co.*, 145 Fed. Rep. 1007 (1906); s. c., 142 Fed. Rep. 247.

<sup>4</sup> *Donovan v. Purtell*, 216 Ill. 629 (1905).

<sup>5</sup> *Milbrath v. State*, 138 Wis. 354 (1909).

<sup>6</sup> See § 682, *infra*.



stockholders and that that entity will be respected and upheld by the courts. The New York court of appeals has laid down the general rule as follows: "In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on, and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts, and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business."<sup>1</sup> This rule is fundamental. It is the explanation and cause of the marvelous increase of corporations in modern times. The stockholders are not liable on the contracts of the corporation. The separate existence and entity of the corporation is recognized and preserved. The courts will refuse to ignore the corporate existence, even though all the stock is owned by one person or by another corporation.<sup>2</sup>

<sup>1</sup> *People v. American Bell Tel. Co.*, 117 N. Y. 241, 255 (1889). The fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one so as to make a contract of one corporation binding upon the other. *Richmond, etc. Co. v. Richmond, etc. R. R.*, 68 Fed. Rep. 105 (1895). A suit does not lie against a corporation for the breach of a contract between the stockholders relative to dividends, etc. *Aldrich v. Crawford Chair Co.*, 152 Mich. 369 (1908). In the case *St. Louis Breweries, Ltd. v. Apthorpe*, 79 L. T. Rep. 551 (1898), where an English corporation held all the stock of an American corporation, and dividends paid by the American corporation were paid directly to the stockholders in the English corporation, the court held that the income tax on the English corporation applied also to dividends paid by the American corporation to American stockholders in the English corporation. The court declined, however, to hold that it would ignore the existence of the American corporation, "because experience has certainly satisfied me that if you give a deci-

sion embodying large principles and large considerations without having felt exactly where the shoe pinches, it is very likely that the next case that may turn up will show that some consideration has been omitted which might have been very vital, or might have affected one's judgment." Nevertheless the court said, "I cannot say that the commissioners were not justified in coming to the conclusion that 'the head and seat and directing power of the appellant company were at the appellant company's registered offices in the city of London, and that if the business at St. Louis and the profits made thereby were technically the business and profits of the American company, the American Company was for such purpose the agent of the appellant company.'"

<sup>2</sup> Even though an Illinois railroad corporation owns practically the entire capital stock of a Texas railroad corporation, yet the former cannot be brought into court in Texas by serving officers of the latter. *Peterson v. Chicago, etc. Ry.*, 205 U. S. 364 (1907). The mere fact that one company owns all the stock of another does not create such a community of interest as to prevent the latter being made a party to a suit by the former. *Federal, etc. Co. v. Bunker Hill, etc. Co.*, 187 Fed. Rep. 474 (1909). Even though two individuals buy all the stock of a company and agree to oper-



The fact that connecting railroads own the stock of a terminal company has no bearing on whether the terminal charge to the public is reasonable, neither does the ownership of such stock make the terminal company a part of the lines of the railroad companies.<sup>1</sup> A holding company is not a common carrier subject to the Interstate Commerce Act merely because it owns the entire capital stock of a railroad corporation which is a common carrier.<sup>2</sup> An act of Congress that interstate

ate it as a part of their co-partnership business, with dummy directors, and then they disagree, this does not entitle them to ignore the corporate existence and place the corporate property in the hands of a court of equity as a part of the co-partnership assets. *Jackson v. Hooper*, 76 N. J. Eq. 592 (1910), rev'g 74 Atl. Rep. 130. Even though a holding company acquires a majority of the stock of two street railway companies, the city cannot consider the latter as practically one and the same company and require transfers. *State v. Tacoma, etc. Co.*, 61 Wash. 507 (1911). Even though there are but three stockholders in a coal mining company which is suing a railroad for damages for discrimination, and they sell their stock under an agreement by which they are to have the results of the suit and are to control it, this is no defense to the suit itself. *Puritan, etc. Co. v. Pennsylvania R. R.*, 85 Atl. Rep. 426 (Pa. 1912). The fact that all the stock in one corporation is owned by stockholders in another corporation and is held for the benefit of the latter, does not make the latter liable for debts of the former. *Crane & Co. v. Fry*, 126 Fed. Rep. 278 (1903). The agreement of a corporation on selling its property not to engage in the same business, does not prevent one of its officers and stockholders engaging in that business, and the stockholders are not individually liable or subject to an injunction because of unfair competition practiced by the corporation. *Hall's, etc. Co. v. Herring, etc. Co.*, 146 Fed. Rep. 37 (1906); modified, 208 U. S. 554. Even though

the purchaser of land, which is subject to a mortgage, thereafter organizes a company which purchases the land on foreclosure sale, and even though he owns all the stock and controls the board of directors, yet the dower right of his wife in such land is foreclosed, where she did not interpose any defense to the foreclosure suit. *Poillon v. Poillon*, 90 N. Y. App. Div. 71 (1904).

Where a corporation sells all its property to another corporation, including an insurance policy, without the consent of the insurance company, the policy is void, even though the corporations had the same stockholders. *Miles, etc. Co. v. Erie, etc. Co.*, 164 Ind. 181 (1905). Where, on foreclosure sale of property purchased by a corporation subject to a mortgage, there is a surplus, it belongs to the corporation without deduction for debts of its stockholders to the purchaser, even though such stockholders are the only stockholders in the company. *Hardy v. Pecot*, 113 La. 350 (1904). It is no defense to an action by an employee that he was employed by a resolution of a dummy board of directors who had no real interest in the company, and that there was a contest in the company and the president had informed the party that the contract was not good. *Collier v. Consolidated, etc. Co.*, 70 N. J. L. 313 (1904). Executors and trustees have no legal right to pay the debts of a corporation, even though the estate holds practically all of its stock and bonds. *Matter of Corbin*, 101 N. Y. App. Div. 25 (1905). Although two corporations have the

<sup>1</sup> *Interstate Commerce Com. v. Stickney*, 215 U. S. 98 (1909). Cf. § 317, *supra*.

<sup>2</sup> *United States v. Union Stockyard, etc. Co.*, 192 Fed. Rep. 330 (1912).



railroads shall not transport products in which they have an interest, direct or indirect, does not apply to articles owned by mining or coal or

same officers, one is not liable for the wages of an employee of the other, discharged by such officers. *Holder v. Cannon Mfg. Co.*, 138 N. C. 308 (1905). A judgment against a West Virginia corporation cannot be enforced against the president, even though it is alleged that the corporation was a myth and did not exist, and that its organization had not been kept up and that the president was the real owner and carried on the business. The remedy is an original suit against him. *Tilley v. Coykendall*, 172 N. Y. 587 (1902). An officer is not personally liable for an infringement by the corporation, unless it is insolvent or it is a mere dummy to protect others. *Loomis, etc. Co. v. Manhattan, etc. Co.*, 117 Fed. Rep. 325 (1902). See also § 682, *infra*. Even though the stockholders and officers of a lumber company and a railroad company are substantially the same, and even though the lumber company has sold its railroad to the railroad company, yet the lumber company is not liable for the negligence of the railroad company. *Goodwin v. Bodeaw Lumber Co.*, 109 La. 1050 (1902). Even though a hospital corporation is exclusively for the benefit of a railroad corporation and the officers of the latter are officers of the former, yet the railroad company is not liable for the negligence of hospital employees. *Illinois, etc. R. R. v. Buchanan*, 88 S. W. Rep. 312 (Ky. 1905). A railroad company owning all the stock and bonds of another company does not own the property of the latter and cannot sue on a cause of action belonging to the latter. *Fitzgerald v. Missouri Pac. Ry.*, 45 Fed. Rep. 812 (1891). Although one corporation owns all the stock of another corporation, the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company. *Williamson v. New Jersey Southern R. R.*, 28 N. J. Eq. 277 (1877); *aff'd*, on this point, in 29 N. J. Eq. 311 (1878);

*Central Trust Co. v. Kneeland*, 138 U. S. 414, 423 (1891); *Toledo, etc. R. R. v. Hamilton*, 134 U. S. 296, 304 (1890), and §§ 852, 857, *infra*. Although one water-works company owns all the stock of another water-works company, a mortgage given by the former company on all its property does not cover the property of the latter company as against *bona fide* purchasers of bonds of the latter company. *National Water-Works Co. v. Kansas City*, 78 Fed. Rep. 428 (1896).

A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation and the bridge itself leased to the latter. *St. Louis, etc. Ry. v. Williams*, 53 Ark. 58 (1890). Even though one man owns a majority of the stock of two corporations, and they have dealings with each other, yet upon the insolvency of the one a claim of the other is to be allowed the same as the debt of any other creditor. *Lange v. Burke*, 69 Ark. 85 (1901). A mortgage covering after-acquired property of an irrigation company does not cover property of another company subsequently organized by parties interested in the first company, even though the second company used the property of the first company. *Farm, etc. Co. v. Alta, etc. Co.*, 28 Colo. 408 (1901).

Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. *Atchison, etc. R. R. v. Cochran*, 43 Kan. 225 (1890). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. *East St. Louis, etc. Ry. v. Jarvis*, 92 Fed. Rep. 735 (1899). The fact that the



other companies in which the railroad is a stockholder.<sup>1</sup> Even though an owner of real estate has transferred it to a corporation for convenience only and he owns all the stock and the company merely holds the title and has no employees or officers, and pays no wages, and neither expends nor receives money, and is practically a dummy, yet the corporation must pay a tax on its capital stock although it has already paid a tax on the land.<sup>2</sup> And even though an English company owns all the

same persons own all the stock in two corporations does not make one corporation responsible for the contracts of the other. *Waycross, etc. R. R. v. Offerman, etc. R. R.*, 109 Ga. 827 (1900). Even though a person buys all the stock, bonds, and property of a corporation, and a suit is pending against the corporation for negligence, yet he is not liable for a judgment thereon. *Tilley v. Coykendall*, 69 N. Y. App. Div. 92 (1902); *aff'd*, 172 N. Y. 587. Where an individual constructs an electric light system in a village and then transfers it to a corporation in which he holds most of the stock, he is not personally liable for the death of a person by reason of the crossing of the electric wire with a telephone wire, causing the electric wire to melt and fall and convey the current through such person, even though the negligent construction of the electric system was by him before the property was transferred to the corporation. *Gordon v. Ashley*, 77 N. Y. App. Div. 525 (1902). The fact that one corporation owns a large amount of stock in another corporation does not affect the identity of the two. *Ex parte Fisher*, 20 S. C. 179 (1883). Although a stockholder purchases corporate property at a tax sale this does not constitute payment of the taxes in favor of the mortgagee of the property. *Jenks v. Brewster*, 96 Fed. Rep. 625 (1899). Upon the expiration of a charter and the winding up of the company's affairs, stock which it holds in another corporation may be sold, but not the property of the latter corporation, even though the former corporation owned all of

the stock of the latter. *Stewart v. Pierce*, 116 Iowa, 733 (1902). Even though a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, yet it cannot ignore the corporate existence and convey, incur, or deal with the property as its own. *Watson v. Bonfils*, 116 Fed. Rep. 157 (1902). Even though an English corporation owns ninety-five per cent. of the stock of an American corporation, yet the separate identity of the two corporations continues, and the income of the American corporation cannot be taxed in England as the income of the English corporation. *Kodak Limited v. Clark*, [1902] 2 K. B. 450. The fact that two irrigation companies have the same officers and the same stockholders and the same purposes, except that one operates in one state and the other in another state, does not make one of them liable for the debts of the other. *White v. Pecos, etc. Co.*, 18 Tex. Civ. App. 634 (1898). A statutory lien which is good against a lessee mining company is not good against a lessor mining company, even though the stockholders are substantially the same. *United Mines Co. v. Hatcher*, 79 Fed. Rep. 517 (1897), *rev'd Hatcher v. United Leasing Co.*, 75 Fed. Rep. 368. Even though the officers of a lessor mining company are officers also of the lessee, this does not make the former company liable for a lien against the latter. *Union T. Co. v. Branch, etc. Co.*, 134 N. W. Rep. 65 (S. D. 1912). A deed of corporate property by a per-

<sup>1</sup> *United States v. Delaware, etc. Co.*, 213 U. S. 366 (1909). *Cf.* § 317, *supra*.

<sup>2</sup> *People, etc. v. Williams*, 198 N. Y. 54 (1910).



stock and names the board of directors of a German company, yet the identity of the two companies continues and the income tax in England does not apply to profits of the German company transferred by the English company to its patent-right account.<sup>1</sup> A purchase by a city of all of the stock of a bridge company does not affect the bridge company's contract with a street railway for the payment of tolls.<sup>2</sup> Even though one railroad owns a majority of stock in another and controls it, and advertises it as a part of its system, yet it is not liable for damages due to the negligence of the latter.<sup>3</sup> A newspaper publisher who is a stockholder and officer in a corporation which delivers newspapers for several publishers is not liable for a personal injury done by such corporation, on the theory that it is but a dummy, even though it has not filed annual reports, as required by the statute. It is not for the jury to decide whether the corporation was in good faith or was a mere form and evasive device to escape liability. The only question for the jury

son who owns all the stock does not convey good title, especially where he has pledged some of the stock. *Parker v. Bethel, etc. Co.*, 96 Tenn. 252 (1896). Even though one corporation is a stockholder in another, yet a debt due from the latter to the former may be enforced, although one company is practically a branch of the other. *Alabama, etc. Co. v. Chattanooga, etc. Co.*, 37 S. W. Rep. 1004 (Tenn. 1896). Although a construction company owns all the stock of a railroad company, and a bank has loaned large sums of money to the construction company, yet mortgage bonds issued by the railroad company have priority over the claims of the bank. *Exchange Bank v. Macon Const. Co.*, 97 Ga. 1 (1895). Where a failing bank organizes a trust company and owns all its stock, the stock standing in the names of "dummies," and uses the funds of the trust company, it is a debtor of the trust company. *Fisher v. Adams*, 63 Fed. Rep. 674 (1894). See also the cases in the notes below. A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet

subcontractors cannot. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). Where the president owns nearly all of the stock, and keeps no proper accounts, and mingles the business with his own business, and the corporation is insolvent, a creditor of the corporation may attach property on the ground that it is being fraudulently disposed of. *Senour Mfg. Co. v. Clarke*, 96 Wis. 469 (1897). Where a railroad has power to operate a power house in a city it may do so by means of a power house company, all the stock of which it owns, and such subordinate company cannot be indicted for maintaining a nuisance. *People v. Transit, etc. Co.*, 131 N. Y. App. Div. 174 (1909).

<sup>1</sup> *Gramophone and Typewriter, Ltd. v. Stanley*, 99 L. T. Rep. 39 (1908), [1908] 2 K. B. 89, distinguishing *Apthorpe v. Peter, etc. Co.*, 80 L. T. Rep. 395.

<sup>2</sup> *Point, etc. Co. v. Pittsburg, etc. Ry.*, 230 Pa. St. 289 (1911).

<sup>3</sup> *Stone v. Cleveland, etc. Ry.*, 202 N. Y. 352 (1911), rev'g 136 N. Y. App. Div. 907. A lumber company is not liable for an accident on a railroad company's tracks, even though they have many stockholders and officers in common. *Stephens v. Louisiana, etc. Co.*, 122 La. 547 (1908).



is whether the corporation was the real employer.<sup>1</sup> Again, a restriction in a deed to the effect that no part of the property should ever be owned by a negro does not prevent its being owned by an amusement park corporation all of whose stockholders are negroes.<sup>2</sup>

The lower English courts held that where a merchant transfers all his business to a corporation formed for that purpose, and continues to carry on the business in the name of the corporation, he being practically the only stockholder, he is liable for the corporate debts on the theory of principal and agent; but the House of Lords reversed all this and held that he is not liable.<sup>3</sup>

This principle of law is particularly applicable to the plan of a parent company owning all or a majority of the shares of stock of numerous subsidiary companies, such subsidiary companies being local in their operations for the purpose of dividing the responsibilities, liabilities, duties, and details of the business,<sup>4</sup> or for the purpose of regulating taxes,<sup>5</sup>

<sup>1</sup> *Werner v. Hearst*, 177 N. Y. 63 (1903).

<sup>2</sup> *People's, etc. Co. v. Rohleder*, 109 Va. 439 (1908).

<sup>3</sup> *Salomon v. Salomon & Co.*, [1897] A. C. 22. The supreme court of Louisiana, however, has held that in such a case the corporate existence will be ignored. *Samuel, etc. Co. v. Illinois, etc. Co.*, 51 La. Ann. 64 (1898). Even though an English corporation owns nearly all the stock of an American corporation, yet the income of the latter is not subject to the income tax of England. *Kodak Limited v. Clark*, [1903] 1 K. B. 505.

<sup>4</sup> Such is the case of the Bell Telephone Company. It is legal for a manufacturing company to organize a subsidiary company to sell its product, the entire capital stock of the latter being owned by the former. *Dittman v. Distilling Co.*, 64 N. J. Eq. 537 (1903).

<sup>5</sup> Such was the original purpose of the Standard Oil Companies. Mr. John D. Rockefeller on January 10, 1900, before the Industrial Commission of Congress, said in reply to a question as to what are the chief advantages of industrial combination: "All the advantages which can be derived from co-operation of persons and aggregation of capital. Much that one man cannot do alone two can do together, and once we admit

the fact that co-operation, or, what is the same thing, combination, is necessary on a small scale, the limit depends solely upon the necessities of business. Two persons in partnership may be a sufficiently large combination for a small business, but if the business grows or can be made to grow, more persons and more capital must be taken in. The business may grow so large that a partnership ceases to be a proper instrumentality for its purposes, and then a corporation becomes a necessity. In most countries, as in England, this form of industrial combination is sufficient for a business coextensive with the parent country, but it is not so in this country. Our federal form of government, making every corporation created by a state foreign to every other state, renders it necessary for persons doing business through corporate agency to organize corporations in some or many of the different states in which their business is located. Instead of doing business through the agency of one corporation, they must do business through the agencies of several corporations." For a careful and clear statement of the plan of having a parent company own stock in subsidiary companies, see *People v. American Bell Telephone Co.*, 117 N. Y. 241, 244, 255 (1889). A receiver of the parent company will



or for the purpose of exercising the power of eminent domain. Such a company is commonly called a "holding company" and its status is fully discussed elsewhere.<sup>1</sup>

The fact that a New York telegraph corporation, a parent company, owns practically all the stock of an Idaho corporation, does not prevent the latter exercising its power of eminent domain in Idaho.<sup>2</sup> A

not necessarily be appointed receiver of the branch companies. *Evans v. Union Pac. Ry.*, 58 Fed. Rep. 497 (1893). As to the power of one company to acquire the stock of another company see ch. XIX, *supra*. Where a parent company, owning the stock of branch companies, passes into a receiver's hands, and the latter expends money in operating one of the branch companies, he cannot recover it as against a mortgagee of the branch company. The rule is otherwise as to necessary improvements. Coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. *Phinizz v. Augusta*, etc. R. R., 62 Fed. Rep. 771 (1894). Where one street railway owns all the stock of another street railway (excepting five shares, the owner of which does not object), and the former makes a contract authorizing a third street railway to run its cars over the tracks of the company whose stock is so owned, such contract is legal and will be enforced. *South, etc. Ry. v. Second Ave. etc. Ry.*, 191 Pa. St. 492 (1899).

<sup>1</sup> See § 317, *supra*. An American stockholder in an English corporation which owns the entire capital stock of an American brewing company may bring suit against directors of the American company to account for misappropriating its funds with the connivance of the English corporation, and the latter may be made a party and served by publication. *Gordon v. Sorg*, 113 Ill. App. Rep. 522 (1904). Even though an English holding company owns the entire capital stock of a German company and controls its entire business, yet the profits of the German company are not considered profits of the English company under the income tax law,

except so far as they are actually received by the English company. The German company is not a mere alias or trustee or agent for the English company. *Gramophone, etc. Ltd. v. Stanley*, [1906] 2 K. B. 856. Even though one railroad owns all the stock and bonds of a connecting railroad the separate identity of the companies will be considered by a railroad commission in fixing a joint rate. *Hill v. Wadley, etc. Ry.*, 128 Ga. 705 (1907).

<sup>2</sup> *Oregon, etc. R. R. v. Postal, etc. Co. of Idaho*, 111 Fed. Rep. 842 (1901). In a condemnation proceeding instituted by a local telegraph corporation it is no defense that such corporation is a mere "dummy" for a non-resident corporation. *Postal, etc. Co. v. Oregon, etc. R. R.*, 114 Fed. Rep. 787 (1902). The fact that a New York telegraph company owns all the stock of a Utah telegraph company does not prevent the latter exercising the power of eminent domain under the Utah statutes. Moreover, the *de jure* existence of a corporation which is a *de facto* corporation will not be inquired into in condemnation proceedings, unless fraud in its organization is involved. *Postal Tel. etc. Co. v. Oregon, etc. R. R.*, 23 Utah, 474 (1901). A gas company may condemn even though all of its stock is owned by another gas company. *Calor, etc. Co. v. Franzell*, 128 Ky. 715 (1908). The fact that a Colorado telegraph company is but a subsidiary company of a New York corporation, does not prevent the former condemning a right of way on a railroad as allowed by the statutes of Colorado. *Union Pacific R. R. v. Colorado, etc. Co.*, 30 Colo. 133 (1902). A railroad company regularly organized is entitled to condemn a right of way, even though it was organized in the interest of



contract by a subsidiary company is not illegal on the ground that the parent company is avoiding the statutory obligations relative to foreign corporations doing business within the state.<sup>1</sup> Even though a Nebraska railroad corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stockholders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to the federal court.<sup>2</sup> Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.<sup>3</sup>

This general rule, however, like all general rules, has exceptions, and the New York court of appeals stated the exception forcibly as follows: "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves

a coal company which furnished the capital for such railroad. The claim that the railroad company is merely a dummy for the coal company is no defense to the condemnation proceedings. *Kansas, etc. Ry. v. Northwestern, etc. Co.*, 161 Mo. 288 (1901). In *Central R. R. v. Pennsylvania R. R.*, 31 N. J. Eq. 475, 494 (1879), the defendant was enjoined from building another railroad by means of an independent corporation operated by "dummies." The court said: "A corporation cannot in its own name subscribe for stock or be a corporator under the general railroad law, nor can it do so with a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock." Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. *Southern Kansas, etc. R. R. v. Towner*, 41 Kan. 72 (1889); *Atchison, etc. R. R. v. Cochran*, 43 Kan. 225 (1890). In *Nebraska* a "dummy" domestic corporation cannot condemn land for a foreign corporation. *Koenig v. Chicago, etc. R. R.*, 27 Neb. 699 (1889). Condemnation proceedings by a railroad cannot be defeated on the ground that all the stockholders are also stockholders in a granite company, which will be chiefly

benefited by the proposed railroad. *Madera Ry. v. Raymond, etc. Co.*, 3 Cal. App. 668 (1906). A property owner may enjoin condemnation proceedings by a railroad company on the ground that it was not intended to be for public use, but was merely a dummy for a coal company. *Harman v. Caretta Ry.*, 61 W. Va. 356 (1907).

<sup>1</sup> *Cunningham v. City of Cleveland*, 98 Fed. Rep. 657 (1899), the court saying: "It is a common plan to have a parent company engaged in a national business of installing local companies and taking stock in the local companies, but they are distinct legal entities, and the interest of the larger company in the smaller is no reason for holding otherwise." Where a railroad company of one state organizes a railroad company in another state to construct and operate a connecting railroad in the latter state, and owns a majority of the stock and bonds of the latter corporation and controls its policy and divides rates on a mileage basis, it will be considered as doing business in the latter state sufficiently to enable a non-resident to bring suit against it in the latter state for an injury occurring outside of the state. *Buie v. Chicago, etc. Ry.*, 95 Tex. 51 (1901).

<sup>2</sup> *Walters v. Chicago, etc. R. R.*, 104 Fed. Rep. 377 (1900); *aff'd*, 186 U. S. 479.

<sup>3</sup> See § 694, *infra*.



to distort or hide the truth.”<sup>1</sup> And again: “The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth.”<sup>2</sup> And the supreme court of the United States has said: “Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it when their interest is adverse their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose.”<sup>3</sup>

The chief application of this statement of law is in cases of fraud,<sup>4</sup> but there is a line of cases which apply this rule where there is no fraud, and where the owner of the stock is held liable merely because he owns all the stock of the corporation. Thus, it has been held that where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock, and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out

<sup>1</sup> *Anthony v. American Glucose Co.*, 146 N. Y. 407 (1895). In connection with the interstate commerce act two corporations may be considered as one, where they have the same interests and are owned by the same officers and stockholders. *United States v. Milwaukee, etc. Co.*, 142 Fed. Rep. 247 (1905), the court saying (p. 255): “When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction, or a mere mental creation; or that the idea of invisibility or intangibility is a sophism. A corporation, as expressive of legal rights and powers, is no more fictitious or intangible than a man’s right to his own home or his

own liberty.” On the final hearing in this case the proof on this point failed. See 145 Fed. Rep. 1007. As regards jurisdiction, the federal courts will sometimes look beyond corporate existence. Hence, where there are two corporations of the same name, chartered in two states, each owning a part of a certain property which is covered by mortgage, the foreclosure decree based on an allegation of diverse citizenship will not be disturbed on the ground that the wrong state was named in the bill as the state in which one of the parties was incorporated. *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188 (1905).

<sup>2</sup> *Seymour v. Spring, etc. Assoc.*, 144 N. Y. 333, 340 (1895).

<sup>3</sup> *McCaskill Co. v. United States*, 216 U. S. 504, 514, 515 (1910), citing the above section.

<sup>4</sup> See § 663, *supra*.



may hold the railroad company liable on the contract, on the principle of a principal being liable on the contracts of its agent.<sup>1</sup> Again where a street railway company organizes a new dummy street railway company and leases all its property to the latter and afterwards takes back the property, it is liable for the latter's debts, especially where the stock of both companies was controlled by the same parties.<sup>2</sup> It has also been held that where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.<sup>3</sup> A corporation organized by a patentee to infringe a patent, which he has sold, is estopped the same as he would be to deny its validity.<sup>4</sup> Where a holding company, the Southern Pacific Co., owns practically all of the stock of a terminal company in Galveston, the Interstate Commerce Commission has jurisdiction over the latter so far as it engages in interstate commerce.<sup>5</sup>

<sup>1</sup> *Interstate Tel. Co. v. Baltimore, etc. Tel. Co.*, 51 Fed. Rep. 49 (1892). Where a promoter organizes a dummy corporation and does business in its name and owns the entire capital stock and gives his own mortgage on its property, the mortgage may be valid. *Fairbanks, etc. Co. v. Coulson, etc. Co.*, 151 Mo. App. 260 (1910). Where a corporation allows its general manager to hold it out as owning and operating a theater and receives the income, it is liable for the debts. *Arkansas, etc. Assoc. v. Higgins*, 96 Ark. 493 (1910).

<sup>2</sup> *Barrie v. United Rys. Co.*, 138 Mo. App. 557 (1909).

<sup>3</sup> *Day v. Postal Tel. Co.*, 66 Md. 354 (1887).

<sup>4</sup> *National, etc. Co. v. International, etc. Co.*, 158 Fed. Rep. 824 (1908). Where persons organize a corporation with a small capital stock to infringe patents, they may be held liable with the corporation. *Crown, etc. Co. v. Brooklyn, etc. Co.*, 190 Fed. Rep. 323 (1911). A patentee being estopped from questioning the validity of patents which he has invented and sold, cannot by organizing a corporation, in which he and his wife own two thirds of the stock, cause such corporation to contest the patents. It also is estopped. *Automatic Switch Co. v. Monitor Mfg. Co.*, 180 Fed. Rep. 983 (1910).

A corporation owning a majority of the stock of another corporation is not liable for infringement of a patent by the latter even though it elects its own officers as directors of the latter. *Westinghouse, etc. Co. v. Allis-Chalmers*, 168 Fed. Rep. 91 (1909).

<sup>5</sup> *Southern Pacific Terminal Co. v. Interstate Com. Com.*, 219 U. S. 498 (1911), the court saying (p. 523): "In opposition to these views appellants urge the legal individuality of the different railroads and the Terminal Company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it." See also § 317, *supra*.



And there are other decisions practically to the effect that the courts will ignore the corporate existence under certain circumstances.<sup>1</sup>

<sup>1</sup> Under the commodities clause of the act of congress of June 29, 1906, prohibiting interstate railroad companies from transporting articles in which they "may have any interest direct or indirect" with certain exceptions, does not prevent a railroad transporting articles manufactured by a corporation in which the railroad owns stock, without regard to the amount of stock held. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 404 (1909); the court holding also (p. 413) that if the words quoted above referred to legal or equitable interest in the commodities, they did not include commodities owned by the separate corporation. In the case *United States v. Lehigh Valley R. R.*, 220 U. S. 257, 274 (1911), the court held that while the act of congress prohibiting a railroad from dealing in commodities to carriers, did not prevent its owning stock in a corporation that dealt in such commodities, yet where the railroad owned the entire capital stock of such company, "the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause." Where residents of Pennsylvania in order to finance Pennsylvania corporations organize a holding company in Delaware, and that company carries on its financial operations in Pennsylvania without qualifying under the Pennsylvania statutes as a foreign corporation, no business being done by the Delaware corporation anywhere else, the Delaware corporation cannot enforce in the bankruptcy court in Pennsylvania notes which one of the Pennsylvania corporations had given to it. *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. Rep. 310 (1909), the court saying

(p. 313): "Courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms." Where a person is employed as general manager of one of two allied corporations, but the written contract is made with the other, he may hold the former liable. *Blair v. Kingman, etc. Co.*, 82 Neb. 773 (1908). Where an insurance company owns a majority of the stock of a trust company and causes individuals for its accommodation to guarantee notes, and they are sued thereon, by the trust company, the court may compel the insurance company to pay the debt. *Hyde v. Equitable, etc. Soc.*, 61 N. Y. Misc. Rep. 518 (1908). Where all the stock of a dissolved corporation is owned by one family and one of their number contracts to sell its land as trustee, the contract is binding although another trustee who was a director knew nothing about it, he having sold all his stock. *Heenan & Finlen v. Parmele*, 80 Neb. 514 (1908). A purchaser of electric power from a subsidiary company may offset the debt by its claim against the parent company for goods delivered where the former company supposed that it was dealing with the two companies as one institution, and the parent company had expressly agreed that the accounts should be offset. *Gay v. Hudson River, etc. Co.*, 187 Fed. Rep. 12 (1911). The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation liable, and one who pays the tax may have contribution from the others. *Richter v. Henningsan*, 110 Cal. 530 (1895). Where one person owns the entire capital stock his admissions are binding on the corporation. *Rutz v. Obeare*, 115 Pac. Rep. 67 (Cal. 1911). Where a constitution prohibits a corporation from holding for more than five years any real estate which it does not need in its business, this cannot be avoided by a railroad company organ-



A judgment against individuals canceling land grants for fraud is binding on a corporation to which they turned over such grants in ex-

izing a land company to hold such real estate. The state may escheat the land. *Commonwealth v. Louisville, etc. Co.*, 139 Ky. 689 (1909). Under the Kentucky constitutional provision that land cannot be held by a corporation more than five years unless proper or necessary for its business, a lot conveyed by a railroad company, reserving a purchase money mortgage for the price, to a company whose stock was originally held by the railroad and which has been distributed among the stockholders, is subject to escheat. *Louisville, etc. R. R. v. Commonwealth*, 151 S. W. Rep. 934 (Ky. 1912). A broker employed to sell the property of a corporation may collect his commission if the purchaser buys all the stock of that corporation. *Benedict v. Dakin*, 243 Ill. 384 (1910). A person owning all the stock and controlling the board of directors of an electric light company and who causes it to sell its property, is really the owner and hence an easement which that company had over his private property for its poles and wires passes with the conveyance. *Keokuk Electric, etc. Co. v. Weismann*, 146 Iowa, 679 (1910). Where an option is assigned to a person to be paid for if exercised, payment must be made if the person organizes a corporation to which the option is then assigned and takes all its stock and causes it to exercise the option. *Thompson Co. v. Pennebaker*, 173 Fed. Rep. 849 (1909). Work by a stockholder on claims of his mining company will be counted to prevent a forfeiture of the claims. *Wailles v. Davies*, 164 Fed. Rep. 397 (1908). For an interesting discussion of the question as to why the artificial existence of the corporation, as distinguished from that of stockholders, should be ignored, see *Cincinnati, etc. Co. v. Hoffmeister*, 62 Ohio St. 189 (1900); and *Andres v. Morgan*, 62 Ohio St. 236 (1900). Where all the stockholders of a company transfer their stock to a trustee and receive in exchange therefor bonds of the company guaranteed by another company and secured by such stock,

the latter company, being the owner of the equity of redemption, may be considered as practically owning the property of the former company. *Chicago, etc. Co. v. City of Chicago*, 199 Ill. 579 (1902). A company owned entirely by bankrupts, the business having been intermingled, may be able to claim goods on hand at the time of bankruptcy. *Ludvig v. American Woolen Co.*, 188 Fed. Rep. 30 (1911). Where, in order to develop the property of a land company, its stockholders organize a railroad company and also a light, heat, and power company, the respective interests of the various companies being practically the same, it is legal for the land company to indorse and guarantee the notes of the other companies, the court saying, "for purposes of equity, courts will look behind that artificial personality, and, if need be, ignore it altogether, and deal with the individuals who constitute the corporation; and that is what, in justice and fairness, must be done here, where practically the same persons were associated together for one common purpose, under three or four different names, corresponding to the several branches of the single common enterprise, and acted together only formally as distinct organizations, each devoted to the corporate pursuit of its appropriate branch." *Kendall v. Klappertal Co.*, 202 Pa. St. 596 (1902). Where a person, who is carrying on a dairy business, buys all the stock of a dairy company and becomes its general manager and conducts both businesses the same as one, the bank in which the accounts are kept is not responsible for the funds of the dairy company being transferred to him. *Bank of New South Wales v. Goulburn, etc. Co.*, [1902] App. Cas. 543. Where a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, the object of the whole transaction being to conceal



change for its stock, even though other people had purchased stock relying on such grants, the existence of the corporation being unknown

the amount of money the bank has invested in real estate, the transaction is fraudulent as to creditors of the bank and the real estate may be attached as the property of the bank. *Watson v. Bonfils*, 116 Fed. Rep. 157 (1902). Where a railroad company owns all the stock of certain other railroad companies and all the property is operated as one system, the parent company may be liable as principal for the negligence of one of the subordinate companies causing injury to an employee of the latter. *Lehigh, etc. R. R. v. Delachesa*, 145 Fed. Rep. 617 (1906). Where a company operating a plant controls a company owning the plant, the former company is liable for damages due to a boiler exploding through its negligence. *James McNeil, etc. Co. v. Crucible, etc. Co.*, 207 Pa. St. 493 (1904). For the purposes of income tax, a Cape Colony corporation resides in England, if a majority of its directors reside in England and the important business of the company is transacted in England, except the actual mining operations. *De Beers, etc. Mines, Ltd. v. Howe*, [1906] App. Cas. 455. A railroad corporation that has been operating a railroad cannot avoid liability for accidents on the ground that it leased the same to another company, such other company being a mere nominal corporation and the interest being the same. *Chesapeake & Ohio R. R. v. Howard*, 14 App. Cas. Dist. of Col. 262 (1899). A financing company may be liable for the obligations of a construction company to contractors constructing a railroad, where the financing company practically takes charge. *Alabama Security Co. v. Dewy*, 156 Ala. 530 (1908).

Where one corporation owns all the stock and purchases all the property for another corporation, and employs a person to do work for the latter, it is liable for his wages on the ground that the subordinate company was merely an agency or instrumentality for carrying out the purposes

of the former. *Kelly v. Ning, etc. Assoc.*, 2 Cal. App. 460 (1905). A subsidiary company may be liable to a lawyer for services, even though he has been paid by the parent company for services rendered to the latter. *Trimble v. Texarkana, etc. Ry.*, 199 Mo. 44 (1906). Where a railroad pays for the construction of another railroad company's line on an understanding that they should be consolidated and assumes all the obligations of the latter and practically owns all its stock and takes possession and operates it, the two roads may be considered as having been consolidated, sufficiently at least to come within the meaning of a statute authorizing the consolidation of certain consolidated companies. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). A railroad contractor in suing the construction company may join also the railroad company on an allegation that the construction company is a mere dummy of the railroad company. *O'Brien v. Champlain, etc. Co.*, 107 Fed. Rep. 338 (1901). Where a corporation owns and operates a hotel and then leases it to another corporation without notice to the employees, and the latter fails, the former may be held liable to them. *Oriental, etc. Co. v. Barclay*, 25 Tex. Civ. App. 543 (1901). Where one corporation owns all the stock of another and the business is intermingled they may be considered as one under the bankrupt act. *In re Southwestern, etc. Co.*, 133 Fed. Rep. 568 (1904). Where the only stockholders in a corporation are two men and their wives, and the corporation is merely an instrument for their business, and they are adjudged bankrupts, the assets of the corporation belong to them and may be administered in the bankruptcy court. *In re Horgan*, 97 Fed. Rep. 319 (1899). Where the president owns all or nearly all of the stock and mingles his business with that of the company, and causes a debtor of the company to make a payment on his indi-



at the time of the suit.<sup>1</sup> Where one corporation is merely a "dummy" of another corporation, a mortgage on the property of the latter may

vidual debt to a bank, the payment is legal. *Brunswick, etc. Co. v. Nat. Bank, etc.*, 99 Fed. Rep. 635 (1900); s. c., 192 U. S. 386. Where one person is president and general manager and owns all the stock, a note executed by him in the name of the corporation is valid, the proceeds being used in the corporate business. *Africa v. Duluth, etc. Co.*, 82 Minn. 283 (1901). A promoter's agreement involving the getting in to a new organization of many properties is satisfied as to one property if ninety-five per cent. of the stock of the latter is obtained. *Jewell v. McIntyre*, 33 N. Y. Misc. Rep. 26 (1900). Where a person has turned in securities under a plan of consolidation which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. *Jewell v. McIntyre*, 62 N. Y. App. Div. 396 (1901); *aff'd*, 172 N. Y. 638. Where a person owns the entire capital stock of a corporation and contributes money to it, by reason of its capital stock being impaired, and then sells all the stock, he cannot claim that the corporation owes him the money so contributed, such money having been charged by him on the books to profit and loss. *Times, etc. Co. v. Given*, 106 Fed. Rep. 253 (1900); *aff'd*, 114 Fed. Rep. 92. Even though two persons own the entire

capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. *Saranac, etc. R. R. v. Arnold*, 167 N. Y. 368 (1901). Where a partnership owns all the stock of a corporation which was organized for the purpose of holding timber lands, the court in appointing a receiver of the partnership may ignore the incorporation and may authorize the receiver to take possession of the property of the corporation, it being merely an organization for convenience. *Cole v. Price*, 22 Wash. 18 (1900). Where an Arkansas mercantile company and an Ohio real estate company are practically one company, having the same stockholders and officers, two contracts between a third person and each of them may be considered as one contract, where practically two parts of the same transaction are involved. *Bloch, etc. Co. v. Metzger*, 70 Ark. 232 (1901). A railroad company owning practically all the stock of another company may lease the line of the latter company to another company. *Chicago, etc. Ry. v. Union Pac. Ry.*, 47 Fed. Rep. 15 (1891). Where a bank buys wall-paper at a sheriff's sale and organizes a corporation to sell the paper, all the stock of the corporation being owned by the bank, and guarantees debts thereafter incurred by such corporation, the bank is liable on such debts. *American Nat. Bank v. National Wall-Paper Co.*, 77 Fed. Rep. 85 (1896). Where the contractor to construct the road is merely a "dummy" for the officers and stockholders, and there is evidence that the company's name and credit were used to construct the road, it is for the jury to say whether the company is liable for the debts incurred by the contractor

<sup>1</sup> *Linn, etc. Co. v. United States*, 196 Fed. Rep. 593 (1912).



attach to property of the former, even in priority to a new mortgage on the property of the former.<sup>1</sup> The vendor's lien on land for the unpaid

in construction. *Hirschmann v. Iron Range, etc. R. R.*, 97 Mich. 384 (1893). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. *St. Louis, etc. R. R. v. Kirkpatrick*, 52 Kan. 104 (1893). A firm, one of the members of which owns all the stock of a corporation which owes money to such firm, cannot participate with other creditors of the corporation in the distribution of the latter's assets, where the firm have treated the debt as the individual debt of that member of the firm. *Pott v. Schmucker*, 84 Md. 535 (1897). A contract between three local companies, by which one runs over the tracks of another for a consideration paid to the third, is legal as to the second corporation, where such second corporation is a mere dummy of the third corporation and the earnings of both corporations went together. *Union, etc. Ry. v. Chicago, etc. Ry.*, 163 U. S. 564, 592 (1896). Under the usual contract, by which a construction company takes all the stock and bonds and does all the work, and the railroad company is dormant until the road is finished, a creditor of the construction company may file a lien, under the statute, the same as though he furnished the labor and materials to the railroad company itself. *McDonald v. Charleston, etc. R. R.*, 93 Tenn. 281 (1893). If one person buys all the stock of another company, it thereby becomes dormant, and he is liable for the debts incurred thereafter, except as to those debts which were incurred on the credit of the company only. *Louisville Banking Co. v. Eisenman*, 94 Ky. 83 (1893). Under a constitutional provision that conveyances to a corporation, a majority of the

stock of which is held by aliens, shall be void, the attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such majority having since that time passed into alien hands. *State v. Hudson Land Co.*, 19 Wash. 85 (1898). Where a manufacturing company sells its patents, etc. to a holding company in consideration of stock of the latter, under a plan for controlling the patents and business in that line of business, this is entering a combination within the meaning of a contract of the former by which royalties were to be paid to another corporation. *Brownsville Glass Co. v. Appert Glass Co.*, 136 Fed. Rep. 240 (1905). Where a telephone company agrees to pay to another company a certain percentage of all rentals received on telephones which are leased, and the former company grants exclusive licenses in exchange for stock of still other companies, such stock is in the nature of a rental and is to be included in the contract. *Western, etc. Co. v. American, etc. Co.*, 125 Fed. Rep. 342 (1903). A contract to pay twenty per cent. of rentals or royalties on leases or licenses of telephones applies to stock in subsidiary companies received in exchange for a lease or license for telephones. *Western Union Tel. Co. v. American Bell Tel. Co.*, 187 Fed. Rep. 425 (1911), aff'd, 203 Fed. Rep. 785. The right of one of the owners of a mining claim to forfeit the interest of his co-owners for failure to contribute to certain work is not lost, even though the former conveys the property to a corporation for stock, it appearing that the corporation joined with him in signing and serving the notice. *Badger, etc. Co. v. Stockton, etc. Co.*,

<sup>1</sup> *Central T. Co. v. Kneeland*, 138 U. S. 414 (1891). Where a construction company owns all the stock of a railroad company a court of equity

may consider the two as one in determining priority of liens. *United States, etc. Co. v. Delaware, etc. Co.*, 112 S. W. Rep. 447 (Tex. 1908).



purchase price is good as against a corporation which the vendee forms to take over the land, the directors and stockholders being dummies, and all the stockholders having knowledge of the lien.<sup>1</sup> Where a partition suit has been instituted and the defendant then forms a corporation to buy the property and issue stock to him in payment therefor, the corporation is not a *bona fide* purchaser.<sup>2</sup> An attorney may be disbarred for organizing a sham corporation without capital or business, but for the purpose of bringing suits in the United States court where he brings suits in its name in the state court after it has been adjudged illegal by the United States court.<sup>3</sup>

There is a line of cases holding that, by agreement between all the stockholders, the assets of a private corporation may be distributed among the stockholders, without formal corporate action, or may be used for *ultra vires* purposes by unanimous consent, and that all this is legal if corporate creditors are not injured, and the state does not object.<sup>4</sup> It is to be borne in mind, however, that these decisions arose out of unusual circumstances and hence are applicable only to cases of unusual equitable considerations.

The liability of a corporation on the obligations of another corporation whose entire assets it purchases at private sale,<sup>5</sup> or at judicial

139 Fed. Rep. 838 (1905). A railroad company which acquires all the stock of another railroad company and then files a certificate with the secretary of state under the New York statute, which prescribes that thereupon the former succeeds to the property of the latter, is practically dissolved. *Rochester Railway v. Rochester*, 205 U. S. 236 (1907), *aff'd* 182 N. Y. 116. A domestic corporation cannot obtain a patent to a mining claim under the federal statutes unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. *Thomas v. Chisholm*, 13 Colo. 105 (1889). As to the power of one corporation to buy the stock of other corporations, see §§ 315-317, *supra*. On this general subject see also § 709, *infra*.

<sup>1</sup> *Finnell v. Finnell*, 156 Cal. 589 (1909).

<sup>2</sup> *Mound City Co. v. Castleman*, 177 Fed. Rep. 510 (1910); *aff'd*, 187 Fed. Rep. 921.

<sup>3</sup> *Gelders v. Haygood*, 182 Fed. Rep. 109 (1910).

<sup>4</sup> See §§ 6, 546, 641, *supra*, and § 671, *infra*. The court may look behind the corporate existence when it is necessary to do so, in order to do equity. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (1903), involving a suit to recover back dividends, the suit being based on technicalities which were inequitable. Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockholders and officers. *Leigh v. Kewanee, etc. Co.*, 127 Fed. Rep. 990 (1904). And where a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892).

<sup>5</sup> See § 672, *infra*.



sale,<sup>1</sup> is considered elsewhere, such a purchase being different from a purchase of the stock of such other corporation.

§ 665. *Participation, ratification, and laches as a bar to stockholders' complaints.* — This subject is considered elsewhere.<sup>2</sup>

§ 666. *Parties, pleadings, etc.* — This subject also is considered elsewhere.<sup>3</sup>

<sup>1</sup> See § 890, *infra*.      <sup>2</sup> See ch. LXIV, *infra*.      <sup>3</sup> See ch. XLV, *infra*.



## CHAPTER XL.

### ULTRA VIRES ACTS AND CONTRACTS—IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE IN EXCESS OF THE CHARTER POWERS OF THE CORPORATION, DIRECTORS, OR STOCKHOLDERS.

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| <p>§ 667. Meaning of the term <i>ultra vires</i>.<br/>         668. Method of treatment of the subject.<br/>         669. A stockholder may object to an <i>ultra vires</i> act.<br/>         670. Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.<br/>         671. Sale of corporate property to another corporation in exchange for stock and bonds of the latter — Distribution of such stock and bonds.<br/>         672. Corporate creditors' rights where the corporation sells all its property to another corporation for stock of the latter — Rights and remedies of creditors of an individual or partnership, all of whose assets are transferred to a corporation in exchange for stock or bonds.</p> | <p>§ 673. A corporation taking over all the property of another corporation may be liable for the debts of the latter.<br/>         674. Rights and liabilities of mortgagees of a corporation that purchases property and issues stock in payment therefor.<br/>         675-677. Consolidations, leases, and sales of railroads.<br/>         678. A corporation cannot be a partner in a partnership, unless specially authorized by statute.<br/>         679. A corporation cannot be an executor or administrator or trustee, unless expressly authorized by charter.<br/>         680. Stockholder's right to prevent the corporation from undertaking a new business.<br/>         681. Miscellaneous <i>ultra vires</i> acts — Enforcement of <i>ultra vires</i> contracts.<br/>         682. Personal liability of the directors and officers for <i>ultra vires</i> and other acts.</p> |
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§ 667. *Meaning of the term ultra vires.* — The term *ultra vires*, as used in this treatise, means any act of a corporation which the corporation is not authorized to do, either by its express or implied powers. This term has been objected to as having no fixed and clear meaning, and to some extent the objection is reasonable. There is no other term, however, that has acquired the significance, general use, and peculiar meaning that are attached to the words *ultra vires*; and consequently the term has acquired a permanent place in the vocabulary of corporation law.<sup>1</sup>

<sup>1</sup> "The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action." *Leslie v. Lorillard*, 110 N. Y. 519 (1888). For various definitions of the words *ultra vires*, see *Pierce, Railroads* (2d ed.), p. 516; *Taylor v. Chichester, etc. Ry.*, L. R. 2 Exch. 356,



§ 668. *Method of treatment of the subject.* — There has been extreme difficulty and confusion in defining the validity, effect, rights, and remedies of an *ultra vires* act. The attempt to formulate general rules on this subject has only added to the confusion.<sup>1</sup> Accordingly,

378 (1867); Bissell *v.* Michigan, etc. R. R. Cos., 22 N. Y. 258, 293 (1860); National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875); Shrewsbury *v.* North Staffordshire Ry., L. R. 1 Eq. 593 (1865); Nassau Bank *v.* Jones, 95 N. Y. 115 (1884); Green's Brice's *Ultra Vires* (2d ed.), 35; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 579 (1869); McPherson *v.* Foster, 43 Iowa, 48, 64, 65 (1876); Ashbury, etc. Co. *v.* Riche, L. R. 7 H. L. 653, 672 (1875); 2 Kent's Com. \*300 (12th ed.), note. *Ultra vires* contracts are contracts which are beyond the statutory powers of the corporation, and not contracts expressly prohibited by statute and contrary to the public policy of the legislature. Strickland *v.* National Salt Co., 79 N. J. Eq. 182 (1911). Two difficulties have arisen in agreeing upon a definition of this term. First, the term *ultra vires* was often used to designate not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy, and are void whether done by corporations or individuals. Such acts when done by corporations are now termed "illegal" acts, and the term *ultra vires* is not used so as to include them. Second, the term *ultra vires* has been applied to acts which are beyond the powers of the directors, but within the powers of the majority of the stockholders. This use of the term, however, is now discarded, and it is used to designate acts which are beyond the powers of a majority of the stockholders as against a minority; or are beyond the powers of the stockholders acting unanimously as against the state. In Taylor *v.* Chichester, etc. Ry., L. R. 2 Exch. 356, 378 (1867), Blackburn, J., said: "I think it very unfortunate that the same phrase *ultra vires* has been used to express both an excess of authority as against the share-

holders, and the doing of an act illegal as being *malum prohibitum*; for the two things are substantially different; and I think the use of the same phrase for both has produced confusion." *Ultra vires* in a primary sense is beyond the chartered purposes of the corporation, but in a secondary sense is an act done without the consent of certain persons or an act not to be exercised in the particular manner, or for a specific purpose, although within the scope of the general powers. The former acts are void, but the latter may not be. Wykes *v.* City Water Co., 184 Fed. Rep. 752 (1911). Even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue. Anderson *v.* Midland Ry., [1902] 1 Ch. 369.

<sup>1</sup>For instance, the general rule that "any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law," etc. (Perrine *v.* Chesapeake, etc. Co., 9 How. 172 — 1850), is sound law, and has been laid down in many cases; but as a matter of fact, this principle gives little light or satisfaction to the bench, bar, or layman. Each case turns largely on its own facts. Moreover, the decision turns largely on who sues, who is sued, what relief is sought, and whether the act has been performed by one side or not. General rules cannot clearly make the distinctions. The old ideas have been changed. Indeed it is refreshing to hear from that great judge, Mr. Justice Miller, such sound sense as this: "The truth is, that, with the great increase in corporations in very recent times and



the plan of explanation pursued in this work is to state those acts which have been adjudged *ultra vires*,<sup>1</sup> and also those acts which have been adjudged to be *intra vires*.<sup>2</sup> It must be borne in mind that nearly every corporate act is *ultra vires* or *intra vires* in a broad sense. It was from this standpoint that Professor Brice's work on *Ultra Vires* was written. The plan of this book, however, has been to divide the subject into other and more practical headings, such as "preferred stock" and the various other chapter headings herein contained, rather than to group everything under the heading of *ultra vires* or *intra vires*. Most corporate acts, whether *ultra vires* or *intra vires*, have been or will be considered in other parts of this book. Hence only such subjects are treated here as are not extensive enough or important enough for separate chapters.

In general, it remains to add that at common law an *ultra vires* act may be objected to by the state, a stockholder, the corporation, or the person contracting with the corporation; and since often one of these parties may sustain the objection, where the others are not allowed to do so, it is necessary to consider always the four questions: Who brings the suit; who is sued; what act is complained of; and what performance has already been had. It rarely happens that the state objects to an *ultra vires* act. That it has a right to object by *quo warranto* is undoubted.<sup>3</sup> The question of when and whether the stockholder must first apply to the directors or stockholders to remedy the wrong before he brings suit,<sup>4</sup> and also the question of when a ratification of the act by the other stockholders is a bar,<sup>5</sup> is considered elsewhere.

The tendency is to limit the application of the doctrine of *ultra vires*, especially in regard to partially executed contracts. In this respect the New York court of appeals is in conflict with the supreme court of the United States.<sup>6</sup>

§ 669. *A stockholder may object to an ultra vires act.* — That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly imbedded in the jurisprudence of modern times.<sup>7</sup> Upon this principle of law rest the

in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers." *Salt Lake City v. Hollister*, 118 U. S. 256 (1886). See also *Pennsylvania R. R. v. Keokuk, etc. Co.*, 131 U. S. 371, 384, 389 (1889); *Stourbridge*

*Canal v. Wheeley*, 2 Barn. & Ad. 792 (1831).

<sup>1</sup> This is the subject of this chapter.

<sup>2</sup> This is the subject of the following chapter, XLI.

<sup>3</sup> See § 635, *supra*.

<sup>4</sup> See § 740, *infra*.

<sup>5</sup> See §§ 649, 652, 662, and ch. XLIV.

<sup>6</sup> See § 681, *infra*.

<sup>7</sup> Quoted and approved in *Harding v. American, etc. Co.*, 182 Ill. 551 (1899). See §§ 492-496, *supra*.



stability, permanence, and honesty of management of many corporations, particularly those of railroads, and from it arises much of the confidence, safety, and protection of the stockholder himself. It was first promulgated in America, in 1820, in *Livingston v. Lynch*,<sup>1</sup> and was applied to corporations in *Hartford & New Haven Railroad Company v. Crosswell*,<sup>2</sup> and in England, in 1824, in *Natusch v. Irving*.<sup>3</sup> These cases have been followed by a long list of supporting decisions. They were the first to establish clearly the doctrine that any act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the express or implied powers of the charter of incorporation or of association — in other words, any *ultra vires* act — is a breach of the contract between the corporation and each one of its stockholders, and that consequently any one or more of the stockholders may object thereto and compel the corporation to observe the terms of the contract as set forth in the charter.<sup>4</sup>

§ 670. *Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.* — Ever since the case of *Abbot v. American Hard Rubber Company*,<sup>5</sup> the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property where the corporation is a solvent, going concern.<sup>6</sup> Thus as against

<sup>1</sup> 4 Johns. Ch. 573.

<sup>2</sup> 5 Hill, 383 (1843).

<sup>3</sup> 2 Cooper's Ch. 358, by Lord Eldon; also reported in *Gow on Partnership*, 398. Thus, Lord Chancellor Campbell, in *Simpson v. Westminster, etc. Co.*, 8 H. L. Cas. 712 (1860), said: "I bow to the authority of *Natusch v. Irving*. . . . The funds of a joint-stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires*; and, although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction." In *Pickering v. Stephenson*, L. R. 14 Eq. 322 (1872), the court said: "It is difficult to conceive any system of jurisprudence in which *Natusch v. Irving*, would have been differently decided."

<sup>4</sup> Quoted and approved in *Harding v. American, etc. Co.*, 182 Ill. 551 (1899). A stockholder may file a bill

to enjoin or set aside an *ultra vires* act, even though every other stockholder is opposed to him. *Hoole v. Great Western Ry.*, L. R. 3 Ch. App. 262 (1867); *Beeman v. Rufford*, 1 Sim. (N. S.) 550 (1851), where a majority of the stockholders had even voted to ratify the illegal act; *Bagshaw v. Eastern Union Ry.*, 19 L. J. (Ch.) 410 (1850), aff'g 7 Hare, 114; *Hare v. London, etc. Ry.*, 30 L. J. (Ch.) 817, 829 (1861); s. c., 2 Johns. & H., 80; *Winch v. Birkenhead, etc. Ry.*, 5 De G. & Sm. 562 (1852). A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government. *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429 (1895).

<sup>5</sup> 33 Barb. 578 (1861). See also *Abbot v. American Hard Rubber Co.*, 4 Blatchf. 489 (1861); s. c., 1 Fed. Cas. 13.

<sup>6</sup> Quoted and approved in *Smith v. Stone*, 128 Pac. Rep. 612, 617 (Wyo. 1912). *People v. Ballard*, 134 N. Y.



the dissent of a stockholder two New Jersey leather companies cannot consolidate unless the statute expressly authorizes such consolidation.

269 (1892), reviewing the cases (rehearing denied, 136 N. Y. 639); *Re Sovereign L. Ass. Co.*, L. R. 42 Ch. D. 540 (1889); *aff'd*, [1892] 3 Ch. 279. See also *Smith v. New York, etc. Co.*, 18 Abb. Pr. 419, 435 (1865); *Rollins v. Clay*, 33 Me. 132 (1851); *Barclay v. Quicksilver Min. Co.*, 9 Abb. Pr. (N. S.) 283 (1870); *Copeland v. Citizens' Gas Light Co.*, 61 Barb. 60 (1871); *Conro v. Port Henry Iron Co.*, 12 Barb. 27 (1851); *Astor v. Westchester Gas Light Co.*, 33 Hun, 333 (1884); *Bird v. Bird's, etc. Co.*, L. R. 9 Ch. App. 358 (1874); *Adrianee v. Roome*, 52 Barb. 399 (1868); *Brady v. New York*, 16 How. Pr. 432 (1857); *Middlesex R. R. v. Boston, etc. R. R.*, 115 Mass. 347 (1874). *Cf. Dana v. Bank of U. S.*, 5 Watts & S. (Pa.) 223, 247 (1843); *Union Bank v. Ellicott*, 6 Gill & J. (Md.) 363 (1834). See also *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607 (1882); *Balliet v. Brown*, 103 Pa. St. 546 (1883); *Gray v. New York, etc. Steamship Co.*, 5 Thomp., 3 Hun, 383. But see *Hutchinson v. Green*, 91 Mo. 367 (1886), and *Mills v. Hurd*, 29 Fed. Rep. 410 (1887), relative to unincorporated associations. A stockholder of a manufacturing company may enjoin a lease of all its property and business to another corporation for twenty-five years at a rental equal to one half of the profits of the business. *Small v. Minneapolis, etc. Co.*, 45 Minn. 264 (1891). The board of directors have no power to sell all the property of the company without action by the stockholders. *Consolidated, etc. Co. v. Nash*, 109 Wis. 490 (1901). A stockholder may cause to be set aside a sale of all the property of the corporation at an inadequate price to another corporation having the same officers and directors. *Hinds v. Fishkill, etc. Co.*, 96 N. Y. App. Div. 14 (1904). Even though a suit in New Jersey by a stockholder in a Maine corporation to enjoin a New Jersey corporation from taking over the assets of the Maine corporation joins the Maine corporation as a party defendant, and the latter is

not served, yet the court may grant relief. *Wilson v. American, etc. Co.*, 67 N. J. Eq. 262 (1904). The minority may cause to be set aside a sale of all the corporate assets to a syndicate representing the majority. *Blais v. Brazeau*, 25 R. I. 417 (1903). A stockholder may file a bill to set aside a sale of the entire assets of the company, which is solvent and a going concern, to another company, and no request to the directors need be made where they authorized the transaction and a majority of the stockholders had ratified it. *Tillis v. Brown*, 154 Ala. 403 (1908). Where a receiver has been appointed at the instance of a minority stockholder on account of the company having sold all its property to another corporation, but the transaction has been undone and canceled, the court should discharge the receiver. *Forrester v. Boston, etc. Co.*, 22 Mont. 430 (1899). A corporation is not bound by a contract for the sale of its property, even though four or five directors and also the owner of the majority of the stock write their names on the contract under the word "accepted." Moreover, the statute of frauds applies to the transaction as affecting real estate. *Taylor v. Scott & Co.*, 149 Mich. 525 (1907). A business corporation cannot sell out a branch of its business at common law, and if it sells it under the New York statute authorizing a sale on a two-thirds vote, a dissenting stockholder may claim the appraised value of his stock. *Matter of Timmis*, 200 N. Y. 177 (1910). A company formed to buy and sell mineral lands may sell all of its land. *Maben v. Gulf, etc. Co.*, 173 Ala. 259 (1911). By unanimous consent stockholders of an Arizona corporation may transfer all its assets to a Nevada corporation, the latter assuming the liabilities and issuing its stock share for share for the old stock, and any stockholder who votes for it cannot thereafter object, but a stockholder who has merely given a proxy is not bound where the stockholder did not



Hence where the main purpose of one company, in which the complainant is a stockholder, is to manufacture and sell leather, with other incidental

know of the proposed action, even though the proxy votes for the change and the written proxy gave to him all the authority that the stockholder "would possess if personally present at such meeting," those words having reference to ordinary business only. Such a stockholder is not bound, even though the Arizona corporation is dissolved, inasmuch as such a reorganization is giving away corporate assets to a new corporation or compelling him to be a party to a continuation of the business by a new corporation. He may cause the reorganization to be set aside, even though the Nevada corporation is not a party. *Farish v. Cieneguita, etc. Co.*, 12 Ariz. 235 (1909). Where a corporation has sold all its property, and all the stockholders but one have transferred their stock and received pay therefor, he cannot sue for his share because the transaction is a division of the capital stock prohibited by the California statutes, and his remedy is to undo the transaction. *Tapscott v. Mexican, etc. Co.*, 153 Cal. 664 (1908). Where one corporation owns a majority of the stock of another and causes the latter to sell its property to the former, the minority stockholders if they all agree may have the sale set aside, but if only a few are objecting a court of equity may order a valuation to be made of the minority stock. *Binney v. Cumberland, etc. Co.*, 183 Fed. Rep. 650 (1910). A trustee in bankruptcy of a stockholder may file a bill to set aside an alleged illegal transfer of the corporate assets. *Greenhall v. Carnegie Trust Co.*, 180 Fed. Rep. 812 (1910). Ordinarily the directors of a company have no power to lease its property for ten years. *Kelley v. Forney*, 84 Kan. 297 (1911). The directors may authorize a five-year lease, even though the by-laws require all conveyances to be approved by the stockholders. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911). A lease of all the corporate property made by a majority vote of the stockholders and directors may be set

aside at the instance of a dissenting stockholder where the lessee owned a majority of the stock and controlled the board of directors of the lessor. *Parsons v. Tacoma, etc. Co.*, 25 Wash. 492 (1901). A transfer of a lease of property by the general manager, who has exercised all the powers of the company, is valid, even though there is no vote of the stockholders, where such lease does not constitute all the assets of the corporation and the transaction was fair in itself. *Pennsylvania, etc. Co. v. Pure-Oil Co.*, 195 Pa. St. 388 (1900). A member of a mutual insurance company may enjoin the company from transforming itself into a joint-stock company. *Schwarzwaelder v. German Ins. Co.*, 59 N. J. Eq. 589 (1899). In the case *Arents v. Blackwell's, etc. Co.*, 101 Fed. Rep. 338 (1900), where the holders of 159,769 shares out of 160,000 shares of the stock of a tobacco company wished to accept the offer of another company to buy it out for \$2,800,000, and a person had purchased one share for the purpose of stopping the sale and having the charter repealed, the court appointed a receiver to sell the property as preliminary to a dissolution and distribution of the assets. Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association, and sells it out to a corporation organized by himself, the minority stockholders of the association may compel him to account for the property. As regards the person to whom the stock was issued, however, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. *Booth v. Dodge*, 60 N. Y. App. Div. 23 (1901). In the case *De La Vergne, etc. Co. v. German, etc. Inst.*, 175 U. S. 40 (1899), a contract was made by which the president of an Illinois manufacturing corporation sold all its assets to a rival New York corporation, and all the shares of stock in the Illinois corporation were



purposes, and the other company has very much broader powers, even though in the same line of business, a statute authorizing consolidation

also delivered to the New York corporation. The court held the transaction to be illegal on the ground that the president was not authorized to sell the assets, and that on the other hand the New York corporation was prohibited by its charter from purchasing stock in other corporations. A mining corporation may at common law lease its property for five years for a rental, payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. *Hennessy v. Muhleman*, 40 N. Y. App. Div. 175 (1899). A receiver was appointed at the instance of minority stockholders, under the Louisiana statutes, in the case *Davies v. Monroe, etc. Co.*, 107 La. 145 (1901), where the majority were about to sell out an electric-light and water-works plant to a foreign corporation controlled by the president, at a price less than the debts, and the president, in addition to his salary, had been charging for traveling expenses. A sale of all the corporate property to an individual who purchases in good faith cannot be set aside by the corporation as *ultra vires*. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869). An injunction against transferring all the property to another corporation will not be granted where only a leasing of part of the property is contemplated. *Small v. Minneapolis, etc. Co.*, 10 N. Y. Supp. 456 (1890). A vendee of all the property of a corporation cannot avoid the purchase on the ground that the stockholders had not assented thereto. *Stokes v. Detrick*, 75 Md. 256 (1892). A charter cannot be assigned. Only the property or shares of stock can be assigned. *Welch v. Old Dominion, etc. Co.*, 10 N. Y. Supp. 174 (1890). Directors who are merely vested with the ordinary powers of executive management cannot radically affect the charter rights of stockholders (*Baker's Appeal*, 109 Pa. St. 461 (1885), 42 Leg. Int. 226); and hence have no

authority to dispose of the corporate plant by lease, sale, or otherwise. *Martin v. Continental, etc. Ry.*, 14 Phila. 10 (1880). A secession of the majority, carrying corporate funds to a new corporation, is a fraud on the old corporation. *Tomlinson v. Bricklayers' Union*, 87 Ind. 308 (1882). Where all the property of the corporation is sold, together with the stock of the company, the directors cannot subsequently act as a board, they no longer being stockholders, as required by the statute. *Orr, etc. Co. v. Reno Water Co.*, 17 Nev. 166 (1882). In *Citizens' Street R. R. v. Robbins*, 144 Ind. 671 (1896), the administratrix had illegally sold stock to a party, who then caused the corporation to sell all its property to another corporation. A subsequent administrator sued to set aside the sale of the corporate property or for damages. The court held that, as the purchasing corporation had expressly assumed the liabilities of the vendor corporation, it must pay for the value of the stock, inasmuch as the vendor corporation was liable for allowing the transfer. It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto. *Lamkin v. Palmer*, 24 N. Y. App. Div. 255 (1897); *aff'd*, 164 N. Y. 201. The case *Hirsch v. Burns*, 74 L. T. Rep. 769 (1897), was affirmed in 77 L. T. Rep. 377, to the effect that a person having an option to purchase the unissued stock of a company has a claim for damage in case the company sells the business to another company without protecting such option.

Where, by a majority vote of the stockholders, all the assets of a Maine corporation are transferred to a New Jersey corporation, the latter agreeing to pay all the debts and to issue one share of its stock for every two shares of the stock in the former corporation, and for two years the New Jersey corporation fails to pay such debts and the stock of the Maine cor-



of companies having the same or similar business, does not apply, especially so where the consolidation agreement provides that the con-

poration has not been fully delivered, a dissenting stockholder in the Maine corporation may enjoin the New Jersey corporation from disposing of such assets. *Eldred v. American Palace-Car Co. etc.*, 96 Fed. Rep. 59 (1899). In a stockholder's suit to set aside an illegal transfer of the assets of his corporation to another corporation and to compel a retransfer, the persons through whom the property was transferred need not be made parties if the persons in possession of the assets are made parties. *Eldred v. American, etc. Co.*, 99 Fed. Rep. 168 (1900). But the federal court in New Jersey has no jurisdiction of a suit brought by stockholders in a Maine corporation against that corporation and a New Jersey corporation to set aside an illegal transfer of property from the Maine corporation to the New Jersey corporation, the property itself not being in New Jersey. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 455 (1900). Moreover, if the Maine corporation is not served and does not voluntarily appear, final relief cannot be granted and a preliminary injunction will be dissolved. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 457 (1900). In a stockholder's suit to set aside a sale by a Maine corporation of all its assets to a New Jersey corporation, the suit being in New Jersey, the Maine corporation is a necessary party defendant, and a court in Maine will not appoint a receiver of the same for the sole purpose of appearing in the suit in New Jersey. *Hutchinson v. American, etc. Co.*, 104 Fed. Rep. 182 (1900). A New York court will not, at the instance of a New York stockholder in an Arizona mining company, enjoin the company from transferring its property in Arizona, and appoint a receiver thereof, inasmuch as such an injunction will not be effective except with the aid of the Arizona courts, and the question involved is one relating to the internal affairs of the company which should be controlled by the statutes and public

policy of Arizona. The court, however, in the final decree, may set aside illegal sales, even though the property is beyond the jurisdiction. *Hallenborg v. Greene*, 66 N. Y. App. Div. 590 (1901). Where the secretary and treasurer has managed the business as though the property was his own, a sale of all the property with the consent of ninety-five per cent. of the stockholders to an innocent purchaser for value is legal, even though no meeting of the directors or stockholders authorized the sale. *Magowan v. Groneweg*, 14 S. Dak. 543 (1901). See s. c., 16 S. Dak. 29. Where, in a stockholder's suit in the federal court to set aside a sale of all the assets of the company to another company, an injunction has been denied on the giving of a bond, an injunction will not be granted in a similar suit by the same parties in the state court, especially where the purchaser is outside of the jurisdiction of the court, and the advantage to the complainant will be small as compared with the injury to the defendant. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). Where a minority stockholder starts a suit in the federal court to set aside a sale of the property of the company to another corporation, but does not bring in as a party defendant a railway company which is about to issue securities, in accordance with contracts with the two companies, and afterwards starts a suit in the state court for the same relief, and brings in the railway company as party defendant, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). In the case *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being



solidated company shall have all the extensive powers of the second-named corporation.<sup>1</sup> And even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made.<sup>2</sup> Indeed it is very doubtful whether a dissolution can ever be had at common law by a majority of the stockholders where the corporation is a going, prosperous concern.<sup>3</sup> And certainly if the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. This is the law as laid down in the well-considered case of *Kean v. Johnson*.<sup>4</sup>

willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that, while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails, and he may be compelled to take his actual interest. Under the English statute a reorganization is legal if there is no bad faith or fraud, even though the entire property is sold on a cash basis to a new corporation controlled by a majority. *Castello v. London, etc. Co. Ltd.*, 107 L. T. Rep. 575 (1912).

<sup>1</sup> *Colgate v. United States Leather Co.*, 75 N. J. Eq. 229 (1909).

<sup>2</sup> Quoted and approved in *Harding v. American, etc. Co.*, 182 Ill. 551 (1899); *People v. Ballard*, 134 N. Y. 269; 136 N. Y. 639 (1892). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. *Treadwell v. United, etc. Co.*, 47 N. Y. App. Div. 613 (1900). Cf s. c. 134

N. Y. App. Div. 394. See also § 629, *supra*.

<sup>3</sup> Quoted and approved in *Theis v. Spokane, etc. Co.*, 34 Wash. 23 (1904). See § 629, *supra*.

<sup>4</sup> 9 N. J. Eq. 401 (1853); *Ervin v. Oregon, etc. Nav. Co.*, 27 Fed. Rep. 625 (1886). Where before the dissolution of an insurance company all of its assets were transferred to another responsible company which contracted to meet all obligations, the court will not necessarily set the transfer aside and appoint a receiver, but will allow the transfer to stand, if fair and best. The minority are not absolutely entitled to a receivership and sale. *Baltimore, etc. R. R. v. Cannon*, 72 Md. 493 (1890). An oil mining corporation may lease its oil lands, reserving a royalty. *Starke v. Guffey Pet. Co.*, 80 S. W. Rep. 1080 (Tex. 1904); *aff'd*, 98 Tex. 542. Even though a corporation is in debt to its directors, yet if its income is sufficient to pay the interest, the directors cannot legally sell their holdings of stock to a competing concern, together with such debt, whereby the competing concern obtains a majority of the stock, even though the minority are offered the same price, such action being followed practically by the new corporation taking a lease of the assets of the old corporation, and doing all the business. The minority stockholders may hold the directors personally liable, and may have a receiver appointed, and may have the mortgage securing the directors' debts canceled, and the business itself continued by



Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly that which cannot legally be done directly.<sup>1</sup>

Where, however, the statutes authorize dissolution on a certain vote of the stockholders, a dissolution so voted is legal, irrespective of the motives of the stockholders in voting it.<sup>2</sup> A majority of the stockholders of a dissolved corporation may authorize a sale of all its property.<sup>3</sup> A *visi prius* court in Colorado has held that a statute allowing corporations to extend their term of existence by a majority vote of the stockholders, is not binding on a dissenting stockholder in a corporation existing at the time of the enactment of the statute, and that such dissenting stockholder may insist upon being paid the value of his stock to be ascertained by a proper appraisal; otherwise that the company be liquidated in due form.<sup>4</sup> By amendment the duration may be shortened.<sup>5</sup>

A state may enact a statute authorizing a railroad corporation to condemn a minority of the stock in another company, the former company being already the owner of the majority of the stock, it being shown that the public interest so demands, and the improvement of the railroad itself being of sufficient public interest.<sup>6</sup>

A stockholder in a railroad company which has sold its property to another railroad company cannot have the sale set aside on the ground that the buying company had no authority to purchase.<sup>7</sup> The rule that a going corporation cannot be sold out to another corporation does not apply to a medical school, even though it has a capital stock, its real purpose not being for profit.<sup>8</sup> Fraternal beneficiary corporations

the receiver. The former directors who resigned, as well as new directors who took their places, are proper party defendants. *Jacobus v. Diamond, etc. Co.*, 94 N. Y. App. 366 (1904). The soundness of this last decision may well be doubted.

<sup>1</sup> Quoted and approved in *Theis v. Spokane, etc. Co.*, 34 Wash. 23 (1904). *Boston, etc. R. R. v. New York, etc. R. R.*, 13 R. I. 260 (1881). A majority of the stockholders in a New Jersey corporation cannot dissolve it under the statute for the purpose of selling the assets to a Massachusetts corporation, inasmuch as such a consolidation is not authorized by the New Jersey statutes. *Riker & Son Co. v. United Drug Co.*, 79 N. J. Eq. 580 (1912). See §§ 629, 630, *supra*.

<sup>2</sup> See § 629, *supra*. The "right to have the business carried on until the natural death of the corporation is subject to the will of the majority of

two thirds provided for in the statute." *Beling v. American, etc. Co.*, 72 N. J. Eq. 32 (1907).

<sup>3</sup> *Hoag v. Edwards*, 69 N. Y. Misc. Rep. 237 (1910). On the dissolution of a national bank its assets may be conveyed to a new bank from which some of the minority are excluded, and they cannot complain if the full value and the best price was thereby obtained. *Green v. Bennett*, 110 S. W. Rep. 108 (Tex. 1908).

<sup>4</sup> *Pratt v. South Pueblo, etc. Ass'n*, 1 Colo. Dec. Supp. 171 (1901).

<sup>5</sup> *Tognazzini v. Jordan*, 130 Pac. Rep. 879 (Cal. 1913).

<sup>6</sup> *Offield v. New York, etc. R. R.*, 203 U. S. 372 (1906). See also § 671, *infra*.

<sup>7</sup> *Hinds County v. Natchez, etc. R. R.*, 85 Miss. 599 (1905).

<sup>8</sup> *McLeod v. Lincoln, etc. College*, 69 Neb. 550 (1903). A college corporation has inherent power to sell all its property unless there is some special



have no power to consolidate unless the statute expressly authorizes them to do so.<sup>1</sup>

If, however, the corporation is an unprofitable and failing enterprise, then a sale of all the corporate property with a view to dissolution may be made.<sup>2</sup> And it has been held in Washington that a minority stock-

restriction. *Tash v. Ludden*, 88 Neb. 922 (1911).

<sup>1</sup> *Bankers', etc. v. Crawford*, 67 Kan. 449 (1903). The minority members of a beneficiary association may object to its consolidating with a non-resident similar association, unless the statutes provide therefor. *Knapp v. Supreme Commandery, etc.*, 121 Tenn. 212 (1908).

<sup>2</sup> Quoted and approved in *Price v. Holcomb*, 89 Iowa, 123 (1893), and *Harding v. American, etc. Co.*, 182 Ill. 551 (1899); *Doyle v. Leitelt*, 97 Mich. 298 (1893); *Lauman v. Lebanon Valley R. R.*, 30 Pa. St. 42 (1858). A minority stockholder of a corporation in bankruptcy cannot prevent a sale at public auction by order of the court, even though the sale is a step towards reorganizing the company under a plan by which all stockholders will be allowed to participate. *Schuler v. Woodward*, 169 Fed. Rep. 1012 (1909). Where the majority stockholders of an insolvent corporation turn all of its assets over to a new company for a sum sufficient to pay the debts of the old company, all the stockholders being given an opportunity to become stockholders of the new company, the minority stockholders cannot object. *Marks v. Merrill, etc. Co.*, 188 Fed. Rep. 850 (1911). A minority stockholder cannot cause to be set aside a sale of all the corporate assets in consideration of the purchaser paying the corporate debts where the assets are worth no more than the debts and the company is without funds to go on, and the stock has no value; especially where that particular stockholder was thereby released from an obligation for a part of the debts. *Stebbins v. Michigan, etc. Co.*, 191 Fed. Rep. 238 (1911). Even though an insolvent corporation sells its property, yet if the stockholders do not cause the purchase money to be tendered back they cannot set aside

the sale for fraud. *Perchmann v. Mt. Eagle, etc. Co.*, 128 La. 894 (1911). The directors of a failing mining company may sell its property to pay its debts. *Common Sense, etc. Co. v. Taylor*, 152 S. W. Rep. 5 (Mo. 1912). A failing corporation may sell its property. *Smith v. Stone*, 128 Pac. Rep. 612 (Wyo. 1912). Where a corporation is in a failing condition the stockholders may vote that the plant should be sold at the best price obtainable, and if no purchaser be found by a certain date it should be sold to such of the stockholders as were creditors, on condition that they pay all the debts, and it is not objectionable that some of such stockholders were also directors, all of the stockholders being given an opportunity to participate. *Heidbreder v. Superior, etc. Co.*, 184 Mo. 446 (1904). A company which is in debt and unable to raise funds to continue its business may, under the Wisconsin statute authorizing corporations on a majority vote of their stockholders to sell all their property, make such sale at public auction, giving the stockholders the first opportunity to purchase, and if one stockholder purchases at such sale he may associate with him such other stockholders as he sees fit. *Werle v. Northwestern, etc. Co.*, 125 Wis. 534 (1905). An insurance company, which is solvent but is doing a losing business and unable to continue without further loss, may sell its business to another insurance company and wind up its affairs. *Raymond v. Security, etc. Co.*, 111 N. Y. App. Div. 191 (1906). The capital stock is not a trust fund for the stockholders after the payment of the debts, and hence immediately prior to dissolution a liquidator may be appointed by the corporation with power to sell its assets. *Knott v. Evening Post Co.*, 124 Fed. Rep. 342 (1903); *rev'd on another point* in 130 Fed. Rep. 820.



holder in a gas company, which, to preserve its property and business, must either borrow money for extensions or else consolidate with another

An embarrassed corporation may lease its property for a year in order to keep afloat, such lease being reasonable in its terms. *Plant v. Macon, etc. Co.*, 103 Ga. 666 (1898). Where the stockholders of an insolvent corporation have authorized the directors to sell the property and public sale is thereupon made, the court will not set the sale aside, although directors who were creditors of the corporation purchased at such sale at a low figure. *Patterson v. Portland, etc. Works*, 35 Oreg. 96 (1899). The holder of seventy-five shares cannot enjoin the holders of three thousand six hundred and seventy-five shares from making a private sale of the corporate assets at a fair price, where the corporate business is unprofitable, and each stockholder has an opportunity of participating in the purchase. *Phillips v. Providence, etc. Co.*, 21 R. I. 302 (1899). Where the business was a losing one, a lease of all the property by the stockholders, having wide powers by the charter, was upheld. *Featherstonhaugh v. Lee, etc. Co.*, L. R. 1 Eq. 318 (1865). A dissenting stockholder cannot enjoin the corporation from selling all its property where its debts are large and a mortgage is about to be foreclosed, and a sale is the only means of protecting the company, and there is no fraud involved, and a large majority of the stockholders are in favor of the sale, and the company will have the proceeds of the sale in its treasury to continue business. *Sewell v. East, etc. Co.*, 50 N. J. Eq. 717 (1893). A manufacturing corporation may, for the purpose of protecting its stockholders from further loss, discontinue its operations when unprofitable, and may sell or lease the property. *Skinner v. Smith*, 134 N. Y. 240 (1892). To discontinue a failing business and proceed to sell the property and pay the debts is not a breach of trust. *Rothwell v. Robinson*, 44 Minn. 538 (1890). A sale, however, of all the corporate assets for stock in another company is not legal, even though

the vendor corporation is insolvent, where the intent is, not to wind up the insolvent company, but to hold the stock indefinitely in the names of trustees. *Byrne v. Schuyler, etc. Co.*, 65 Conn. 336 (1895). By a vote of the board of directors and a majority of the stockholders, in meeting assembled a rubber manufacturing company may lease its entire business to another rubber manufacturing company, the financial condition of the leasing company being depressed and its business not profitable for want of capital, and the lease being the best, if not the only, means of preventing insolvency, and there being no fraud in the case. *Bartholomew v. Derby R. Co.*, 69 Conn. 521 (1897). In New Jersey a failing corporation cannot sell out all its assets to another corporation, inasmuch as the statutes authorize a dissolution by a failing corporation, and the sale can be made in connection with such dissolution. *Hunt v. American, etc. Co.*, 81 Fed. Rep. 532 (1897). If the corporation is financially embarrassed, a majority of the stockholders may authorize the directors to sell all its property at public auction, and a reorganization committee representing a part of the stockholders may buy it in, the price paid being a fair one. *Hayden v. Official, etc. Co.*, 42 Fed. Rep. 875 (1890). Where one building association absorbs another and takes all of its assets and tries to force the minority stockholders to transfer or surrender their stock, and causes the absorbed association to become insolvent, a receiver will be appointed at the instance of minority stockholders, even though the absorbed association is a failing one. *Continental, etc. Assoc. v. Miller*, 44 Fla. 757 (1902). The directors of a failing company have no power to sell all its assets to another company and agree to assess the stockholders for any deficit in the assets as compared with the liabilities. *Farmers', etc. Trust Co. v. Hazen*, 21 Pa. Sup. 130 (1902).



company, cannot enjoin a sale of the assets of the former to the latter, such sale having been authorized by the directors and a majority of the stockholders, even though a majority of the stock of the former company is owned by the latter company, there being no actual fraud.<sup>1</sup>

Where an insurance company, having authority to sell its property, proceeds to sell to another company which has no authority to buy, the transaction is illegal, and a stockholder in the former who agrees to take stock in the latter in exchange for his old stock is not bound to carry out the transaction.<sup>2</sup> But even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the notes are used to take it up, the money cannot be recovered back.<sup>3</sup> Where a sale of all the corporate assets is set aside, and a receiver is authorized to borrow money to repay the money received on the sale, the loan made by him is legal.<sup>4</sup>

By the unanimous consent of the stockholders it is always legal to sell all the property of a private corporation,<sup>5</sup> proper provision being

<sup>1</sup> *Theis v. Spokane, etc. Co.*, 49 Wash. 477 (1908). See also 203 Fed. Rep. 16; 203 id., 727 and 142 N. W. Rep. 434.

<sup>2</sup> *Dougan's Case*, 28 L. T. Rep. 60 (1873); *aff'd*, L. R. 8 Ch. App. 540 (1873).

<sup>3</sup> *McClure v. Trask*, 161 N. Y. 82 (1899).

<sup>4</sup> *St. Paul Trust Co. v. St. Paul Globe Pub. Co.*, 60 Minn. 105 (1895).

<sup>5</sup> See § 671, *infra*. A corporation may convey its property with the consent of stockholders. *State v. Western, etc. Co.*, 40 Kan. 96 (1888). Where an iron manufacturing concern owns an iron manufacturing plant and stocks in an ore company and a railway company and a steamboat company and other corporations, and also a farm, and by consent of all the partners the firm is transformed into a corporation which takes all the property, including the stocks and the farm, one of the participants cannot afterwards complain that it was illegal for the corporation to acquire such stocks and the farm. *Burden v. Burden*, 159 N. Y. 287 (1899). The agreement of a creditor of a corporation with a stockholder who is also a creditor of the same, that if the latter will consent to a sale of the property the former will pay the latter's debt, is enforceable even though oral.

*Lamkin v. Palmer*, 164 N. Y. 201 (1900). So long as a corporation is solvent it may, with the consent of its stockholders, dispose of property at such price as it sees fit, and may even make a gift of property, and, present creditors being protected, future creditors cannot complain. *Hamilton v. Menominee, etc. Co.*, 106 Wis. 352 (1900). Where a mining company has sold all its property with the consent of the stockholders, a subsequent purchaser of the stock cannot complain. *Boldenweck v. Bullis*, 40 Colo. 253 (1907). An agreement of a company to transfer its assets to another does not prevent the former bringing suit on a claim, no specific transfer of that claim having been made. *Eastfield S. S. Co. v. McKeon*, 201 Fed. Rep. 465 (1913). Stockholders in selling their stock in connection with the transfer of all the property to a new corporation may reserve what may be thereafter realized from a suit. *Independent, etc. Co. v. Anderson*, 106 La. 55 (1901). See 106 La. 95. Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for dividends paid after the time when he would have been entitled to the stock, if he had fully complied



made for the protection of corporate creditors.<sup>1</sup> Moreover, where by the written consent of all the stockholders of a New Jersey corporation,

with his contract. *Beatty v. Johnston*, 66 Ark. 529 (1899). The board of directors with the consent of the stockholders may sell all the property. *Robinson, etc. Co. v. De Baulte*, 50 La. Ann. 1281 (1898). A stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto where she afterwards disposes of part of the new stock so issued. *Hoene v. Pollak*, 118 Ala. 617 (1898). Where but one meeting of the board of directors was ever held and then the charter was forfeited, and the president, with the consent of the directors individually, and of all the stockholders, conveyed away the property, and creditors were not injured, the transaction is legal. *Aransas, etc. Co. v. Manning*, 94 Tex. 558 (1901). By unanimous consent of the stockholders a mercantile company may sell all its property and take land in part payment therefor for the purpose of winding up the business. *Morisette v. Howard*, 62 Kan. 463 (1901). Where a private corporation sells all its property to another corporation on the agreement of the latter to pay the debts of the former, and the latter has paid a part of such debts, the selling corporation cannot claim that the deed is *ultra vires* and retake possession. *Savings & T. Co. v. Bear Valley, etc. Co.*, 112 Fed. Rep. 693 (1902). Even though the purchaser of the property of a corporation takes, in addition to the deed, all of the shares of stock, the consideration going directly to the stockholder, the transaction is a sale of the property and not of the stock, and hence the proceeds of the sale belong to the corporation. *Pendery v. Carleton*, 87 Fed. Rep. 41 (1898). Where a corporation sells its property through misrepresentations, and in deeding the property causes all its outstanding capital stock to be deliv-

ered to the vendee, the vendee in suing to recover back the money need not allege that the stock was valueless, there being an allegation that the property was valueless. *Keener v. Baker*, 93 Fed. Rep. 377 (1899). A corporation in acquiring the assets of a partnership may acquire a cause of action which the latter has against another corporation for negligence and may enforce such cause of action, even though it would have had no power to buy it separately from the other property. *Central, etc. Co. v. Capital, etc. Co.*, 60 Ohio St. 96 (1899). Where a corporation has sold all its property with the consent of all its stockholders, the transaction cannot subsequently be attacked by a subsequent purchaser of stock. *City of Spokane v. Amsterdamsch, etc.*, 22 Wash. 172 (1900). The sale of a business of a corporation which does not specifically transfer the trade name and good-will does not enable the purchaser of the business from the corporation to claim such trade name. *Cutter v. Gudebrod, etc. Co.*, 44 N. Y. App. Div. 605 (1899); *aff'd*, 168 N. Y. 512. Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration. *Grant v. Lowe*, 89 Fed. Rep. 881 (1898). By unanimous consent of the stockholders a corporation may sell all of its property without formal action. *Kennedy v. Merchants', etc. Bank*, 67 W. Va. 475 (1910). In buying out a corporation the purchaser may pay different stockholders various sums to vote in favor of the sale, there being no concealment and all the stockholders having consented. *Keady v. United Rys. Co.*, 57 Oreg. 325 (1910). Even though three persons

<sup>1</sup> See § 672, *infra*.



and the action of its board of directors, a corporation sells all its property for stock and bonds of a new company to be distributed among the old stockholders, a pledgee of one of the old stockholders cannot object, especially where the statute authorizes the pledgor of stock to represent the stock and no notice had been given of the pledge.<sup>1</sup> These rules do not apply, however, to railroad and certain other quasi-public corporations. The state has an interest in their continuance, and they cannot sell their property except upon the express consent of the state.<sup>2</sup>

who own all the stock of a corporation, enter into a contract to sell it, and one of them secretly receives a higher price for his holdings of the stock, yet the other vendor cannot by an action in *assumpsit* claim a part of such extra price. His remedy, if he has any, is in equity for an accounting, or an action for deceit. *Cummings v. Synnott*, 120 Fed. Rep. 84 (1903), rev'g 116 Fed. Rep. 40. See also § 320, *supra*. Where the directors own all the stock of a corporation, they may authorize its president to sell its assets; and the fact that the authority was not given at a regular directors' meeting is immaterial. *Jordan v. Collins*, 107 Ala. 572 (1895). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. *Tulare, etc. Dist. v. Kaweah, etc. Co.*, 44 Pac. Rep. 662 (Cal. 1896). The new company may enforce the right of the old one to indemnity. *Miller v. Lancaster*, 5 Coldw. (Tenn.) 514 (1868). Or may settle a suit against the old one. *Paine v. Lake Erie, etc. R. R.*, 31 Ind. 283 (1869). In general see *Slattery v. St. Louis, etc. Co.*, 91 Mo. 217 (1886). The incorporation of a reorganized company, giving it all the rights, etc. of the old company, does not give it title to a judgment obtained by the old company. *Wilmington, etc. R. R. v. Downward*, 14 Atl. Rep. 720 (Del. 1888). Sometimes the stock as well as the property is delivered. *Pendery v. Carleton*, 87 Fed. Rep. 41 (1898). Where a street railway is sold by unanimous consent, no one but the state can object, and hence

a custodian of a part of the securities involved in the sale cannot raise such objection. Read *v. Citizens', etc. R. R.*, 110 Tenn. 316 (1903). Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockholders and officers. *Leigh v. Kewanee, etc. Co.*, 127 Fed. Rep. 990 (1904). Where the stockholders of a telephone company do not object to a sale of its property to another company, it is presumed that they acquiesce. *Badger, etc. Co. v. Wolf River, etc. Co.*, 120 Wis. 169 (1904). Where a consolidation is brought about by the fraudulent representations of a stockholder in one of the corporations, the remedy of the consolidated company against him is not a suit for money received by him as a stockholder, but is an action for damages for fraud or a suit to rescind. *Anderson, etc. Co. v. Pungs*, 134 Mich. 79 (1903). Where one company sells all its property to another, pursuant to resolutions of the stockholders of both companies, and in the deed a portion of the property is omitted, a suit lies to correct the deed. *Pinchback v. Bessemer, etc. Co.*, 137 N. C. 171 (1904). A stockholder who consents to the corporation selling all its property cannot afterwards object thereto. *Sheehan v. O'Rourke Iron Works*, 112 La. 461 (1904).

<sup>1</sup> *Elyea v. Lehigh, etc. Co.*, 169 N. Y. 29 (1901).

<sup>2</sup> See ch. LIII, *infra*.



Where the by-laws of a private corporation authorize a sale of all its property, such sale may be made even against the wishes of a minority of the stockholders.<sup>1</sup> So, also where the charter expressly authorizes such a sale it is legal.<sup>2</sup> A corporation may lease or sell all its property where the statutes authorize the same at the time of its incorporation.<sup>3</sup>

<sup>1</sup> It is legal for the by-laws to provide that the company may sell out all its property at any time. *Cotton v. Imperial, etc. Corp.*, [1892] 3 Ch. 454. The by-laws may provide that the company may sell out its entire business. *Republican, etc. Mines v. Brown*, 58 Fed. Rep. 644 (1893), reversing *Brown v. Republican, etc. Mines*, 55 Fed. Rep. 7.

<sup>2</sup> See § 892, notes, *infra*. The sale may have to be a public sale. See § 671, *infra*. The principle that the board of directors has no power to sell out the entire property does not apply where the statute under which it was incorporated authorized such a sale. *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, 98 (1879). Under the English statutes authorizing the holders of the securities to reorganize or modify the original plan, provided the court approves the same, the plan may be amended so that dissenting security-holders be paid in cash their proportion of the assets as they then exist. *Foreign, etc. Trust Co. v. Sloper*, [1894] 3 Ch. 716, rev'g [1893] 2 Ch. 96. Where a water-works company has power to sell its entire property, and the sale has been authorized by a vote of 1,100 shares out of 1,350 shares, the court will not enjoin the sale at the instance of the minority stockholders on the ground that the price is inadequate. *Peabody v. Westerly Water-works*, 20 R. I. 176 (1897). In *Re Buenos Ayres, etc. Co.*, 66 L. T. Rep. 408 (1892), a sale of the company's enterprise to the government upon terms which paid something to the preferred stockholders, but left nothing for the common stockholders, was sustained. Power to sell to a company does not authorize a sale to an individual. *Bird v. Bird's, etc. Co.*, L. R. 9 Ch. App. 358 (1874). In *Clinch v. Financial Corp.*, L. R. 5 Eq. 450 (1868), the company had power to consolidate with another

company if the liabilities of the stockholders were not increased. A stockholder enjoined a consolidation in which such liabilities would be increased. Where a corporation is given power to lease its property without the mode of making the lease being prescribed, it may be by a vote of the majority of the stockholders. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902). A statute authorizing a sale of corporate property in whole or in part upon a vote of the stockholders does not require such vote upon an ordinary sale of real estate. *Marvin v. Anderson*, 111 Wis. 387 (1901). Where a corporation sells or leases all its property to another corporation which the majority of the stockholders of the former corporation own or control, the contract may not be illegal in itself, but it will be scrutinized carefully by the court, and, if unfair, will be set aside. *Mumford v. Ecuador, etc. Co.*, 111 Fed. Rep. 639 (1901). Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute, the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. *Boston, etc. R. R. v. Graham*, 179 Mass. 62 (1901). As to such an appraisement, see also § 671, *infra*.

<sup>3</sup> *Starke v. J. M. Guffey, etc. Co.*, 98 Tex. 542 (1905). Under the West Virginia statutes a meeting of the stockholders may authorize a sale of all the corporate property and hence their ratification of an illegal sale by the directors is sufficient. *Metcalf v. American, etc. Co.*, 122 Fed. Rep. 115



Even though the statutes of New York authorize the insertion of special provisions in a charter, not inconsistent with law, yet the secretary of state need not accept a certificate of incorporation which gives the power to sell all the property to any foreign or domestic corporation on a two-thirds vote, it appearing that the statute would require a ninety-five per cent. vote in case of a sale to a foreign corporation.<sup>1</sup> A statute requiring the consent of the stockholders to the sale of corporate property does not mean all the stockholders, but means a majority.<sup>2</sup>

Under a reserved right to amend charters the legislature may authorize a sale of all the corporate property on a vote of two thirds in interest of the stockholders.<sup>3</sup> A corporation may amend its certificate of incorporation by inserting power to consolidate as granted by a statute passed after the original certificate of incorporation has been filed. A stockholder who became such after the charter has been amended, authorizing

(1903). Under the California statute the stockholders by a two-thirds vote may authorize a lease of the corporate property for five years, the rental to be one fourth of the profits, and such a lease will not be construed as constituting a copartnership. *McTigue v. Arctic*, etc. Co., 130 Pac. Rep. 165 (Cal. 1912). The California statute that a corporation should not lease its property except with the consent of the stockholders has been repealed. See *Standard Oil Co. v. Slye*, 129 Pac. Rep. 589 (Cal. 1913). In Colorado, see 203 Fed. Rep. 599 (1913).

<sup>1</sup> *People v. Whalen*, 119 N. Y. App. Div. 749 (1907); *aff'd*, 189 N. Y. 560. Where the statutes allow the incorporators to insert in the charter any provision relative to the powers of the company, or of its stockholders and directors, the right to vote may be withheld from the stockholders until a certain date, thus leaving the first directors in office during the intervening time, and a further provision that during that time the directors may do any act which the stockholders might do enables them to sell all the property, where that was the chief purpose of the corporation, and the corporation was unable to develop the property. *Union T. Co. etc. v. Carter*, 139 Fed. Rep. 717 (1905).

<sup>2</sup> *Louisville, etc. R. R. v. Jarvis*, 87 S. W. Rep. 759 (Ky. 1905). The state cannot oust a foreign railroad cor-

poration from operating a railroad in the state on the ground that the railroad in the state had been leased to the foreign company without the consent of the stockholders, as required by statute, it appearing that such stockholders did not object. *Louisville & N. R. R. v. State*, 154 Ala. 156 (1907).

<sup>3</sup> *Allen v. Ajax, etc. Co.*, 30 Mont. 490 (1904). A statute authorizing corporations to sell all their property on a certain vote of the stockholders applies to corporations existing at the time of the enactment of the statute, the legislature having the reserved right to alter, amend or repeal charters. *Germer v. Triple-State, etc. Co.*, 60 W. Va. 143 (1906). An amendment that has not been acted upon may be repealed. *City of Pomona v. Sunset Tel. & Tel. Co.*, 224 U. S. 330 (1912). Under its reserved power, the legislature may authorize a consolidation of railroads, especially where they are in a failing condition. A majority of the stockholders may accept such an amendment. *Hinds County v. Natchez, etc. R. R.*, 85 Miss. 599 (1905). See also § 501, *supra*. Under the English statute, a charter, with the consent of the court, may be fundamentally altered, and the company may be given the power to sell its property. *Re New Westminster, etc. Co. Ltd.*, 105 L. T. Rep. 946 (1911), or to lease all the property. *Re Anglo-American Tel. Co. Ltd.*, 105 L. T. Rep. 947 (1911).



a consolidation, cannot complain.<sup>1</sup> Where a statute authorizes a sale such sale is made by the directors and not by the stockholders.<sup>2</sup> But statutory power to transfer the business and property of a corporation does not authorize a transfer of its unpaid subscriptions.<sup>3</sup> A hotel company may sell its hotel and with the proceeds purchase another hotel.<sup>4</sup> And in any

<sup>1</sup> *Colgate v. United States, etc. Co.*, 73 N. J. Eq. 72 (1907); but see s. c., 75 N. J. Eq. 229 (1909).

<sup>2</sup> See § 709, *infra*. The stockholders and not the directors in a national bank are to decide whether the stock shall be assessed in order to restore the impaired capital stock. *Commercial, etc. Bank v. Weinhard*, 192 U. S. 243 (1904), the court saying: "It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corporation. . . . The origin and continuation of the association would seem to be matters in which the owners and not the managers of the bank are primarily interested. Action upon the comptroller's order involves extraordinary action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards and not conferred by statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act."

<sup>3</sup> *Bank of China v. Morse*, 168 N. Y. 458 (1901). In this case a New York subscriber to stock in an English corporation was sued by the company for the amount of such subscription, such company having been reorganized under the peculiar English statutes. The court refused to enforce the liability on the ground that the funds were not for the purpose of paying debts of the old corporation, but were partially for the purposes of

the new corporation which the New York subscriber did not become interested in and had no notice thereof, and on the further ground that the reorganization scheme was practically a sale by the old company to the new company. Even though the charter provides that a portion of the unpaid subscription price shall not be called for except upon the company being wound up, this does not prevent a call if the company sells all its property to another company and receives stock of the latter in consideration thereof, this being one way of winding up the company, and even though the money is not necessary to pay the company's debts, the subscriber not having exercised his right to demand cash for the appraised value of his stock as allowed by statute. *Car Trust Inv. Co. v. Metropolitan T. Co.*, 184 Fed. Rep. 443 (1911).

<sup>4</sup> *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68 (1898). The directors of a mining company, with the consent of a majority of the stock, may sell its mines, inasmuch as it may buy others. *Lange v. Reservation, etc. Co.*, 93 Pac. Rep. 208 (Wash. 1908). A sale of the entire property is different from the sale of the whole of its business, and the former may be legal where the latter would be illegal. *Ritchie v. Vermillion Min. Co.*, 1 Ont. L. Rep. 654 (1901). A business corporation cannot sell out a branch of its business at common law, and if it sells it under the New York statute authorizing a sale on a two-thirds vote, a dissenting stockholder may claim the appraised value of his stock. *Matter of Timmis*, 200 N. Y. 177 (1910). Where the charter of a land company authorizes it to own and sell real estate it may sell a water-front property, although the purpose of its organization was really to acquire that property only, it appearing that a large majority of the stockholders



case the right of a dissenting stockholder to object may be lost by laches or ratification.<sup>1</sup>

had ratified the sale. *Peters v. Waverly, etc. Co.*, 74 S. E. Rep. 168 (Va. 1912).

<sup>1</sup> See ch. XLIV, *infra*; *Banks v. Judah*, 8 Conn. 145 (1830), holding that long delay of a dissenting stockholder in bringing suit will bar his remedy. This, perhaps, is the first reorganization case that is to be found in the books. The whole business of the corporation cannot be sold out except by unanimous consent of the stockholders, but a stockholder who acquiesces in it cannot afterwards complain. *Feld v. Roanoke Inv. Co.*, 123 Mo. 609 (1894). Where a part of a charter is illegal, and a new corporation is formed to take over the property and debts and issue share for share of stock in the old, a stockholder who assented cannot then refuse to take the new stock. *Glymont Imp. etc. Co. v. Toller*, 80 Md. 278 (1894). Five years after a corporation has sold all its property to another corporation, and received the consideration, it cannot maintain a bill to set aside the sale as *ultra vires*, the rights of third parties having intervened in the meantime. *Bear Valley, etc. Co. v. Savings, etc. Co.*, 117 Fed. Rep. 941 (1902). Even though a New York mining company dissolves and sells its property to a West Virginia company in order to avoid New York taxes, a share of stock and some bonds in the new company being given for each share of stock in the old company, and even though a dissenting stockholder is entitled to have a public sale of the property, yet if when the time for depositing the stock was about to expire he sells most of his stock to a business associate who makes the exchange, he cannot then insist on a public sale, especially where such sale would destroy a profitable concern, but the court will order that he be allowed to participate, notwithstanding that the time has expired, or that he be paid the value of his stock. *Treadwell v. United, etc. Co.*, 134 N. Y. App. Div. 394 (1909). Where by consent of

all the stockholders in a corporation doing a losing business its president is authorized to sell its property and pay the debts, and he does sell it to one of the stockholders at its full value, the other stockholders having notice of the sale and an opportunity to purchase, one of them cannot afterwards object on the ground that the directors had not authorized the sale. *Ebelhar v. Nave*, 119 S. W. Rep. 1176 (Ky. 1909). By unanimous consent stockholders of an Arizona corporation may transfer all of its assets to a Nevada corporation, the latter assuming the liabilities and issuing its stock share for share for the old stock, and any stockholder who votes for it cannot thereafter object, but a stockholder who has merely given a proxy is not bound, where the stockholder did not know of the proposed action, even though the proxy votes for the change and the written proxy gave to him all the authority that the stockholder "would possess if personally present at such meeting," those words having reference to ordinary business only. Such a stockholder is not bound, even though the Arizona corporation is dissolved, inasmuch as such a reorganization is giving away corporate assets to a new corporation or compelling him to be a party to a continuation of the business by a new corporation. He may cause the reorganization to be set aside, even though the Nevada corporation is not a party. *Farish v. Cieneguita, etc. Co.*, 12 Ariz. 235 (1909). The consent of the stockholders to one company buying the property of another company as required by statute, is presumed, where the transaction had been completed for twenty years, and even if the statute is not complied with as to the stockholders of the vendor, the purchaser cannot avoid the liabilities imposed under the statute. *Whiting v. Malden, etc. R. R.*, 202 Mass. 298 (1909). A stockholder by voting for a consolidation agreement does not waive his right to keep his own stock and share in the profits of his company,



The subject of the reorganization of corporations upon foreclosure is considered elsewhere.<sup>1</sup>

§ 671. *Sale of corporate property to another corporation in exchange for stock and bonds of the latter — Distribution of such stock and bonds.* — In addition to the objections to a sale of all the corporate property to another corporation, referred to in the preceding section, there often is involved the question of whether the sale may be in exchange for the bonds and stock of the vendee company. In these days of consolidations, reorganizations, and mergers of corporations it frequently happens that the purchase price is paid in the stock and bonds of the purchasing company. The question then arises whether the selling company has power to take stock and bonds in payment, and whether it may compel its stockholders to accept such stock and bonds upon a distribution of the assets of such selling company. The general rule has been that the stock of the vendee company received by the vendor company in payment for the property cannot be forced upon dissenting stockholders of the vendor company in a distribution of its assets. They are entitled to money. Such of them as do not wish to accept the stock of the new corporation are entitled to the value of their stock in the old corporation in cash, and may have an injunction until they are secured.<sup>2</sup> It

especially where the consolidation agreement had a provision to that effect. *Miller v. Chicago, etc. R. R.*, 193 Fed. Rep. 41 (1912). *Cf. s. c.*, 204 Fed. Rep. 436. Even though a steel company owns stock in an iron company and pledges it, and several years thereafter causes the iron company to sell all its property to such steel company, the pledgee cannot complain, even though the steel company becomes insolvent, the stock for the entire period having stood in the name of the pledgor. *Cohen v. Big Stone, etc. Co.*, 111 Va. 468 (1910). A sale of all the corporate assets by the owner of sixty per cent. of the stock is not binding on him because he has no power to make such a sale. *Bias v. Atkinson*, 64 W. Va. 486 (1909).

<sup>1</sup> See ch. LII, *infra*.

<sup>2</sup> *State v. Bailey*, 16 Ind. 46 (1861); *Kelly v. Mariposa Land, etc. Co.*, 4 Hun, 632 (1875). *Cf. New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322 (1861); *s. c.*, 15 N. J. Eq. 418 (1862). *Contra, Sawyer v. Dubuque Printing Co.*, 77 Iowa, 242 (1889). Where a person owning a majority of the stock of an Arizona

corporation is president and controls all the officers, and transfers all its property to a Mexican corporation for stock of the latter which is appropriated by him to his own use, a New York stockholder in the old company may sue him and both companies in the New York courts to set aside the entire transaction and for an accounting, and service upon the Arizona company may be by publication. *Grant v. Cobre, etc. Co.*, 193 N. Y. 306 (1908). Even though the statutes authorize a sale on the majority vote of stockholders, yet a minority stockholder of the selling company is not bound to accept a thirty-year bond of the purchasing company, secured by mortgage on the property sold. *Koehler v. St. Mary's, etc. Co.*, 228 Pa. St. 648 (1910). Upon dissolution a majority of the stockholders may sell the corporate property to another corporation at a fair price and take stock in payment, provided non-consenting stockholders are paid in cash. *Slattery v. Greater New Orleans, etc. Co.*, 128 La. 871 (1911). In a suit by stockholders to wind up a corporation and have certain stock de-



has been held that a stockholder may enjoin a sale of all the corporate property to another corporation in exchange for the stock and mort-

clared void on the ground that it is watered stock, the court may enjoin the company from selling all its assets to another corporation for stock in the latter to be issued to stockholders of the former. *Parrish v. Reese*, 165 Ala. 638 (1910). An English company doing business in France cannot under English law sell its assets to a French corporation in exchange for stock of the latter, even though the company has to be reorganized in some way in order to keep going. *Thomas v. United Butter Companies, etc.*, [1909] 2 Ch. 484. A stockholder may have a preliminary injunction against a sale of all the property to a new corporation for cash and the right to subscribe for stock in the new company, the new company being controlled by the directors of the old company. *Mitchell v. United, etc. Co.*, 72 N. J. Eq. 580 (1907). The New York courts refused to hold a New York stockholder in an English corporation liable for his unpaid subscription where under a plan of reorganization, sanctioned by the English courts, in accordance with English law, the amount collected is to go to the reorganized company, while other stockholders need not pay their subscriptions if they take part in the reorganized company and pay a small sum, especially where, if all the stockholders paid in full, the amount would be more than necessary to pay the debts. *Bank of China v. Morse*, 168 N. Y. 458 (1901). Under an English floating debenture, stockholders have no right to sell out the entire property to another corporation in exchange for stock unless the debenture holders consent. *Foster v. Borax Co.*, [1899] 2 Ch. 130. Or unless money is deposited in court to pay the dissenting debenture holders. *Foster v. Borax Co.*, [1899] 2 Ch. 130, 137. Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon between them, it is legal that the consideration be a right extended by the new company to the old stockholders to

demand partly paid up stock of the new company within a limited time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such a case to attend the meeting and vote against it if he objects. It is no excuse that he was ill or abroad or negligent in dissenting under the English statute. *Burdett-Coutts v. True Blood, etc. Ltd.*, [1899] 2 Ch. 616. It is not legal for a receiver, even under an order of the court, to sell nearly all the property of the company to another corporation in exchange for stock of the latter to be given to stockholders of the former, with a provision that dissenting stockholders should be paid on a certain basis which is different from stock of the former corporation acquired by the latter corporation. *People v. Anglo-American, etc. Assoc.*, 60 N. Y. App. Div. 389 (1901). A minor who has subscribed and paid for stock in a corporation, which corporation was afterwards merged in another corporation, for stock of the latter, cannot recover back his money from the second corporation. *White v. Mount Pleasant, etc. Corp.*, 172 Mass. 462 (1899). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. *Farmers', etc. Co. v. Penn., etc. Co.*, 103 Fed. Rep. 132, 157 (1900); *aff'd*, 186 U. S. 434. Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new cor-



gage bonds of the latter, even though the corporation offers to pay in cash the full value of his stock and that not even a statute can deprive

poration equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the persons so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900). *Taylor v. North Star, etc. Co.*, 79 Cal. 285 (1889), holds that laches may bar the stockholders' right to object. Although a corporation is authorized by its charter "to take stock" in other corporations, this does not authorize it to sell all its property to another corporation in payment for stock of that corporation to be distributed among the stockholders of the vendor corporation. *Elyton Land Co. v. Dowdell*, 113 Ala. 177 (1896). Where a corporation sells its business for stock in another company, it may distribute the stock among those of its stockholders who are willing to take it; but any stockholder may demand money instead. If he accepts the stock, however, he cannot afterwards complain. *Feld v. Roanoke Inv. Co.*, 123 Mo. 603 (1894). Where a company is reorganized by a new company buying the property of the old, and giving the stock of the new company to the old company in payment therefor, the transaction being carried out by 160,165 shares out of 164,211 shares, over 4,000 shares not being represented, the old company cannot distribute the stock among the stockholders unless the company is dissolved. *Kohl v. Lilienthal*, 81 Cal. 378 (1889). A stockholder in a Maine corporation may bring suit in New Jersey to set aside an illegal transfer of the property of the former to the latter, even though service in such suit cannot be obtained on the Maine corporation. *Wilson v. American, etc. Co.*, 64 N. J. Eq. 534 (1903). In a suit by a dissenting stockholder to declare void an agreement of sale of the corporate assets to another company for stock of the latter, the ven-

dee corporation is a necessary party defendant. *Doughty v. Lomagunda Reefs Limited*, [1903] 1 Ch. 673. A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata*. The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of \$25 worth of stock cannot enjoin a sale by those owning ninety-three per cent. of the entire capital stock. Such a sale is valid, although there were directors in common. *Pitcher v. Lone, etc. Co.*, 39 Wash. 608 (1905). On account of the legal difficulties mentioned above it is now quite common to organize a holding company to accomplish very much the same purpose. See § 317, *supra*. Even though the court at the instance of a dissenting stockholder has enjoined a corporation from issuing stock in payment for the property of another corporation to be purchased at a high valuation, this does not prevent the majority of the stockholders forming a holding corporation in another state and issuing the stock of the latter in exchange for the stock of the two former corporations at a price equivalent to the above-mentioned valuation. The court has no power to enjoin such a transaction at the instance of a dissenting stockholder. The fact that the holding company may name the directors of both companies is not objectionable in itself. *Pierce v. Old Dominion, etc. Co.*, 67 N. J. Eq. 399 (1904). Where the state by a suit in the state court has forfeited the charter of a water-works company, no receiver being appointed, and thereafter on a bill filed in the United States court a receiver is appointed by the latter court, and thereafter under a statute the governor of the state appoints a liquidator of the affairs of such corporation, and thereafter the liquidator is brought in as a party defendant to the suit in the



a stockholder of this right, except possibly under the reserved right to amend the charter. To compel the stockholder to take such stock would be compelling him to sell his stock.<sup>1</sup> Moreover, to compel the stockholders of the old corporation to accept the stock of the new corporation in payment for their interest in the old would be in effect to compel them to join the new corporation, or, what is the same thing, compel them to consent to a consolidation.<sup>2</sup> The supreme court of the United States has decided that the majority stockholders have no right

United States court and interposes a plea, and thereafter the stockholders organize a new corporation and receive its stock in exchange for their stock in the old corporation, the state cannot maintain a suit to forfeit the charter of the latter corporation and enjoin a transfer of the assets of the old corporation to the new corporation, on the ground that the stock of the new corporation is issued at a fictitious value, the proof being insufficient to sustain any such claim, and the plant itself not yet having been sold and its value ascertained. *State v. New Orleans, etc. Co.*, 111 La. 1049 (1904). Where a holding company increases the capital stock of one of its subsidiary companies and then causes it to purchase the common stock of the holding company, thereby creating a conflict of interest between the preferred stockholders of the holding company and the subsidiary company, which by the plan would control the holding company itself, minority stockholders may enjoin such a reorganization, it being a part of the plan that the holding company shall sell its various stocks to such subsidiary company. *Robinson v. Holbrook*, 148 Fed. Rep. 107 (1906).

<sup>1</sup> *Morris v. Elyton, etc. Co.*, 125 Ala. 263 (1900). A statute forbidding the officers of a mining corporation from selling its property, without such sale being approved by a certain proportion of the stock at a meeting of the stockholders, does not authorize a sale of all the assets of a prosperous mining corporation as against the dissent of minority stockholders, where such sale is not for cash but for the capital stock of a foreign corporation, even though such latter company offers to pay a fixed price in cash to stock-

holders who do not care to take new stock in exchange for the old. A minority stockholder may enjoin the sale even though the selling corporation offers to give to such minority stockholder a bond that the dissenting stockholders should receive the value of their stock. A court has no power to compel dissenting stockholders to so dispose of their shares *in invito*. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). A by-law, even though passed upon the organization of the company, cannot legally provide that upon a sale of the company's property for stock in another company, the stock going to dissenting stockholders might be sold in such manner as the old company thought fit, and the proceeds paid over to the dissenting stockholder, where the statute provided that the interest of dissenting stockholders should be ascertained by arbitration. *Payne v. Cork Co.*, [1900] 1 Ch. 308.

<sup>2</sup> *Ex parte Bagshaw*, L. R. 4 Eq. 341 (1867); *McCurdy v. Myers*, 44 Pa. St. 535 (1863); *Frothingham v. Barney*, 6 Hun, 366 (1876); *Lauman v. Lebanon Valley R. R.*, 30 Pa. St. 42 (1858). A single stockholder may enjoin his company from selling substantially all its property to another company for shares of stock in the latter. *Carter v. Producers', etc. Co.*, 164 Pa. St. 463 (1894). Where two companies are consolidated this is practically a dissolution of the old companies and hence a stockholder in one of them may bring a suit in equity to have the value of his stock determined and insist upon payment therefor in cash. *Barnett v. Philadelphia, etc. Co.*, 218 Pa. St. 649 (1907), the court following *Lauman v. Lebanon Valley R. R.*, 30 Pa. St. 42 (1858).



upon dissolution, to sell the corporate property to a new corporation for stock in the latter, and then say to the minority, "We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one."<sup>1</sup> At the public sale the majority stockholders may buy in the property;<sup>2</sup> but they have no right to buy it at private sale at a price which they themselves put upon it. Where, however, the price is a fair one, and all stockholders are allowed to participate, it is not likely that a court would order a public sale, there being no tangible prospect of benefit from such a public sale.<sup>3</sup> As to a sale of the corporate property for purchase-money bonds in payment, this is equivalent to a sale for money payable in the future, and hence the transaction is not open to the same objections as in the case of stock. Actual fraud, however, will of course always invalidate such a sale.<sup>4</sup>

Where, however, one company is authorized by statute or by its charter to sell its property to another company, it may receive in payment therefor shares of stock in the vendee company, and its stockholders cannot object thereto.<sup>5</sup> Moreover the statutes may be amended

<sup>1</sup> *Mason v. Pewabic Min. Co.*, 133 U. S. 50 (1890). The result of this Pewabic Mining Company litigation was that the original sale of the property for \$50,000 was set aside, and the property then sold for \$710,000. See *Mason v. Pewabic Min. Co.*, 66 Fed. Rep. 391 (1894). Cf. *Treadwell v. Salisbury Mfg. Co.*, 73 Mass. 393 (1856). See also *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 130, 415 (1871); s. c., 24 N. J. Eq. 455 (1873); *Lauman v. Lebanon Valley R. R.*, 30 Pa. St. 42 (1858).

<sup>2</sup> See § 653, *supra*. A reorganization committee representing a part of the stockholders may buy in the property at a public sale by the directors, the business being financially embarrassed, and the price being a fair one. *Hayden v. Official, etc. Co.*, 42 Fed. Rep. 875 (1890). See also ch. LII, *infra*.

<sup>3</sup> See § 662, *supra*, and § 892, *infra*. In New Hampshire it is held that a majority of the stockholders in a going, prosperous corporation, may, the same as in a copartnership, dissolve it and sell its property to another

corporation for stock in the latter, the minority stockholders being given the privilege of taking money instead, where the transaction is a fair one itself. A public sale is not necessary. *Bowditch v. Jackson Co.*, 82 Atl. Rep. 1014 (N. H. 1912). In a suit by a stockholder to enjoin the company from selling its assets to another company for stock in the latter, each stockholder being given the privilege to take a certain amount of cash for his stock, which cash, however, was not one third of the intrinsic value of the stock, the court may refuse the injunction if the purchasing company gives a bond to pay the intrinsic value of the complaining stockholder's stock. *Jackson Co. v. Gardiner Inv. Co.*, 200 Fed. Rep. 113 (1912).

<sup>4</sup> See § 884, *infra*.

<sup>5</sup> *Farmers', etc. Co. v. Toledo, etc. R. R.*, 54 Fed. Rep. 759 (1893). Where a corporation has power to sell all its property it may take in payment therefor stock in another corporation, even though dissenting stockholders cannot be compelled to accept such stock. *Metcalf v. American, etc. Co.*,



so as to authorize such a sale.<sup>1</sup> On a consolidation under a statute existing when the corporation was formed, a stockholder is not entitled

122 Fed. Rep. 115 (1903), holding also that the West Virginia statute against a corporation purchasing stock did not apply to such a sale which will wind up the corporation. Where by its charter a corporation may sell all its property and deal in stocks it may sell all its property for stock. *Traer v. Lucas, etc. Co.*, 124 Iowa, 107 (1904). Where a statute authorizes corporations to sell all their property on a vote of the stockholders owning sixty per cent. of the capital stock at a meeting duly called for that purpose, and the charter of the company authorizes it to invest in stock and bonds, the corporate property may be sold on such vote, and stock and bonds taken in payment. *Germer v. Triple-State, etc. Co.*, 60 W. Va. 143 (1906). A trustee holding property for various persons cannot transfer it to a corporation in exchange for stock of the latter, even though the trust agreement authorizes a sale and provides

that the proceeds of the sale shall be divided among the beneficiaries. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy should not be joined. *Moody v. Flagg*, 125 Fed. Rep. 819 (1903). Where the statute authorizes corporations to consolidate, a stockholder cannot object thereto on the ground that he is given stock in the consolidated company instead of cash, and even though the authorized capital stock of the consolidated company is much larger than that of the constituent companies and no provision has been made for the issue of the balance. *Mayfield v. Alton, etc. Co.*, 198 Ill. 528 (1902). A preferred stockholder of a constituent company who by a consolidation is entitled to bonds in the new company having a par value one and one third times the par value of his preferred stock, cannot object thereto, it being shown that

<sup>1</sup> See §§ 499-502, *supra*, and § 896, *infra*. A minority stockholder in a street railway cannot cause to be set aside a sale of its property to another company for stock of the latter, where such sale is authorized by statute, even though the statute was passed subsequently to the incorporation of the street railway, and even though the purchasing company had issued bonds and stocks to the amount of \$90,000,000 in payment for street railways, the capital stock and bonded indebtedness of which was only \$33,255,000, and even though in making the sale the majority stockholders voted that the stock was worth \$170 a share, and that that price should be paid to minority stockholders, and the vendee company thereupon agreed to pay the same. The remedy of the dissenting stockholder, if any, is at law for the market value of the stock or a proportionate share of the proceeds. *Tanner v. Lindell Ry.*, 180 Mo. 1 (1904). The legislature may authorize a railroad corporation to con-

solidate with other companies, on a vote of a majority of its stock, provision being made for assessing and paying the value of dissenting stock. It is immaterial that the state had not reserved the power to amend the charter. *Spencer v. Seaboard, etc. Co.*, 137 N. C. 107 (1904). The board of directors may at the expense of the corporation publish and also issue to the stockholders notice of a proposed scheme of consolidation or for an exchange of the stock for stock in another corporation, even though the plan is not consummated. *Rascover v. American, etc. Co.*, 135 Fed. Rep. 341 (1905). Policy holders in a mutual insurance company are practically stockholders therein, and on a distribution of a surplus the existing policy holders are entitled to it, and hence a statute authorizing it to turn its property over to a stock corporation organized for that purpose, only a small part of the stock to go to the policy holders, is illegal. *Huber v. Martin*, 127 Wis. 412 (1906).



to demand cash instead of his proportion of stock in the consolidated corporation.<sup>1</sup>

Even though the charter authorizes the company to sell its assets and take stock in another corporation in payment and distribute the same among the stockholders, yet this does not authorize it to sell and take partly paid up stock in payment.<sup>2</sup> A real estate company cannot

the bonds were worth more in the market than the stock had been worth, and the new company offering to pay him the present value of his stock at the time of the consolidation or the present value with future preferred dividends discounted. *Beling v. American, etc. Co.*, 72 N. J. Eq. 32 (1907); holding also that in dismissing a minority stockholder's suit in equity, the court may do so without prejudice to an action at law by him for the value of the stock at the time of the consolidation which he complains of. In the case *Lee v. Atlantic, etc. R. R.*, 150 Fed. Rep. 775 (1906), consolidation is defined as a dissolution of two old corporations by the formation of a new one, while a merger is a sale of the property of one to the other in exchange for stock of the latter, even though the latter is called a merger and not a sale. Where a corporation sells its assets for stock in another corporation, such stock going to the selling corporation itself, this is a sale and not a consolidation. *Hiles v. Hiles & Co.*, 120 Ill. App. 617 (1905), distinguishing *Chicago, etc. Ry. v. Ashling*, 160 Ill. 373 (1895). A dissenting stockholder may enjoin a New Jersey street railway company from selling its property to another street railway company in exchange for stock of the latter, unless such sale is made in connection with dissolution proceedings. He may enjoin a sale of the property to a Washington street railway company for twenty thousand shares of the full-paid stock of the latter, where dissenting stockholders of the former are to be paid only \$35 cash in lieu of each share of the Washington corporation, which he would be entitled to. On its face this is an issue of the Washington stock at \$35 per share, and is in violation of the Washington statutes. The court

said: "To the extent of sixty-five per cent. of the issue the increase of capital stock will be, therefore, 'fictitious' and, according to the constitution, 'void.' Such a scheme ought not to be forced upon an unwilling stockholder of the New Jersey company." Moreover, it being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. *Coler v. Tacoma Ry. etc.*, 65 N. J. Eq. 347, rev'g 64 N. J. Eq. 117 (1903).

<sup>1</sup> *Mayfield v. Alton Ry.*, 100 Ill. App. 614 (1901); aff'd, 198 Ill. 528. There is no statute under which an Illinois corporation can consolidate with a foreign corporation. *Loughlin v. United States School Furniture Co.*, 118 Ill. App. 36 (1905).

<sup>2</sup> *Bisgood v. Nile, etc. Co., Ltd.*, [1906] 1 Ch. 747. Where the charter authorizes a sale of all the assets for stock in another corporation, partly paid up stock may be received in payment for such assets. *Mason v. Motor, etc. Co., Ltd.*, [1905] 1 Ch. 419. A charter under the English statutes cannot provide that the assets may be sold for partly paid up stock in another company which the old stockholders must accept or take such compensation as the plan of reorganization provides. *Bisgood v. Henderson's etc. Estates, Ltd.*, [1908] 1 Ch. 743, the court saying that "any division which compels a member to find further money or to forfeit his money is bad." Even though the charter authorized the company to sell its assets and take stock in another corporation in payment and distribute the same among the stockholders, yet this does not authorize it to sell and take partly paid up stock in payment. *Bisgood v. Nile, etc. Co., Ltd.*, [1906] 1 Ch. 747.



sell all its real estate to another corporation organized for that purpose taking in exchange the capital stock of the latter, such stock to be thereupon offered to the stockholders of the former for subscription at par *pro rata*, such right to be forfeited if not exercised or sold within a certain time. A dissenting stockholder may enjoin the scheme, the court holding that a corporation has no power to create other corporations for such purpose. The court said: "The increase is to be obtained by what is in effect a forced assessment upon the full-paid and non-assessable shares of the stockholders, for unless they take new stock they lose a material part of their investment, although something they do not want is given in exchange."<sup>1</sup> But where the charter allows a sale of all the assets for partly paid stock in another company, the contract of sale may provide that such stock as is not accepted by the stockholders may be sold for their benefit.<sup>2</sup> Policy holders in a mutual insurance company are practically stockholders therein, and on a distribution of a surplus the existing policy holders are entitled to it, and hence a statute authorizing it to turn its property over to a stock corporation organized for that purpose, only a small part of the stock to go to the policy holders, is illegal.<sup>3</sup>

Frequently the statutes provide for buying out dissenting minority stockholders at the appraised value of their stock.<sup>4</sup> Such a statute

Even though the charter authorizes the corporation to sell all its assets, it cannot sell the same to another corporation for partly paid stock to be distributed among its members, members not accepting the shares to lose all their interest in the concern. This is an attempt to force the shareholders to provide more capital on pain of forfeiting their shares. *Manners v. St. David's, etc. Mines, Ltd.*, [1904] 2 Ch. 593.

<sup>1</sup> *Schwab v. Potter*, 194 N. Y. 409 (1909). See also § 884, *infra*. Even though the charter provides that a portion of the unpaid subscription price shall not be called for except upon the company being wound up, this does not prevent a call if the company sells all its property to another company and receives stock of the latter in consideration thereof, this being one way of winding up the company, and even though the money is not necessary to pay the company's debts, the subscriber not having exercised his right to demand cash for the appraised value of his stock as

allowed by statute. *Car Trust Inv. Co. v. Metropolitan T. Co.*, 184 Fed. Rep. 443 (1911).

<sup>2</sup> *Fuller v. White, etc., Ltd.*, [1906] 1 Ch. 823.

<sup>3</sup> *Huber v. Martin*, 127 Wis. 412 (1906).

<sup>4</sup> Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. *Boston, etc. R. R. v. Graham*, 179 Mass. 62 (1901). In determining the value of a dissenting stockholder's stock which is condemned, in connection with a lease in accordance with the statute, it is immaterial that the stock three years prior thereto was



exists in New York.<sup>1</sup> Where an act of congress provides that a national bank charter on its expiration may be renewed, dissenting stock-

worth more, but that on account of bad management its value had diminished; and it is immaterial that three years prior thereto a lease might have been made at a higher rental. The market value of the stock after the lease may be shown, even though the condemnation was by reason of such lease. The regular market value should be the basis of the award. *Gregg v. Northern R. R.*, 67 N. H. 452 (1893). A provision in a general act authorizing leases that a dissenting stockholder may have the value of his stock appraised and paid is legal. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902). Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that even though the stock were appraised, the corporation would not buy it. *Whiton v. Batchelder, etc. Corp.*, 179 Mass. 169 (1901). Under the Virginia statute on the consolidation of two corporations a dissenting stockholder is entitled to have the stock appraised and payment made to him in cash. *Winfree v. Riverside, etc.*

*Co.*, 75 S. E. Rep. 309 (Va. 1912). Where dividends on preferred stock are cumulative and are in arrears, and the company is consolidated with another company, the preferred stockholders cannot be compelled to take bonds and stock in the new company for a less amount than their old holdings with the arrears of dividends, especially where the original stock provided that on liquidation it should be paid in full with arrears, and it appearing that there were existing profits in the old company sufficient to pay such arrears; and that these would go to the common stockholders by way of common stock in the new company. A preferred stockholder may enjoin such consolidation, and is not obliged to allow the value of his stock to be appraised, as provided in the statute. *Colgate v. United States, etc. Co.*, 73 N. J. Eq. 72 (1907). See s. c., 75 N. J. Eq. 229 (1909). Where in the organization of a mercantile corporation some of the principal employees become stockholders, under a contract between all the stockholders, by which a majority might declare a stockholder to be undesirable, and thereupon he was to be paid the cash value of the stock as appraised, the stock to be then divided among the other stockholders, a suit in equity lies to compel an employee to give up stock so appraised, and the appraisal is the actual cash value of the assets without anything for good-will, and the fact that there is preferred stock is imma-

<sup>1</sup> See Laws 1901, ch. 130. A dissenting stockholder had an appraisal of his stock under the New York statute in *Matter of Timmis*, 200 N. Y. 177 (1910). Where an appraisal of the stock of a dissenting stockholder is made under a statute authorizing a consolidation, and there is no market value for the stock, the award is like an unliquidated account and bears interest only after the appraisers' report. *Trask v. Peekskill Plow Works*, 6 Hun, 236 (1875). A person in

whose name stock stands on the books of the company, but who is not the real owner thereof, cannot have the stock appraised under a statute. *Matter of Rogers*, 102 N. Y. App. Div. 466 (1905). Under the New York statute application for appraisal may be heard after sixty days, provided the notice of such application is given within sixty days. *Matter of Ennis v. Federal Brewing Co.*, 123 N. Y. App. Div. 691 (1908); aff'd, 192 N. Y. 570.



holders to be paid the appraised value of their stock, the latter, who have done all in their power to obtain the appraisal, are not liable on the stock if the corporation subsequently becomes insolvent.<sup>1</sup> Sometimes a more formal condemnation is authorized.<sup>2</sup> A state may enact a statute authorizing a railroad corporation to condemn a minority of the stock in another company, the former company being already the owner of the majority of the stock, it being shown that the public interest so demands, and the improvement of the railroad itself being of sufficient public interest.<sup>3</sup> A question may also arise as to whether the

terial, if it is redeemable at any time, it being shown also that the common stock had never been sold on the market. *Boggs v. Boggs & Buhl*, 217 Pa. St. 10 (1907). Under the English Companies Act all the property of a company may be sold to another company, but provision is made for the protection of the minority by paying them the value of their shares. *Re London, etc. Bread Co.*, 62 L. T. Rep. 224 (1890). See also *Baring-Gould v. Sharpington, etc. Syndicate*, [1899] 2 Ch. 80. The statutory notice to be given by a stockholder that he wishes to sell his stock in consequence of a reorganization may be waived by a representative of the company. *Brailey v. Rhodesia, etc.*, [1910] 2 Ch. 95. Under a statute authorizing any stockholder to demand payment in cash where the property of the company is sold to another company he cannot examine the officers before deciding whether to demand the cash or take new stock. *Re British, etc. Co. Ltd.*, [1908] 2 Ch. 450. In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. *Holst v. Sydney, etc. Ry.*, 69 L. T. Rep. 132 (1893). Where, upon the voluntary dissolution of a corporation, a reorganization scheme is carried out by which the property is turned over to a new company for its shares and a reasonable time is fixed within which the old stockholders must exercise their option to take stock or have it

sold by the liquidator, a stockholder cannot exercise his option after that time, although he was ignorant of the whole matter, nor can he have the scheme set aside. *Postlethwaite v. Port Phillip, etc. Co.*, L. R. 43 Ch. D. 552 (1889); *Weston v. New Guston Co.*, 62 L. T. Rep. 275 (1889); s. c., 60 L. T. Rep. 805; *aff'd*, 64 L. T. Rep. 815. Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. *Tuttle v. Batchelder, etc. Co.*, 170 Mass. 315 (1898). A statute that dissenting stock shall be appraised is not applicable where no appraisal proceedings are had, and hence the owner may claim new stock in exchange therefor, even though considerable time has elapsed. *Douglass v. Concord, etc. R. R.*, 72 N. H. 26 (1903).

<sup>1</sup> *Apsey v. Kimball*, 221 U. S. 514 (1911); *aff'g* 199 Mass. 65, and *Kimball v. Apsey*, 164 Fed. Rep. 830 (1908). Where a stockholder in a national bank gives notice in accordance with the national bank act of his intention to take the value of his stock on a renewal of the charter, he is not liable on the stock thereafter, but is a creditor, even though the appraisal had not been completed for two years when the bank failed. *Apsey v. Whittemore*, 199 Mass. 65 (1908).

<sup>2</sup> See § 896, *infra*.

<sup>3</sup> *Offield v. New York, etc. R. R.*, 203 U. S. 372 (1906). Where a railroad corporation has legally acquired nearly all the stock of another cor-



selling corporation has power to acquire the stock and bonds of another corporation; but it seems that where all the stockholders of the company accepting the stock assent, no one else can object.<sup>1</sup>

poration, the legislature may authorize the former to condemn the minority holdings of such stock. *New York, etc. R. R. v. Offield*, 77 Conn. 417 (1904), holding also that in a proceeding by a railroad to condemn shares of its stock as allowed by statute, it is no defense that the company might have financed its improvements in some other way.

<sup>1</sup>Although a corporation cannot purchase or deal in stocks of other corporations unless expressly authorized by law so to do, yet it may take stock in payment for a debt. And where all the stockholders of a manufacturing corporation consent to the sale of all its property to another corporation in exchange for stock in the latter, even though the former corporation was forbidden by statute to purchase the stock of other corporations, the corporation may then sell the stock, and the vendee cannot set up *ultra vires* on the part of the vendor. *Holmes, etc. Co. v. Holmes, etc. Co.*, 127 N. Y. 252 (1891). A contract whereby a corporation agrees to sell all its property to another corporation for bonds and stock of the latter company cannot be enforced, nor be the basis of damages for breach, inasmuch as one corporation has no power to buy the stock of another corporation. *Easun v. Buckeye Brewing Co.*, 51 Fed. Rep. 156 (1892). An offer of a corporation to sell out, in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company, where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. *Bi-Spool, etc. Co. v. Acme Mfg. Co.*, 153 Mass. 404 (1891). The stockholders of a corporation may, together with the directors, cause the corporate property to be sold to a new corporation in exchange for the stock of the latter.

A pledgee of stock in the former corporation cannot after the sale undo the sale or hold the latter corporation liable. His remedy is against the pledgor and the first corporation. *Leathers v. Janney*, 41 La. Ann. 1120 (1889), holding also that a purchasing corporation is not bound to see that the selling corporation distributes the stock of the former legally among the stockholders of the latter corporation. Where a consolidation is effected by one company buying all the stock of another company, and, just before the transaction is completed, the company whose stock is thus sold issues a dividend of inter-bearing securities in order to defraud the purchasing company, the latter may, by a bill in equity, have such securities canceled. *Bailey v. Citizens' Gaslight Co.*, 27 N. J. Eq. 196 (1876). A corporation organized to deal in the stock of a stockyard corporation and hold personal and real estate may buy competing stockyards; and may buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stockyard company, and to bind stockyard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. *Ellerman v. Chicago, etc. Co.*, 49 N. J. Eq. 217 (1891). A Michigan capsule company has no right or power to sell all its property to a New Jersey capsule company — a combination company — in exchange for or payment of stock of such New Jersey company. The agreement so to do cannot be enforced, even though every stockholder assented to it. *Merz Capsule Co. v. U. S. Capsule Co.*, 67 Fed. Rep. 414 (1895). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in pay-



By unanimous consent of the stockholders it is legal for a private corporation to sell all its property to another company, take its stock in payment, and divide the stock among the stockholders, all creditors being paid.<sup>1</sup> A stockholder who takes part in and assents to the action

ment, and the stock is taken in the name of its secretary individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee, however, having taken with knowledge of all the facts. *Bear River, etc. Co. v. Hanley*, 15 Utah, 506 (1897). It is legal for a manufacturing company to organize a subsidiary company to sell its product, the entire capital stock of the latter being owned by the former. *Dittman v. Distilling Co.*, 64 N. J. Eq. 537 (1903). It being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. *Coler v. Tacoma Ry. etc.*, 65 N. J. Eq. 347 (1903). A stockholder in a railroad company which has sold its property to another railroad company cannot have the sale set aside on the ground that the buying company had no authority to purchase. *Hinds County v. Natchez, etc. R. R.*, 85 Miss. 599 (1905). A corporation may purchase the assets of another corporation and issue stock in payment therefor. *Hiles v. Hiles & Co.*, 120 Ill. App. 617 (1905).

<sup>1</sup> Where an iron manufacturing concern owns an iron manufacturing plant and stocks in an ore company and a railway company and a steamboat company and other corporations, and also a farm, and by consent of all the partners the firm is transformed into a corporation which takes all the property, including the stocks and the farm, one of the participants cannot afterwards complain that it was illegal for the corporation to acquire such stocks and the farm. *Burden v. Burden*, 159 N. Y. 287 (1899). In the case *Hoene v. Pollak*, 118 Ala. 617 (1898), where one corporation sold all its property to another corporation for stock of the

latter, the stock of the latter was issued directly to the stockholders of the former. A committee appointed by the stockholders to sell the property for stock in a new corporation and dissolve the old corporation and distribute the assets may be liable to the stockholders, if, after making such sale, they delay in dissolving the old corporation and distributing the assets until the new stock becomes worthless. Their liability is a question of negligence for the jury. *In re Lincoln, etc. Co.*, 190 Pa. St. 124 (1899). See also §§ 548, 671, *supra*, and § 766, *infra*. The distribution of the stock of the vendee corporation among the stockholders of the vendor corporation amounts to a distribution of the capital stock of the vendor corporation among its stockholders. But this is not necessarily illegal. See §§ 3, 641, *supra*. A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability. *People v. Barker*, 141 N. Y. 251 (1894). The company may distribute the assets, provided all creditors are paid. *Rorke v. Thomas*, 56 N. Y. 559 (1874). See, to same effect, cases in § 670, *supra*. A corporate creditor cannot maintain a bill to enjoin the declaration of a dividend out of the capital stock. *Mills v. Northern Ry.*, L. R. 5 Ch. App. 621 (1870). Cf. ch. XXXII, *supra*. Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. *Allegheny v. Pittsburgh, etc. R. R.*, 179 Pa. St. 414 (1897). Practically, there was a division of the corporate assets among the stockholders in the case *Boston*,



of a stockholders' meeting which authorizes a sale of the property to another corporation in exchange for stock of the latter to be issued to

etc. *Co. v. Bankers', etc. Co.*, 36 Fed. Rep. 288; *aff'd, sub nom. United Lines Tel. Co. v. Boston, etc. Co.*, 147 U. S. 431 (1893). In this case the usual and simple process of one company selling all its property to the other company, and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation. In a suit to compel stockholders of a foreign corporation to discover and account for corporate property illegally divided among them, the property must be definitely described. Service on the corporation by publication is insufficient. *King v. Sullivan*, 93 Ga. 621 (1894). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue of the stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders who under protest subscribe for the new stock, and then wait eighteen months before commencing legal proceedings, are estopped from objecting. *Post v. Beacon, etc. Co.*, 84 Fed. Rep. 371 (1898). It is legal for the stockholders to agree to sell all the stock and pay the corporate debts and to receive from the purchasers the value of the property owned by the company. *Goodman v. Purnell*, 187 Fed. Rep. 90 (1911). A pool or partnership to purchase the securities of a railroad company and divide the profits or losses is not terminated by the purchase of the

railroad and the turning of the securities over to the new railroad corporation where the securities received in exchange therefor are pledged to carry on the transaction instead of being distributed. *Watkins v. Delahunty*, 133 N. Y. App. Div. 422 (1909). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment, and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. *Chattanooga, etc. R. R. v. Evans*, 66 Fed. Rep. 809 (1895). The sale of a business of a corporation which does not specifically transfer the trade name and good-will does not enable a purchaser of the business from the corporation to claim such trade name. *Cutter v. Gudebrod, etc. Co.*, 44 N. Y. App. Div. 605 (1899); *aff'd*, 168 N. Y. 512. Where a company is in difficulties and an agreement is made by which creditors are given the right to sell all the assets in case the business does not succeed within a certain time, and they do so, the purchaser has no right to organize a corporation having the same name as the old corporation, unless that was a part of the original agreement, and not even a majority of the stockholders have a right to vote to allow such use of the name, unless there is a new consideration therefor. *Armington v. Palmer*, 21 R. I. 109 (1898). Even though a Colorado corporation is organized for the issue of stock in exchange for stock in a Kansas corporation, and a stockholder in the latter assigns his Kansas certificate to another person and causes the Colorado corporation to issue its stock to such other person, yet if he fails to have the transfer recorded in the books of the Kansas corporation he is liable on such Kansas stock. *Pine v. Western, etc. Bank*, 63 Kan. 462 (1901). Even though a Nebraska railroad corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stock-



stockholders of the former, cannot afterwards object thereto and demand cash, even though his assent was only by refraining from voting against the proposition.<sup>1</sup> Where a corporation sells its property for preferred stock in another corporation to be issued to the stockholders

holders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to the federal court. *Walters v. Chicago, etc. R. R.*, 104 Fed. Rep. 377 (1900); *aff'd*, 186 U. S. 479. A corporate creditor cannot attack a sale of all the assets of the corporation for a valuable consideration and in good faith, even though such sale was not formally authorized by the board of directors or stockholders. *Magowan v. Groneweg*, 14 S. D. 543 (1901). See *s. c.*, 16 S. D. 29. Where, upon the sale of all the assets of one corporation to another, stock of the latter is issued to stockholders of the former, and it is provided that any surplus remaining from a certain fund shall be divided among all the stockholders of both companies, this interest in the surplus vests in the then existing stockholders individually, and this interest does not pass on a subsequent sale of his stock by a stockholder. *Read v. Citizens', etc. R. R.*, 110 Tenn. 316 (1903). Where on a sale of the corporate property the proceeds are divided among the holders of the entire capital stock, although a part of it is treasury stock, a bank in which money is deposited may interplead as to the part going to the treasury stock. *Little v. St. Louis, etc. Co.*, 197 Mo. 281 (1906). Where by consent of all the stockholders the corporate property is sold and the proceeds distributed and one of them secretly receives an additional price and afterwards is sued by another stockholder for his *pro rata* share thereof, he may defend on the ground that the whole transaction was to create a trust. *Erpelding v. McKearnan*, 143 Mich. 409 (1906). A city in buying a water-works plant may take a deed of the plant itself, and also a transfer of all the shares of stock, and this does not prevent the former stockholders distributing among themselves the purchase price. *Connor v.*

*City of Marshfield*, 128 Wis. 280 (1906). Where in a special act of incorporation thirteen incorporators are named and they organize and elect directors, and the latter accept subscriptions, and all the incorporators are given opportunity to subscribe, those who do subscribe may sell all their stock and thereby transfer the entire corporation, and those incorporators who do not subscribe are not entitled to any part of the price. *Roosevelt v. Hamblin*, 199 Mass. 127 (1908). The same rule applies to promoters who assist in obtaining the charter. *Dobbins v. Peabody*, 199 Mass. 141 (1908).

<sup>1</sup> *Carr v. Rochester, etc. Co.*, 207 Pa. St. 392 (1904). Where a corporation has purchased all the assets of another corporation and issued stock in payment of the same, the stockholder in the former who became a stockholder after the transaction, cannot maintain a suit to have the issue declared void, especially where there is no offer to return the property. *Buford v. Keokuk, etc. Co.*, 69 Mo. 612 (1879), *aff'g* 3 Mo. App. 159. Where one corporation buys the assets of another, the stock of the former being issued to the stockholders of the latter, a new stockholder in the former cannot complain that the latter corporation distributed its assets before dissolution. *O'Dea v. Hollywood, etc. Ass'n*, 154 Cal. 53 (1908). An insolvent corporation having \$1,000,000 common stock and \$600,000 preferred stock, may reorganize by reducing its stock to \$200,000 common and \$200,000 preferred, and issuing \$270,000 first preferred having priority over the old preferred, and a person who owns one per cent. of the old preferred cannot object after the reorganization has been carried out, the first preferred being issued to the creditors in part payment of their claims. *Ecker v. Kentucky, etc. Co.*, 144 Ky. 264 (1911).



of the former, they cannot after accepting this preferred stock, object that it does not grant as much as was agreed upon.<sup>1</sup>

A solvent copartnership may, by consent of the whole firm, merge itself into a corporation, proper provision being made for the payment of creditors.<sup>2</sup> Where a person who holds property which belongs to

<sup>1</sup> *Mellon v. Mississippi, etc. Co.*, 77 N. J. Eq. 498 (1910).

<sup>2</sup> Partners who merge their partnership into a corporation and take stock in payment, thereby waive liens which existed in the partnership. *Francklyn v. Sprague*, 121 U. S. 215 (1887). A solvent mercantile firm may transfer all their assets to a new corporation in payment for stock, and then pledge the stock to certain of their creditors. *Coaldale Coal Co. v. State Bank*, 142 Pa. St. 288 (1891). Where a surviving partner organizes a corporation and transfers to it a large part of the assets of the old firm fraudulently, but outside persons become interested in the stock of the corporation, the estate may bring suit to compel the corporation to permit it to become a stockholder, and may join the other stockholders as parties defendant, and may compel the corporation to pay to the estate such part of the profits as in equity it is entitled to, the corporation having acquired patent rights and other property from other sources. *Rowell v. Rowell*, 122 Wis. 1 (1904). Where one of the partners sells all the business to a corporation for stock, and keeps the stock, the other partners may compel him to account, even though they delay five years. *Lamb v. Lamb*, 140 Mich. 85 (1905). As against the dissent of a partner, a limited partnership has no power to sell all of its assets to a corporation in exchange for the stock of the latter. This is not such a winding up of the partnership as is legal. *Emery v. Kalamazoo, etc. Co.*, 132 Mich. 560 (1903). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. *Tilkey v. Augusta, etc. R. R.*, 83 Ga. 757 (1889). Where two members of a firm give notice of a

dissolution of the firm, and then transfer all the assets to a newly formed corporation, the court will place all the property in the hands of the third member of the firm for the purpose of winding it up. *Macdonald v. Trojan, etc. Co.*, 10 N. Y. Supp. 91 (1890). Where by agreement a partnership is merged into a corporation, and then one partner is refused his part of the stock, he may sue for an accounting and payment in cash. *Crosby Lumber Co. v. Smith*, 51 Fed. Rep. 63 (1892). Under a partnership agreement providing for incorporation, part of the partners may incorporate, transfer the property to the corporation, and compel the other partners to pay in to the corporation the amounts of money contemplated by the partnership agreement before the stock is issued to them. *Hennessy v. Griggs*, 1 N. Dak. 52 (1890). A corporation formed to purchase the assets of a firm may sue on claims of such firm which have been assigned to it, and the firm are not proper parties to the suit. *Lottman, etc. Co. v. Houston, etc. Co.*, 38 S. W. Rep. 357 (Tex. 1896). Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint notwithstanding the general understanding as to the division of control. *Baumgarten v. Nichols*, 69 Hun, 216 (1893). A partnership consisting of responsible persons may sell its business for stock to a corporation organized for that purpose. The creditors of the partnership cannot claim a lien on the property. *Bristol, etc. Trust Co. v.*



another person sells the property for stock in a corporation, the latter person may claim the stock.<sup>1</sup>

If one corporation sells out to another for stock of the latter, a stockholder in the former may sue the purchasing corporation for his part of such stock, it not having been delivered.<sup>2</sup> Where a corporation trans-

Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898). Where a person sells his business to a corporation for the stock of the latter, with the agreement of the latter to indorse the notes of the vendor, such indorsements are legal. *Nat. Bank of Commerce v. Allen*, 90 Fed. Rep. 545 (1898). Where an individual transfers all his property to a corporation in exchange for its capital stock and a mortgage, neither he nor the corporation can subsequently attack the transaction. *Burke, etc. Co. v. Wells, etc. Co.*, 7 Idaho, 42 (1900).

<sup>1</sup> *Chapman v. Porter*, 69 N. Y. 276 (1877); *Re Gilbert*, 104 N. Y. 212 (1887).

<sup>2</sup> The court said: "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth." *Anthony v. American Glucose Co.*, 146 N. Y. 407 (1895). Where on a consolidation the president of a constituent company receives for the benefit of all the stockholders the stock in the new company and also certain assets of the old company, a stockholder in a suit to compel him to account must join the constituent company and also other stockholders. *Knickerbocker v. Conger*, 110 N. Y. App. Div. 125 (1905). Where by contract one corporation agrees to issue one share of its stock for every two shares of stock in another corporation, a stockholder in the latter may have specific performance of such an agreement. *Motley v. Southern Ry. Co.*, 184 Fed. Rep. 956 (1911). A stockholder in a corporation which has sold all its property cannot sue for his part of the assets, the corporation still being in existence, even though it has never issued certificates of stock. *Harton v. Johnson*, 166 Ala. 317 (1910). Where a company sells its property to another company for stock of the latter,

the latter is not liable to a stockholder of the former in regard to a part of the stock. *Kimball v. Success Mining Co.*, 38 Utah, 78 (1910). Where one company is sold out to another company on the basis of the latter company issuing its stock share for share for the stock of the former company, a stockholder of the former company may sue the latter company for his stock without joining the old company or any of the old stockholders. *Fletcher v. Newark, etc. Co.*, 55 N. J. Eq. 47 (1896). Where by the terms of a lease of all the corporate property the rent is to be paid directly to the stockholders as dividends, and a prior mortgage of the lessee is foreclosed, and the lease is not assumed by the receiver, a stockholder of the lessor cannot object to a subsequent arrangement between the lessor and the reorganized company of the lessee by which a certain sum is paid to the lessor to be used for other purposes than dividends. *Central, etc. Co. v. Farmers', etc. Co.*, 112 Fed. Rep. 81 (1901). Where various properties are transferred to a coal company for stock on the further understanding that all moneys already expended on such properties should be repaid in bonds of a railway to be guaranteed by the coal company, but such distribution of bonds is never made on account of the impossibility of such a guaranty being legally made, one of the parties who turned in his property may hold the coal company liable in damages for the amount of money expended by him on the property before turning it in for stock. *Crown, etc. Co. v. Thomas*, 177 Ill. 534 (1898). A contract between two companies, by which one buys out the other and agrees to issue certain securities to stockholders of the vendor does not give such stockholders a direct right as against the purchasing company.



fers its property pending a suit by it, the transferee may be substituted.<sup>1</sup>

§ 672. *Corporate creditors' rights where the corporation sells all its property to another corporation for stock of the latter — Rights and remedies of creditors of an individual or partnership, all of whose assets are transferred to a corporation in exchange for stock or bonds.* — Where a corporation sells all its property for cash there is no difficulty in regard to creditors, the sale being an honest one, inasmuch as the cash must be applied to the corporate debts before any distribution is made among the stockholders. But where the property is sold for stock a more difficult question arises. A creditor of the corporation then has several remedies open to him. He may subject the stock to the payment of his debt;<sup>2</sup> and if the stockholders have dis-

*Re Metropolitan, etc. Co.*, [1900] 2 Ch. 671. Although a new company with the same name and capital stock buys out the old, yet a stockholder in the old cannot compel a transfer of his stock on the books of the new. *Huggins v. Milwaukee B. Co.*, 10 Wash. 579 (1895). Where the sale of one company to another was induced by fraud, the vendor may rescind, even though the stock of the vendor was canceled as a part of the sale. *Texas, etc. Assoc. v. Dublin, etc. Co.*, 38 S. W. Rep. 404 (Tex. 1896). Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. *Chicago, etc. Ry. v. Hoyt*, 89 Wis. 314 (1895). Where the assets of a corporation are turned over to a new corporation and all the stockholders exchange their stock for new stock, they cannot afterwards claim that a surplus of the old corporation should have been divided. *Boynton v. Roe*, 114 Mich. 401 (1897). While negotiations were pending between two gas companies for their consolidation by one company buying the stock of the other, upon a certain basis of capital and indebtedness, one

of them, without the knowledge of the other, passed a resolution declaring a scrip dividend of ten per cent. on its capital stock, thus increasing its indebtedness by that amount. The certificates were accordingly issued; but after the consolidation, upon a bill filed for that purpose, the scrip was declared void. *Bailey v. Citizens' Gas Light Co.*, 27 N. J. Eq. 196 (1876). As to a suit to collect guaranteed dividends, see § 775, *infra*.

<sup>1</sup> *Nome, etc. Co. v. Ames, etc. Co.*, 187 Fed. Rep. 928 (1911).

<sup>2</sup> Corporate creditors may object to the company selling out all its property to another corporation and receiving pay in the stock of the latter corporation. Such stock may be subjected by the creditors to their debts, or the conveyance may be set aside and the company wound up as insolvent. *Vance v. McNabb, etc. Co.*, 92 Tenn. 47 (1892); *Fort Payne Bank v. Alabama Sanitarium*, 103 Ala. 358 (1894). Where the corporation sells all its assets, and the purchasing corporation gives its bonds to the stockholders of the former, such bonds belong to the corporate creditors. *Peters v. Fort Madison Const. Co.*, 72 Iowa, 405 (1887). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. *Chattanooga,*



tributed the stock among themselves without paying the corporate debts, he may compel them to return the stock and apply it to his debt;<sup>1</sup>

etc. *R. R. v. Evans*, 66 Fed. Rep. 809 (1895). Where the stockholders distribute the assets of the corporation among themselves, leaving enough, as they suppose, to pay the debts of the company, and it turns out that the amount left is not sufficient, the stockholders must pay back enough to liquidate such debts. *Grant v. Ross*, 100 Ky. 44 (1896). A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. *Stone v. Reed*, 152 Mass. 179 (1890). Where the officers of a bank use its funds to buy property, which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property, at their option. *Farmers', etc. Bank v. Kimball Milling Co.*, 1 S. Dak. 388 (1890). Where a mortgagee in possession of the property leases it with other property, and takes stock in payment, he must account to the mortgagor for the dividends received on the stock representing the mortgaged property. The stock is impressed with a trust character. Entries on the stock ledger and corporate books are competent evidence of the issue. *Chapman v. Porter*, 69 N. Y. 276 (1877).

<sup>1</sup> Where a street railway sells all its property for stock to be delivered to its stockholders the remedy of its creditors is not against the property but against such stock. The trust fund theory only applies when a corporation is insolvent or dissolved, or has disposed of its property in fraud of corporate creditors, or has sold its property without authority so to do. *Hagemann v. Southern, etc. R. R.*, 202 Mo. 249 (1907). Where the company is insolvent and all its property is sold and the proceeds divided among the stockholders the creditors may compel them to repay the same.

*Mitchell v. Jordan*, 36 Wash. 645 (1905). Even though a company sells all its assets for cash to another company it may apply such cash to the payment of some of the creditors, and not to others, and if the president is a creditor he may be included among those who are paid. *Shipman Co. v. Detroit, etc. Ry.*, 140 Mich. 589 (1905). In a suit by judgment creditors of a corporation to hold stockholders liable for dividing its assets, all of its property having been sold to another corporation for stock of the latter delivered directly to the stockholders of the former, the judgment by the creditor against the corporation cannot be impeached except for fraud or want of jurisdiction. *Montgomery v. Whitehead*, 40 Colo. 320 (1907). Where a lessor railroad issues mortgage bonds to the lessee and the lessee uses them to buy a majority of the stock of the lessor, the creditors of the lessor, if it becomes insolvent, may hold liable the lessee to the extent of his debt not exceeding the value of such bonds, even though a larger sum has been expended on the leased road. *Northern Pac. Ry. v. Boyd*, 177 Fed. Rep. 804 (1910), *aff'd*, 228 U. S. 482. If a corporation divides its assets among its stockholders, leaving a claim unpaid, a claimant after obtaining judgment against the corporation, may bring suit against the only stockholder within the jurisdiction to compel repayment, and the judgment against the corporation is conclusive as to them. *Champagne Lumber Co. v. Jahn*, 168 Fed. Rep. 510 (1909). A corporate creditor, after obtaining a judgment against the corporation and having execution returned unsatisfied, may hold liable the stockholders who received the stock of another corporation which took over all the assets of the former corporation, even though such stockholders were not stockholders of record. Each stockholder is liable for the entire amount received by him to the amount of the claim, and it is not necessary to join all the stockholders.



or he may levy an attachment or execution upon the property which was transferred;<sup>1</sup> or, after obtaining an unsatisfied judgment against the corporation,<sup>2</sup> he may file a bill in equity to set aside the sale as being in fraud of creditors and to subject the property to the payment of his debt;<sup>3</sup> or under some circumstances he may hold liable the corpora-

*Williams v. Commercial Nat. Bank*, 49 Oreg. 495 (1907). Where the stockholders distribute the assets among themselves, a creditor may follow the assets. *Panhandle Nat. Bank v. Emery*, 78 Tex. 498 (1890). Creditors may reach stock which the corporation, which becomes insolvent, has distributed without a dividend. *McKusick v. Seymour, etc. Co.*, 48 Minn. 172 (1892). Where a corporation sells its property to another corporation for stock of the latter to be delivered to stockholders of the former, the creditors of the former may hold each stockholder liable for the amount received by him, or such creditors may follow the property itself. *Vance v. McNabb, etc. Co.*, 48 S. W. Rep. 235 (Tenn. 1897). Where a construction company distributes its assets among its stockholders without paying its creditors, the stockholders may be compelled to disgorge to the extent of the debts so remaining unpaid. *Grant v. Southern Contract Co. etc.*, 47 S. W. Rep. 1091 (Ky. 1898).

<sup>1</sup> A creditor of an insolvent corporation may attach its property which has been transferred by it to another corporation in payment for the whole capital stock of the latter corporation. *McVicker v. American Opera Co.*, 40 Fed. Rep. 861 (1889). A judgment creditor of an insolvent corporation may levy on and sell under execution the property of the corporation which has been conveyed to a new company, under a reorganization plan to which all of the old stockholders and most of the creditors have assented. *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585 (1890). A creditor of the corporation that sells out all its property to another corporation for stock in the latter may levy an execution on the property on the ground that it is conveyed in fraud of creditors. *Couse v. Columbia, etc. Co.*, 33 Atl. Rep. 297

(N. J. 1895). A stockholder, to whom an insolvent corporation has transferred all its property in exchange for his stock, cannot enjoin a judgment creditor from selling out such assets under execution against the corporation. *Moffat v. Smith*, 101 Fed. Rep. 771 (1900). Where a corporation that is in debt transfers all its assets to a new corporation in exchange for the stock of the latter, a creditor of the former may levy an attachment on such assets. *Buckwalter v. Whipple*, 115 Ga. 484 (1902).

<sup>2</sup> A corporate creditor seeking to reach the assets of the company which have been distributed among the stockholders, upon a sale of all the property of the company, cannot file a bill in equity for that purpose until he has first obtained judgment against the company. *Swan, etc. Co. v. Frank*, 148 U. S. 603 (1893); *Central R. R. v. Pettus*, 113 U. S. 116 (1885). A creditor of a stockholder cannot complain that all the corporate property was sold to the stockholders for their stock. *Wagner v. Marple*, 10 Tex. Civ. App. 505 (1895).

<sup>3</sup> See § 673, *infra*. In a judgment creditor's suit to reach assets of an insolvent corporation which have been turned over to the stockholders in fraud of creditors, the judgment of the creditor against the corporation cannot be impeached except for fraud or want of jurisdiction. All of the stockholders need not be joined, but if any stockholder wishes the equities adjusted as between the various stockholders, he may file a cross-bill. *Singer v. Hutchinson*, 183 Ill. 606 (1900). A creditor may file a bill to set aside a transfer of all the assets of a corporation without consideration, leaving the company insolvent, and to compel the officers to account therefor. *South Bend, etc. Co. v. George C. Cribb Co.*, 105 Wis.



tion that purchased the property from the corporation that is indebted

443 (1900). It may be a question for the jury to decide whether a transfer by an insolvent corporation of the greater part of its business and property to another corporation, in exchange for stock and bonds of the latter, was to delay creditors within the meaning of the bankruptcy act. *Bean-Chamberlain, etc. Co. v. Standard, etc. Co.*, 131 Fed. Rep. 215 (1904). Where one company buys out another and assumes its mortgage, and issues its stock to the stockholders of the latter, but does not pay its floating debt, the holders of such debt may file a bill in equity against the purchasing company to subject the property to the payment of their debts, it being alleged that the property was worth more than the mortgage debt. *Kelley Co. v. Pollock & Bernheimer*, 57 Fla. 459 (1909). Where an electric light and street railway company has transferred all its property to another corporation in exchange for stock of the latter to be distributed among the stockholders of the former, a creditor of the former may maintain a bill in equity to subject the property to the payment of his debt. *Cooper v. Utah, etc. Ry.*, 35 Utah, 570 (1909). A policy holder in a mutual insurance company cannot enjoin the merger of the company with another company, even though he is entitled to an interest in the surplus profits. *Russell v. Pittsburgh, etc. Co.*, 132 N. Y. App. Div. 217 (1909). Where one company has sold all of its assets to another company, a creditor of the former may file a bill in equity against the latter to collect from the assets so transferred, even though the damages are unliquidated, the bill charging that the sale was not in good faith and the transaction being practically a consolidation. *Vicksburgh, etc. Co. v. Citizens' Tel. Co.*, 79 Miss. 341 (1901). In *Barrie v. United Rys. Co.*, 125 Mo. App. 96 (1907), it is held that a contract between two corporations having practically the same directors and officers, would be presumed to be fraudulent, especially where it involved a transfer of the

property of one to the other, without the creditors of the former being paid. A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given, and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid and may be set aside by a judgment creditor of the selling corporation. *Summers v. Glenwood, etc. Co.*, 15 S. Dak. 20 (1901). Where a corporation sells its property to another corporation, the stock of the latter to be given to stockholders of the former, the creditors of the former may follow the property. *Loughlin v. United States School Furniture Co.*, 118 Ill. App. 36 (1905). A judgment creditor who causes fraudulent preferences by an insolvent corporation to be set aside does not thereby himself obtain a preference over other creditors who did not institute proceedings. *Lodi, etc. Co. v. National, etc. Co.*, 41 N. Y. App. Div. 535 (1899). Where a New Jersey corporation is sold out to a New York corporation, a judgment creditor of the former may file a bill in New York to reach the assets of the former corporation, and may join as a party defendant a director in the former corporation who brought about the transfer of such assets. *Clokey v. International, etc. Co.*, 28 N. Y. Misc. Rep. 326 (1899). Where, in a foreclosure suit and before sale, the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. *Farmers', etc. Co. v. Missouri, etc. Ry.*, 21 Fed. Rep. 264 (1884). Although one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show



to him.<sup>1</sup> But any unreasonable delay on the part of the creditor in applying for relief will be fatal to his application.<sup>2</sup> Where all the

that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply. *Sidell v. Missouri Pac. Ry.*, 78 Fed. Rep. 724 (1897). Where a brewery company is dissolved in order that its assets may be sold and consolidated with other breweries, a person who had a bottling contract with it may follow its assets and subject them to his claim. *Schleider v. Dielman*, 44 La. Ann. 462 (1892). Where a creditor of a corporation seeks to reach property which has been fraudulently con-

veyed away by the company, he need not make the corporation a party defendant to the suit which he brings against the party who received the property. *Blanc v. Paymaster Min. Co.*, 95 Cal. 524 (1892). The formation of a new corporation and a transfer to it of all the assets of the old one may be a fraud on the creditors of the old corporation. *San Francisco, etc. R. R. v. Bee*, 48 Cal. 398 (1874). It is legal for a coal corporation, with the assent of all its stockholders, to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders, and they transferred their stock to him in addition to the transfer of the prop-

<sup>1</sup> See § 673, *infra*.

<sup>2</sup> Seven years' delay on the part of an alleged creditor of the old company is fatal to any relief. *Townsend v. St. Louis, Sandoval, etc. Co.*, 159 U. S. 21 (1895). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and a delay of three or four years, during which others become creditors of the new corporation and the latter become insolvent, will bar his claim for an equitable lien on the assets. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). Where one of the partners in a firm organized to locate, develop, and operate mines does not turn into the firm a mine located by him, but transfers the same to a corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money and the stock may have passed into other hands, the court will refuse relief, inasmuch as the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to

claim an interest if it turned out to be valuable. *Curtis v. Larkin*, 94 Fed. Rep. 251 (1899). Where the corporate creditor delays and allows the corporation taking over the property to incur debts, he cannot then complain. *Vaughn v. Comet, etc. Co.*, 21 Colo. 54 (1895). Corporate creditors of an insolvent corporation may set aside a sale of all its property to another corporation for bonds of the latter, the bonds being then distributed among stockholders of the former even though such creditors knew of and acquiesced in the sale at the time. *Fort Payne Bank v. Alabama Sanitarium*, 103 Ala. 358 (1894). Creditors who assent to a corporation turning over all its assets to a partnership, and agree to accept the partnership as their debtor, cannot afterwards complain of the transaction. *Tenney v. Ballard, etc. Co.*, 17 Tex. Civ. App. 144 (1897). A creditor cannot object to a corporation selling all its property for stock in another corporation if he is not injured. *Fourth Nat. Bank, etc. v. Consolidated, etc. Co.*, 76 S. E. Rep. 1057 (Ga. 1913).



property of a telegraph company is sold and the proceeds distributed among the stockholders, a creditor of the company may, by a bill in equity, compel the stockholders to pay the claim against the corporation,

erty. A subsequent creditor of the company who knew all of the facts cannot complain. *Parke, etc. Co. v. Terre Haute, etc. Co.*, 129 Ind. 73 (1891). A creditor whose claim for \$1,000 is contested cannot have a conveyance of all the corporate property to another corporation set aside. *Missouri, etc. Co. v. Reinhard*, 114 Mo. 218 (1893). Contract creditors cannot cause a *bona fide* sale of all the property of a corporation to be set aside merely because the corporation — a going concern — is insolvent. *Chattanooga, etc. R. R. v. Evans*, 66 Fed. Rep. 809 (1895). The Tennessee statute against liens prior to labor and damage claims does not give such claims a lien ahead of an out-and-out *bona fide* sale of the property. *Chattanooga, etc. R. R. v. Evans*, 66 Fed. Rep. 809 (1895). Where all the stock of a corporation is sold to a vendee, who then takes possession of the corporate assets and ignores the corporate existence, the court may construe this as a sale of the corporate assets. *Cusick v. Bartlett*, 91 Me. 153 (1898). Where a corporation is under contract to pay royalties, and subsequently all its assets are sold to another corporation for stock of the latter, which is distributed among the stockholders of the former, and subsequent royalties are not paid, judgment therefor may be obtained against the old corporation, and, upon execution returned unsatisfied, a bill in equity may then be filed to reach the assets so transferred to the new corporation, it being shown that the officers of the new corporation were chargeable with notice of such contract to pay royalties. *Wilson v. Æolian Co.*, 64 N. Y. App. Div. 337 (1901); *aff'd*, 170 N. Y. 618. Where one corporation transfers all its property to another in consideration of the issue of the stock of the latter to the stockholders of the former, a superintendent and patentee having a contract with the former corporation by which he is entitled to

twenty-five per cent. of all profits from manufacturing, use, or sale under said patents, in addition to his salary, and also an interest in all machines sold, may file a bill for an actual accounting as to the value of his interest so transferred to the new corporation, and may join all the stockholders as parties defendant. *Schaahe v. Eagle, etc. Co.*, 135 Cal. 472 (1901). Even though a corporation is put into a receiver's hands, under a statute relative to insolvent corporations, and notice for the presentation of claims is given, and, in accordance with the statute all claims not presented within four months are barred and the property is then sold, yet a non-resident creditor who had no actual notice may attack the proceedings on the ground that they were fraudulent and for the purpose of reorganizing the company in fraud of creditors. *Dobson v. Peek Bros. & Co.*, 103 Fed. Rep. 904 (1900). A general creditor of a solvent corporation cannot maintain a bill in equity against a person to whom the corporation has assigned all its property. *Ames & Harris v. Sabin*, 107 Fed. Rep. 582 (1901). An insolvent Ohio corporation may transfer all its assets to a New Jersey corporation which assumes all the debts. The bondholders of the Ohio corporation cannot object. Such bondholders become creditors of the New Jersey corporation. *Blake v. Domestic, etc. Co.*, 38 Atl. Rep. 241 (N. J. 1897). Even though a railroad company has guaranteed the bonds of another railroad company, and then sells all its property to a third railroad company, yet the guaranteed bondholders cannot have a receiver appointed of the price received on such sale, nor can they prevent a distribution of the price among the stockholders of the selling company, unless it is shown that thereby the guarantor is made insolvent. *Guilmartin v. Middle G. & A. Ry.*, 101 Ga. 565 (1897).



the proceeds being a trust fund.<sup>1</sup> Even though a sale of all the corporate property to an individual may be invalid as to corporate creditors, yet a purchaser cannot defend against the price on the ground of such invalidity.<sup>2</sup> The personal liability of the directors and corporate officers in such a transaction is considered elsewhere.<sup>3</sup>

Where a majority stockholder in a railroad company causes it to issue mortgage bonds to another railroad company, which then guarantees them and takes a lease of the first named railroad, and also purchases the stock, a part of the bonds being used to pay such stockholder for the stock, an unsecured creditor of the first named railroad may hold the second railroad liable on his claim to the extent of the bonds issued in payment for the stock.<sup>4</sup> Where the purchasing company is a mere "dummy" for the selling company, a creditor of the latter may sometimes disregard the identity of the purchasing company.<sup>5</sup>

An insolvent corporation cannot transfer all its assets to one of its directors upon his guarantee to pay all the debts. A creditor may file a bill to set aside a sale by such director of part of the assets to one of the creditors in discharge of a debt.<sup>6</sup> A creditor of a railway company which has sold all its property to another company for a specified price, the former company agreeing to pay its own debts and such agreement being guaranteed by outside parties, cannot hold such outside parties liable on such guaranty.<sup>7</sup> The agreement of a creditor of a corporation to take stock in a proposed reorganized company may be revoked by the creditor at any time before actual performance.<sup>8</sup> The creditor of a corporation may garnishee a person owing such corporation on a subscription for stock, even though such corporation has sold its assets to another corporation.<sup>9</sup> Where an insolvent corporation sells its assets

<sup>1</sup> Baltimore, etc. Tel. Co. v. Interstate, etc. Tel. Co., 54 Fed. Rep. 50 (1893). Where an insolvent Kansas corporation transfers all its assets to a Missouri corporation, and at the same time all the stock of the former is transferred to the latter, the transaction is *ultra vires* and fraudulent, and the statutory liability of the stockholders in the Kansas corporation continues. Anglo-American, etc. Co. v. Lombard, 132 Fed. Rep. 721 (1904).

<sup>2</sup> Clapp v. Allen, 20 Ind. App. 263 (1898).

<sup>3</sup> See § 682, *infra*.

<sup>4</sup> Northern Pacific Ry. v. Boyd, 228 U. S. 482 (1913).

<sup>5</sup> See §§ 6, 663, *supra*, and § 709, *infra*.

<sup>6</sup> Berney Nat. Bank v. Guyon, 111 Ala. 491 (1896). As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company. Levins v. Peeples, etc. Co., 38 S. W. Rep. 733 (Tenn. 1896).

<sup>7</sup> Randall v. Detroit, etc. Ry., 134 Mich. 493 (1903).

<sup>8</sup> Providence, etc. Co. v. Kent, etc. Co., 19 R. I. 561 (1896).

<sup>9</sup> Prentice v. United States, etc. Co., 78 Fed. Rep. 106 (1897). In Long v. Evening News Assoc., 113 Mich. 261 (1897), a judgment creditor of the corporation that had sold all its



for bonds and stock in another corporation, it may sell such bonds and stock to one of its directors at a fair price, no actual fraud being involved.<sup>1</sup>

The rules above laid down are applicable in most respects to a sale by a partnership of all its property to a corporation in exchange for stock. Such sales often are made in order to merge a solvent copartnership into a corporation.<sup>2</sup> They are also made sometimes by an embarrassed or insolvent firm. In such a case the creditors of the firm may object. They may levy an attachment or execution on the property,<sup>3</sup> or reach the stock,<sup>4</sup> or file a bill in equity to set the sale

assets to another corporation in payment of a debt garnisheed the latter for his debt.

<sup>1</sup> *Graham v. Carr*, 130 N. C. 271 (1902).

<sup>2</sup> A transfer of his property by an individual to a corporation in exchange for its stock is not illegal on the ground that it was to avoid inheritance taxes and prevent the partition of the property among his heirs. *Steeg v. Leopold, etc. Co.*, 126 La. 101 (1910). A corporation taking over partnership assets after a certain date is liable for an obligation incurred after that date. *Ziemer v. Bretting Mfg. Co.*, 147 Wis. 252 (1911).

<sup>3</sup> *Booth v. Bunce*, 33 N. Y. 139 (1865); *San Francisco, etc. R. R. v. Bee*, 48 Cal. 398 (1874). Creditors of an insolvent individual who transfers his property to a corporation for stock may attach the property on the ground that the act hindered and delayed creditors. *Dolan v. Wilkerson*, 57 Kan. 758 (1897). Creditors of a person who sells his property to a corporation for stock of the latter cannot attach the corporation as garnishee, inasmuch as they may levy on the stock. *Plant v. Billings-Drew Co.*, 127 Mich. 11 (1901). Where an insolvent partnership sells all its assets to a corporation for stock of the latter, a judgment creditor of such partnership may levy on such assets, inasmuch as the stock so received had no value, the corporation itself becoming insolvent within two months. *Mulford v. Doremus*, 60 N. J. Eq. 80 (1900). A creditor of an insolvent individual who transfers his property to a corporation in exchange for stock and then distributes the

stock *pro rata* among his creditors may levy an attachment upon the property as having been transferred with the result of delaying creditors. *Curran v. Rothschild*, 14 Colo. App. 497 (1900). A creditor of an insolvent firm which has turned over all its assets to a corporation for stock may levy upon the property so transferred especially where one creditor was given a part of the stock for his debt. *Colorado, etc. Co. v. Acres, etc. Co.*, 18 Colo. App. 253 (1902).

<sup>4</sup> Where a firm turns all its property into a corporation for stock, a firm creditor cannot reach the stock of one member of the firm in preference to other creditors of that member. *Singer, etc. Co. v. Carpenter*, 125 Ill. 117 (1888). Where an insolvent business man transfers all his property to a corporation for \$1,500, although it is worth much more, the purpose being to shield the property from his creditors, the court will order the trustee in bankruptcy to seize the property as assets of the bankrupt estate until its ownership can be regularly determined. *Re Berkowitz*, 173 Fed. Rep. 1013 (1908). A trustee in bankruptcy of a person cannot seize the assets of a corporation on the ground that it was fraudulently and illegally organized to purchase that person's goods and defraud his creditors. *Foster v. Hip, etc. & Co.*, 243 Ill. 163 (1909). An insolvent corporation cannot transfer its property to its president on a consideration paid by him to the stockholders, leaving creditors unpaid. *Mundy v. Jacques*, 116 Md. 11 (1911). Where a person sells lumber to a partnership and the latter becomes a corporation he may attach



aside.<sup>1</sup> Even though an insolvent partnership turns over all its assets to a corporation and takes stock in payment, yet if a third party in good

the lumber as the property of the partnership, even though he had accepted notes signed by the president and some of the letter paper showed that a corporation had been formed. *Belcher-Stine, etc. Co. v. Burns*, 159 Mich. 466 (1909). If the partnership is insolvent, then the stock issued is "watered," and the subscribers are liable as though no payment was attempted. *Saylor v. Simpson*, 45 Ohio St. 141 (1888). Where a firm sells its property to a corporation organized for that purpose, the payment being partly in notes of the corporation, and the corporation becomes insolvent, such notes are not second to claims of other corporate creditors. *London v. Bynum*, 136 N. C. 411 (1904).

<sup>1</sup> The creditors of a person may, by bill in equity, set aside a transfer of all his property to a corporation in exchange for shares of stock. *Strieby v. Clinton, etc. Co.*, 29 Atl. Rep. 589 (N. J. 1894). Judgment creditors of an individual may file a bill to set aside a transfer of his property to a corporation for stock, the stock to be distributed among his relatives. *Metcalf v. Arnold*, 110 Ala. 180 (1896). Where a person deeds land to a corporation for stock, but does not record it until the date when he makes an assignment, and there was no delivery of the deed except to himself as president, the deed may be set aside. *Taylor v. Seiter*, 199 Ill. 555 (1902). Where an insolvent person transfers all his property to a corporation for stock and bonds and practically ignores the corporate existence, except to transfer certain of its property to his sons for services, and he then transfers property to his wife, his creditors may have the transfer set aside as fraudulent. *Goodale v. Wheeler*, 41 Oreg. 190 (1902). Where a firm accepts a conveyance from a bankrupt in violation of the bankruptcy act, and conveys the same to a corporation formed for that purpose, the conveyance to the corporation may be set

aside. *Mitchell v. New Orleans, etc. R. R.*, 36 S. Rep. 1 (Miss. 1904). A transfer by an insolvent person of all his property for stock is fraudulent as to his creditors. *Hoppe Hardware Co. v. Bain*, 21 Okla. 177 (1908). A judgment creditor of a partnership may set aside a transfer of its property to a corporation in exchange for stock of that corporation. *Buell v. Rope*, 6 N. Y. App. Div. 113 (1896). In *Tradesmen's Nat. Bank v. Young*, 15 N. Y. App. Div. 109 (1897), the court refused to set aside a transfer of all the assets of an insolvent partnership to a corporation for stock, inasmuch as the creditors of the partnership would secure more by having the transaction stand than set aside. Where one member of a firm buys out the other member and gives his note, and then forms a corporation and turns in the property for stock, and the corporation becomes insolvent, the property cannot be turned over to the retiring partner in payment of such note. *Hall v. Goodnight*, 138 Mo. 576 (1896). Where an insolvent person transfers his property to a corporation for all the stock of the corporation, and the corporation assumes a certain debt of such person, and subsequently conveys its property to such creditor, the whole plan being in order to make payment that way, other creditors of the corporation may object. *Folsom v. Detrick, etc. Co.*, 85 Md. 52 (1897). Where an insolvent individual transfers all his property to a corporation for stock, and his principal creditor acquiesces and loans money to the corporation, and then takes the notes of the corporation for the old debt which such creditor had against the insolvent individual, the transaction is illegal as against other creditors of the corporation. *Craig v. California, etc. Co.*, 30 Oreg. 43 (1896). Where a corporation is formed to make advances to an insolvent copartnership, taking a lien on the property of the latter, and the latter continues the business in its own name and turns



faith invests at the same time a large sum of money in the corporation and takes stock in payment, and he does so on the understanding that

over the proceeds of the sales to the former, the scheme is illegal as giving the firm a false credit and as being inconsistent with the nature of a chattel mortgage. *Mathews v. Hardt*, 37 N. Y. Misc. Rep. 653 (1902); *aff'd*, 79 N. Y. App. Div. 570. A deed of land to a corporation for stock will not be set aside at the instance of creditors of the grantor where the corporation has other property and took the property in question in good faith, even though the grantor immediately transferred the stock to his relatives. *Shumaker v. Davidson*, 116 Iowa, 569 (1901). In the case *Collins v. Stofers Ex'rs*, 52 S. W. Rep. 940 (Ky. 1899), the court held that where the purchaser at foreclosure sale of a gas plant sold the property to an individual on credit, and the latter, instead of operating it himself, operates it in the name of the insolvent corporation, creditors who become such thereafter have no lien prior to the purchase-money lien of the vendor of the property, no deed by the latter having been made. Where a husband and wife accumulate property by their joint efforts and transfer it to a corporation for stock, a creditor of the husband may subject one half of the stock to the payment of his debt. *Croarkin v. Hutchinson*, 187 Ill. 633 (1900). Where a partnership buys goods in the name of a person as agent and afterwards incorporates, and the corporation makes purchases in the same name as agent, the members of the former firm are liable for the goods so bought for the corporation if the vendor had no notice of the incorporation. *Bynum v. Clark*, 125 N. C. 352 (1899). A transfer of a business by an insolvent person to a corporation for stock is void under the statute of Elizabeth as defeating and delaying creditors. *Re Carey*, Sol. Jour., June 8, 1895, p. 541. A receiver of the corporation was appointed in *Bonner v. Villaume, etc. Co.*, N. Y. L. J., Feb. 14, 1895 (Com. Pl.). A conveyance of real estate to a corporation for all

its shares of stock is fraudulent as against a mechanic's lien. *Gross v. Daly*, 5 Daly, 540 (1875). Creditors of an insolvent individual who has transferred his property to a corporation may file a bill to set aside the sale and to have the property sold. *Cass v. Sutherland*, 98 Wis. 551 (1898). A creditor of an insolvent individual may cause to be set aside a transfer of all his property to a corporation formed for that purpose in exchange for stock. *Reille v. Reid*, 28 Ont. Rep. 497 (1895). In *Ex parte Kenmore, etc. Co.*, 50 S. C. 140 (1897), the court allowed the corporate creditors to participate with the creditors of the insolvent debtor in the assets that had been turned over to the corporation for stock. A creditor of an insolvent person may treat as void a conveyance of all his property to a corporation in exchange for its shares of stock. He may file a bill to set aside the conveyance. *Terhune v. Skinner*, 45 N. J. Eq. 344 (1889). In an action by a judgment creditor of a partnership to set aside a conveyance of all its property to a corporation in consideration of its stock, the corporation, its mortgagee, the copartners, and creditors assenting to the transfer are all necessary parties. *National Broadway Bank v. Yuengling*, 58 Hun, 474 (1890). A judgment creditor of a failing firm may set aside an assignment of their property to a corporation formed to take over the property, even though the shares of stock have been sold. *Gardner v. Keogh Mfg. Co.*, 63 Hun, 519 (1892). Creditors of a firm that is transformed into a corporation may pursue the firm's assets so transferred. *Williams v. Colby*, 6 N. Y. Supp. 459 (1889). Where partnership assets are transferred to a corporation in payment for its stock, and the corporation pays part of the debts of the partnership and becomes insolvent, a member of the partnership who individually gave security for some of the partnership debts cannot claim a lien on the corporate assets



the partnership debts have been satisfied, the creditors of the partnership can reach only the stock received by the partnership.<sup>1</sup> Where a person transfers his property to a corporation for stock and then disposes of the stock and then becomes bankrupt, his trustee cannot compel the purchasers of the stock to return it on the ground that the sale to the corporation was fraudulent.<sup>2</sup> A creditor who for six months does not object to a transfer of all the property of his insolvent debtor to a corporation to carry on the business for the benefit of all the creditors, cannot set the transaction aside, all other creditors having assented thereto.<sup>3</sup> A judgment against individuals canceling land grants for fraud is binding on a corporation to which they turned over such grants in exchange for its stock, even though other people had purchased stock relying on such grants, the existence of the corporation being unknown at the time of the suit.<sup>4</sup> Even though a partnership becomes incorporated, yet a party who has dealt with the partnership, and supposes that he is still dealing with it, may hold the partners liable for goods furnished after the incorporation.<sup>5</sup> A contractor, who has assigned his contract to a corporation, which latter then proceeds to carry it out, is not personally liable to the employees, even though the assignment was prohibited by law and the employees may not have known for whom they were working.<sup>6</sup> If an insolvent person sells his property

in priority to corporate creditors. *Re Warner*, 82 Mich. 624 (1890).

<sup>1</sup> *Hall v. Baker, etc. Co.*, 86 Neb. 389 (1910). A corporation purchasing the assets of a copartnership does not thereby assume its debts. *Greenberg-Miller Co. v. Everett Shoe Co.*, 138 Ga. 729 (1912).

<sup>2</sup> *Re Mills*, 179 Fed. Rep. 409 (1910).

<sup>3</sup> *Imperial, etc. Co. v. Longbottom*, 143 Fed. Rep. 483 (1906). An unrecorded mortgagee on property transferred to the corporation in payment for stock cannot claim the property as against subsequent corporate creditors. *Besten v. People's, etc. Co.'s Assignee*, 99 S. W. Rep. 631 (Ky. 1907). Even though a person turns over his merchandise business for stock of a corporation and agrees that the latter will guarantee a certain debt, yet if in the transaction nothing is said about the debt the corporation is not thereafter liable on it. *Evans v. Johnson*, 149 Fed. Rep. 978 (1906). Where partnership assets are transferred to a corporation for stock and fresh money is put into the corpora-

tion, and it becomes insolvent, the partnership creditors are not entitled to participate in the assets of the corporation, there having been no actual fraud. *Thorpe v. Pennock, etc. Co.*, 99 Minn. 22 (1906). A purchaser of corporate assets may have good title as against the creditors of a firm which had previously thereto turned over such assets to the corporation for stock. *National Union Bank v. Hollingsworth*, 143 N. C. 520 (1906).

<sup>4</sup> *Linn, etc. Co. v. United States*, 196 Fed. Rep. 593 (1912).

<sup>5</sup> *Reid v. Kreling's Sons' Co.*, 125 Cal. 117 (1899). Where a firm sells its business to a corporation, but the employees are not given actual notice thereof, and the business continues, the firm may be liable for an injury incurred in the course of the business. *Goodwin v. Smith*, 66 S. W. Rep. 179 (Ky. 1902). See also § 243, *supra*.

<sup>6</sup> *Patton v. McDonald*, 204 Pa. St. 517 (1903). A corporation organized by the members of a firm to take over its assets is liable for its debts,



to a corporation for practically all of the capital stock of the latter, and his creditors attach not only the stock but also the property, the corporation may compromise with the creditors and buy such stock and the creditors' interest in the property.<sup>1</sup> Where preferences are not forbidden, an insolvent person may transfer his property to a corporation in exchange for stock of the latter and pledge such stock with a portion of its creditors. The other creditors cannot set aside the transfer as being in fraud of creditors where the corporation owned other property also and was organized in good faith. The creditors, however, may reach any such stock which the debtor has fraudulently disposed of.<sup>2</sup>

its stock having been issued in payment for such assets, and it being merely a continuation of the business. *Du Vivier & Co. v. Gallice*, 149 Fed. Rep. 118 (1906). Cf. § 243, *supra*. Even though stockholders sell their stock to one person and he takes charge of the property as his own, yet if he continues to do business in the corporate name and the stock is not paid for and is finally turned back, the company is liable for the debts which he has incurred. *Albany Mill Co. v. Huff Bros.*, 72 S. W. 820 (Ky. 1903).

<sup>1</sup> *Sutton v. Dudley*, 193 Pa. St. 194 (1899). Where an individual who owes a debt transfers property to a corporation, and later the corporation, with the consent of all the stockholders and creditors, gives a bill of sale of certain property to pay such debt, the corporation itself cannot subsequently complain. *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87 (1900).

<sup>2</sup> *Fischer v. Campbell*, 101 Fed. Rep. 156 (1900). An insolvent individual may transfer his property to a corporation for stock and pledge the stock to one of his creditors. *Haring v. Hamilton*, 107 Wis. 112 (1900). An insolvent partnership may transfer its property to a corporation in exchange for stock and then give the stock to certain of its creditors. Such a transaction is merely a method of giving a preference allowable at common law. *Troy v. Morse*, 22 Wash. 280 (1900). A debtor may legally transfer his property to a corporation in exchange for stock of the latter, and then transfer the stock to one of

his creditors. This is merely a preference. *Gardner v. Haines*, 19 S. D. 514 (1905). Where preferences by an insolvent debtor are allowed, such insolvent debtor may turn over his property to a corporation in exchange for stock of the latter and may transfer such stock to one of his creditors, it being proved that this was a good business move and that no property was covered up thereby. *Scripps v. Crawford*, 123 Mich. 173 (1900). Where an insolvent person transfers all his property to a corporation in exchange for its stock and then pledges the stock to a few of his creditors, the transfer is a preference within the meaning of the bankruptcy act and may be set aside, and is also illegal at common law where the transfer was intended to place the stock beyond the reach of his creditors. *Allen v. French*, 180 Mass. 487 (1901). A transfer by an insolvent person of all his property to a corporation for stock is not fraudulent as a matter of law, and where it was done with the knowledge of all his creditors, and the stock was then with their knowledge transferred to a person who guaranteed payment of the debts to the extent of thirty-five per cent., a single creditor who stands out for fifty per cent. will not be allowed to set aside the transfer. *Kingman & Co. v. Mowry*, 182 Ill. 256 (1899). But where such assignment was not in good faith a judgment creditor may cause it to be set aside. *Hinkley v. Reed*, 182 Ill. 440 (1899). In the case *First National Bank, etc. v. F. C. Trebein Co.*, 59 Ohio St. 316 (1898), where an insolvent person



Where an insolvent partnership transfers all its assets to a corporation for stock, such stock is not legally paid for, the good-will being worth nothing, and if one of the partners thereafter advances money to the corporation, his claim will not be allowed until other creditors are satisfied.<sup>1</sup> A person making an assignment to a trustee for the benefit of creditors cannot complain that the trustee turned all the property over in exchange for stock, it appearing that there was no equity left for him and the creditors assented to the transaction, and it is immaterial that one of the trustees was a stockholder and director in the corporation.<sup>2</sup>

§ 673. *A corporation taking over all the property of another corporation may be liable for the debts of the latter.* — The general rule undoubtedly is that a corporation which purchases all the property of another corporation is not liable for the debts of the latter.<sup>3</sup>

formed a corporation and transferred all his property to the corporation in exchange for the stock thereof, and then transferred the stock to certain of his creditors as collateral security, the court held that as a court of equity it would set aside the transfer as being fraudulent and also on the ground that the fiction of corporate existence will be disregarded where fraud is involved. See § 663, *supra*.

<sup>1</sup> *Re Alleman, etc. Co.*, 172 Fed. Rep. 611 (1909).

<sup>2</sup> *Whitman v. McIntyre*, 199 Mass. 436 (1908).

<sup>3</sup> *Gray v. National Steamship Co.*, 115 U. S. 116 (1885). Even though a corporation transfers all its property to another corporation on a contract made prior to incorporation of the latter, yet the latter is not liable unless it accepted the property with knowledge of the contract and upon an express or implied undertaking to carry it out. *Holyoke, etc. Co. v. United States, etc. Co.*, 182 Mass. 171 (1902). A company buying the property of another company and paying therefor in stock to the stockholders of the latter is not liable for the debts of the vendor. *Hagemann v. Southern, etc. R. R.*, 202 Mo. 249 (1907). A railroad company purchasing the railroad of another company is not liable for the obligations of the latter. *Burge v. St. Louis, etc. R. R.*, 100 Mo. App. 460 (1903). A corporation purchasing the property of another corporation is not liable for torts of the

latter committed prior to the sale. *Castle's Adm'r v. Aerogen Coal Co.*, 145 Ky. 591 (1911). The mere fact that one company buys some of the assets of another does not render the former liable for the debts of the latter, except possibly to the extent of the value of the assets if no consideration was paid. *Mahaffey Co. v. Russell & Butler*, 54 S. Rep. 807 (Miss. 1911). A Minnesota corporation which issues its stock to the stockholders of another company in payment for property of the latter is not liable for the debts of the latter. *Swing v. Empire Lumber Co.*, 105 Minn. 356 (1908). One corporation buying the assets of another does not thereby become liable for the debts of the latter unless the former has assumed them. *Spear Mining Co. v. Shinn & Co.*, 93 Ark. 346 (1910). A person injured by a railroad company cannot maintain a suit against the successor of that company unless he shows clearly that the successor is liable. *White v. Atlanta, etc. Ry.*, 5 Ga. App. 308 (1908). A company which buys all the property and franchises of another company is not liable for the debts of the latter unless there is proof to the contrary. *Irvine v. New York Edison Co.*, 143 N. Y. App. Div. 344 (1911). Where a Missouri railroad company sells its property and franchises to an Illinois railroad company and the latter is sued in Missouri for an accident it may remove the case to the United



Nevertheless there are circumstances under which the purchasing corporation is liable for the debts of the old company. Thus, where

States court, even though the Missouri constitution provides that a Missouri railroad corporation shall remain such, notwithstanding it consolidates by sale or otherwise with an outside railroad corporation. *Cummins v. Chicago*, etc. R. R., 193 Fed. Rep. 238 (1912). In *Hunter v. Baker Motor*, etc. Co., 190 Fed. Rep. 665 (1911), a corporate creditor claimed to have recourse to another corporation that owned a majority of the stock and had taken all the assets of the insolvent corporation. In Massachusetts the remedy of a creditor of a corporation which has sold its assets to another corporation for stock is at law and not in equity. The new corporation is not liable on the debt. *Ewing v. Composite B. S. Co.*, 169 Mass. 72 (1897). One corporation purchasing a part of the assets of another does not thereby assume the debts of the latter. *Austin Co. v. Smith Co.*, 138 Ga. 651 (1912). The mere fact that a company is organized to take over the business of another company does not prove that it assumed the debts of the latter. *Colorado Springs*, etc. Ry. *v. Albrecht*, 123 Pac. Rep. 957 (Colo. 1912). A railroad company purchasing the railroad of another company under the Ohio statutes is not liable for the debts of the latter, even though the statutes stated that the purchaser should be subject to the "duties, obligations, and restrictions" of the vendor. *Rice v. Norfolk*, etc. Ry., 153 Fed. Rep. 497 (1907). A creditor of a dissolved corporation cannot hold liable a new corporation which purchased a portion of the assets, no fraud being shown. *Houston*, etc. Co. *v. Nicolini*, 96 S. W. Rep. 84 (Tex. 1906). One corporation buying the assets of another is not liable for the torts of the other. *Abilene*, etc. Co. *v. Anderson*, 41 Tex. Civ. App. 342 (1906). A railroad corporation which purchases the property of another railroad corporation is not liable, upon the dissolution of the latter, for a tort committed by it. *Chesapeake*, etc.

*R. R. v. Griest*, 85 Ky. 619 (1887). *Cf. Batterson v. Chicago*, etc. Ry., 53 Mich. 125 (1884). See also § 890, *infra*. And, in general, that the new corporation is not liable for the debts of the old, see *Ewing v. Composite B. S. Co.*, 169 Mass. 72 (1897); *Port Gibson v. Moore*, 21 Miss. 157 (1849); *Shaw v. Norfolk County R. R.*, 82 Mass. 407 (1860); *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576 (1882); *Smith v. Chicago*, etc. Ry., 18 Wis. 17 (1864); *Neff v. Wolf River Boom Co.*, 50 Wis. 585 (1880); *Houston*, etc. R. R. *v. Shirley*, 54 Tex. 125 (1880); s. c., 24 S. W. Rep. 809 (1894); *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8 (1835); *Menasha v. Milwaukee*, etc. R. R., 52 Wis. 414 (1881); *Lake Erie*, etc. Ry. *v. Griffin*, 92 Ind. 487 (1883); *Gilman v. Sheboygan*, etc. R. R., 37 Wis. 317 (1875); *Sappington v. Little Rock*, etc. R. R., 37 Ark. 23 (1881); *Cook v. Detroit*, etc. Ry., 43 Mich. 349 (1880). Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it. *Rathbun v. Snow*, 123 N. Y. 343 (1890). See also, on this subject, ch. LII, *infra*, as to the liability of a purchaser of a railroad at a foreclosure sale. Where two banks are consolidated into a third bank, the stock of the new bank being issued in exchange for stock of the old, the new bank is not liable on the debts of either of the old banks. *Donnelly v. Hearndon*, 41 W. Va. 519 (1895). A new bank which takes over a part of the assets of another bank is not liable for the debts of the latter, even though the individuals interested in both banks are practically the same. *Campbell v. Farmers'*, etc. Bank, 49 Neb. 143 (1896). A purchasing corporation is not liable unless it has expressly assumed such liability. *Fernschild v. Yuengling Brewing Co.*, 15 N. Y. App. Div. 29 (1897); *aff'd*, 154 N. Y. 667.



the purchasing corporation assumes all liabilities, a creditor of the vendor corporation may in some jurisdictions sue the vendee cor-

A corporation which issues stock in payment for the assets of a partnership is not liable for taxes assessed against the partnership, unless it has assumed the same. *Lamkin v. Baldwin, etc. Co.*, 72 Conn. 57 (1899). A company that buys all the assets of another company is not liable for the debts of the latter unless there is an express contract to that effect, it being shown that the latter is able to pay its own debts. *Advance, etc. v. Penn. etc. Co.*, 195 Pa. St. 602 (1900). A street railway company which purchases the street railways and property of another company is not bound to honor passes issued by the latter, even though such passes were issued for rights of way. *Wallace v. Ann Arbor, etc. Ry.*, 121 Mich. 588 (1899). A telephone company that purchases all the property and assets of another telephone company is not liable for damages for personal injuries due to the negligence of the latter. *Chase v. Michigan, etc. Co.*, 121 Mich. 631 (1899). A railroad company is not liable for the debts of a defunct company that started work and abandoned the work, even though an irregular transfer of its assets was made by the latter to the former. *Gulf, etc. Ry. v. Winder*, 26 Tex. Civ. App. 263 (1901). Even though a bank as mortgagee of a glass factory takes possession and undertakes to continue the business in the name of the glass company, yet the bank cannot be held liable on a contract of the latter, inasmuch as the bank had no authority to carry on such business. *Louis Bletz & Co. v. Bank of Kentucky*, 55 S. W. Rep. 697 (Ky. 1900). Even though a New York corporation organizes a West Virginia corporation and transfers to the latter all its property, and the latter is managed by the same parties, yet the latter is not liable on a contract of the old corporation. *Goldmark v. Magnolia, etc. Co.*, 44 N. Y. App. Div. 35 (1899); *aff'd*, 170 N. Y. 579. Even though a person buys all the stock, bonds, and property of a corporation, and a suit is

pending against the corporation for negligence, yet he is not liable for a judgment thereon. *Tilley v. Coykendall*, 69 N. Y. App. Div. 92 (1902); *aff'd*, 172 N. Y. 587. Where the mortgaged property is burned and the insurance money is paid over to the trustee, and the trustee, with the consent of all the bondholders and in pursuance of an order of the court, pays over the money to the reorganized company on representations that the money will be used to rebuild the buildings, and the reorganized company uses only part of the money for that purpose, a bill in equity to compel the new company to account for the remaining part and to apply it to the rebuilding of the buildings will not lie. *Dallett v. Staten Island, etc. Co.*, 61 N. J. Eq. 39 (1901). Where a company takes over the property of another company and the president delivers goods in payment of debts of the latter with the knowledge and consent of the officers and directors of the purchasing company, such payments are legal, and the statutes of Pennsylvania, where such corporations existed, requiring stockholders' consent to the incurring of debts, do not apply. *Curtis v. Natalie, etc. Co.*, 89 N. Y. App. Div. 61 (1903); *aff'd*, 181 N. Y. 543. Where one corporation in purchasing the stock and property of another corporation assumes certain specified debts of the latter, it cannot be held liable on a debt not so specified, there being no fraud. *Anderson v. War, etc. Co.*, 8 Idaho, 789 (1903). Where pending a suit to compel a corporation to remove a public obstruction, the corporation sells all its property to another corporation, the bill should be amended by substituting the latter corporation. *Commonwealth v. City of Newton*, 186 Mass. 286 (1904).

There are decisions, however, to the contrary. Thus, in Illinois it is held that where the assets of a company are sold to another company in payment for stock of the latter, which is distributed among the stockholders of the former, the latter company is



poration on his claim;<sup>1</sup> but in jurisdictions where a contract between two persons for the benefit of a third cannot be enforced by the latter,

liable for the former company's debts. *Swing v. American Glucose Co.*, 123 Ill. App. 156 (1905). Where a company sells all its property to another company for stock in the latter to be issued to stockholders in the former, this is a consolidation, and the new company is liable on the debts of the old company. *Chicago & Joliet, etc. Ry. v. Ferguson*, 106 Ill. App. 356 (1903). Where a lessee corporation transfers all its property to a new corporation in exchange for the stock of the latter, the latter is liable on the lease. *Higgins v. California, etc. Co.*, 122 Cal. 373 (1898). Where a corporation sells all its property to another corporation for stock of the latter, to be given to stockholders of the former, an infant stockholder in the old corporation may hold the latter liable for the value of the stock, after he becomes of age, even though he consented to the transaction and took new stock, which he afterwards returned. *White v. New Bedford, etc. Corp.*, 178 Mass. 20 (1901). Where a corporation takes over partnership assets it is presumed to have assumed the debts. *Modern, etc. Co. v. Blanke, etc. Co.*, 116 S. W. Rep. 153 (Tex. 1909). A corporation organized to take over the assets of another corporation to defraud the creditors of the latter is liable for any judgment against the latter, but the creditor must first obtain a judgment at law. *American Creosote Works v. Lembeke & Co.*, 165 Fed. Rep. 809 (1908). Where a street railway company organizes a new dummy street railway company and leases all its property to the latter and afterwards takes back the property, it is liable for the latter's debts, especially where the stock of both companies was controlled by the same parties. *Barrie v. United Rys. Co.*, 138 Mo. App. 557 (1909). A corporation which knowingly purchases the assets of another corporation for the purpose of delaying creditors is liable to any one of such creditors, even though it has already paid out to other creditors more than the

value of the assets received. *McGovern v. Milwaukee Motor Co.*, 141 Wis. 309 (1910). A gas company buying out another company may be compelled to carry out the contracts of the latter to supply gas. *People's, etc. Co. v. American, etc. Co.*, 133 Pa. St. 569 (1912). Where a corporation is dissolved by action of the secretary of state and later an employee is injured and subsequently the corporate assets are transferred to a new corporation for the stock of the latter, the latter is liable for such damage. *Jones v. Francis*, 127 Pac. Rep. 307 (Wash. 1912). Where a company has passed into the hands of the bankruptcy court and with the consent of the court its property is sold to a new corporation which issues new securities to ninety-five per cent. of the creditors, the remaining creditors may hold the new company liable for their claims, the new company being but a continuation of the old one. *Alberger, etc. Co. v. United Water, etc. Co.*, 87 Kan. 843 (1912). A newly organized company issuing its stock in payment for the property of another company is liable for the debts of the latter. *Meridian, etc. Ry. v. Catar*, 60 S. Rep. 657 (Miss. 1912). Where a corporation issues stock in exchange for stock in another corporation and then takes over the property of the latter, it is liable for the latter's debts, even though it has not expressly assumed the same, and even though the latter is insolvent. *Camden, etc. Ry. v. Lee*, 84 S. W. Rep. 332 (Ky. 1905). Where an insolvent corporation sells all its assets to another corporation for stock of the latter, leaving debts unpaid, a creditor of the selling corporation may hold the purchasing corporation liable. *Tacoma, etc. Co. v. Western, etc. Ass'n*, 37 Wash. 467 (1905).

<sup>1</sup> *Tecumseh Nat. Bank v. Best*, 50 Neb. 518 (1897). Where a corporation taking over the property of an individual agrees to pay his debts, his creditors may sue the corporation on such contracts. *Cox v. Philadelphia, etc. Co.*, 214 Pa. St. 373 (1906).



a different rule prevails.<sup>1</sup> In New York, a judgment creditor of a company whose assets have been transferred to another company in a

Where one corporation purchases the entire assets and assumes all the liabilities of another corporation, and gives a bond to pay such liabilities, such bond may be enforced by a creditor of the latter corporation and the suit may be in equity. *Dancel v. Goodyear, etc. Co.*, 144 Fed. Rep. 679 (1906). An agreement of a corporation which buys all the property of another, that it will pay the debts of the latter, may be enforced by a creditor of the latter, especially where payment for the property was made by an issue of stock of the former company to the stockholders of the latter company. *Barker v. Pullman's, etc. Co.*, 124 Fed. Rep. 555 (1903); *aff'd*, 134 Fed. Rep. 70. If one company, in buying out another, agrees to pay the debts of the latter, a creditor of the latter may hold the former liable on his claim. *Central, etc. Co. v. Sprague, etc. Co.*, 120 Fed. Rep. 925 (1902). Where one street railroad sells all its property to another for stock of the latter, to be distributed among the stockholders of the former, the latter assuming the

debts of the former, it is liable for such debts. *Howell v. Lansing, etc. Co.*, 146 Mich. 450 (1906). A corporation purchasing all the property of another corporation and in payment therefor issuing its stock to the stockholders of the latter, is liable for the debts of the latter where it has assumed them. *Carstens & Earles, Inc. v. Hofius*, 44 Wash. 456 (1906). A company that absorbs all the assets and assumes all the liabilities of another company is liable on a bond given by the latter. *Manny v. National, etc. Co.*, 103 Mo. App. 716 (1904). Where one company in buying the property of another assumes the latter's "indebtedness" a creditor of the latter for an unliquidated claim may obtain judgment against the former and may then ask a court of equity to sell sufficient of the property so conveyed to pay the debt, and may make a mortgagee of the former company a party defendant and need not join the bondholders. *Billmyer, etc. Co. v. Merchants', etc. Co.*, 66 W. Va. 696 (1910). A corporation taking over the assets of another corporation may

<sup>1</sup> Even though one company assumes the payment of the bonds of another company, yet this does not entitle the holder of such bonds to hold the former company liable by a suit in his own name, the bonds being already out at the time the debt was assumed by the former company. The rule might be different where the former company has assets which in equity belong to the bondholders or where the bondholder is the party interested. *National Bank v. Grand Lodge*, 98 U. S. 123 (1878). Even though by a reorganization plan a new company is to assume certain floating debts of the old company, whose property is purchased at the foreclosure sale, yet the holders of such debts have no claim, either in law or in equity, against the new company. *Columbus, etc. R. R. Appeals*, 109 Fed. Rep. 177 (1901). One corporation purchasing all the

property of another cannot be sued for the latter's tort, even though the purchasing company assumed the liabilities of the selling company. *Louisville & N. R. R. v. Hughes*, 134 Ga. 75 (1910). Where a railroad is sold to another company, as authorized by statute, the purchaser is not liable for the debts of the vendor, and in the federal courts and many of the state courts, the vendee is not liable to such creditors, even though by the terms of the purchase it assumed such liabilities. *Hawkins v. Central, etc. Ry.*, 119 Ga. 159 (1903). Where the debt against a dissolved corporation is outlawed, it cannot be collected by levying on property conveyed by a debtor of the old corporation to a new corporation, which took over the assets of the old one and assumed certain of its debts. *Houston, etc. Co. v. Stratton*, 40 Tex. Civ. App. 378 (1905).



consolidation, in exchange for stock of the latter, issued to stockholders of the former, may hold the consolidated company liable on his judg-

be liable for the debts of the latter if it has expressly or impliedly assumed them. *Good v. Ferguson, etc. Co.*, 153 S. W. Rep. 1107 (Ark. 1913). Where one company buys out another and assumes the debts of the latter, a creditor of the latter company may assign his claim as collateral security; but the pledgee is not bound to institute suit to collect such claim, and is not liable for failure so to do, even though the claim is finally lost. *Sampson v. Fox*, 109 Ala. 662 (1896). Where a railway company transfers all its property to another railway company and the latter assumes all the debts of the former except damage claims, holders of such damage claims may reach the assets by a suit in equity. *Johnson v. United Rys. Co.*, 152 S. W. Rep. 362 (Mo. 1912). Where one company in buying the property of another assumes the latter's "indebtedness" a creditor of the latter for an unliquidated claim may obtain judgment against the former and may then ask a court of equity to sell sufficient of the property so conveyed to pay the debt, and may make a mortgagee of the former company a party defendant and need not join the bondholders. *Billmyer, etc. Co. v. Merchants', etc. Co.*, 66 W. Va. 696 (1910). A corporation taking over the business of a partnership may assume one of its notes. *Curtis, etc. Co. v. Smelter Nat. Bank*, 43 Colo. 391 (1908). An agreement by which stockholders in selling their stock agree to pay the corporate debts as determined by the directors was construed in *Jackson v. White*, 188 Fed. Rep. 775 (1911). Where the succeeding company assumes a contract with a patentee, and the patentee thereafter deals with it, the patentee cannot hold the prior company liable except up to the date of the transfer. *Barnes v. American, etc. Co.*, 238 Ill. 582 (1909). A constitutional provision that corporate franchises shall not be sold so as to relieve it from liability does not prevent a mortgage, and does not render a purchaser of the property, sold for the purpose of paying the mortgage, liable for the company's debts. *Russell's Adm'r v. Frankfort, etc. Co.*, 131 Ky. 862 (1909). A corporation may buy and take over a business as of a date prior to its corporate existence. *Myott v. Greer*, 204 Mass. 389 (1910). A purchasing company may be held liable on the debts of the vendor company where the former expressly agrees in the contract of purchase to pay said debts. *Noll v. Chattanooga Co.*, 38 S. W. Rep. 287 (Tenn. 1896). Where a *de facto* corporation incurs debts, and subsequently a new corporation legally organized takes over the business and assumes the debts, the creditors of the *de facto* corporation may hold the latter corporation liable. *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147 (1895). Where a corporation sells all its property to another corporation in payment for stock of the latter, and the new corporation assumes all the liabilities of the old corporation, a creditor of the old corporation may sue the new corporation on his claim. *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. C. 544 (1895). Even though one corporation assumes all the liabilities of another corporation, the remedy of a creditor to enforce such liability against the former corporation is in equity and not in law. *Harvey v. Maine, etc. Co.*, 92 Me. 115 (1898). Where one company buys all the assets and assumes all the liabilities of another, the court may appoint a receiver of the latter to enforce such liabilities against the former. *Barber v. International Co.*, 73 Conn. 587 (1901). Where one railroad owns all the stock of another railroad, and takes a transfer of its property, subject to its debts, it is liable for a tort committed by such other railroad. *Louisville, etc. Co. v. Biddell*, 112 Ky. 494 (1902). In Texas, where, after judgment against a corporation, it is dissolved and a new corporation takes over all its assets and assumes all its obligations, the judg-



ment.<sup>1</sup> Where one railroad company takes over the railroad of another company, whether by lease or otherwise, and continues to perform a contract of the latter for furnishing cars and operating a private branch line, the former is bound thereby and may be compelled to continue to carry it out.<sup>2</sup>

ment may be enforced against the new corporation. *Proctor v. San Antonio, etc. Ry.*, 26 Tex. Civ. App. 148 (1901). Where one company is sold to another, the latter assuming the debts of the former, a creditor of the former may hold the latter liable, and it is no defense that the sale was *ultra vires*. *Rehberg v. Tontine Surety Co.*, 131 Mich. 135 (1902). Where an insolvent corporation transfers its assets to a new corporation, which agrees to pay the debts of the former, the liability of the latter may be enforced by creditors of the former corporation. *Island City Sav. Bank v. Saechtlen*, 3 S. W. Rep. 733 (Tex. 1887). Where a reorganized company continues and assumes payment of a liability of the old company, and new advances are made thereunder, the new company is liable thereon. *Baker v. Harpster*, 42 Kan. 511 (1889). Where the assets of a corporation are transferred to a party who agrees to pay the debts, the creditors may enforce the agreement and collect from him. *Dimmick v. Register*, 92 Ala. 458 (1891). Where a corporation is formed to take over the business of a loaning agent, and does so, and carries on the business for five years without any new agreement, it is bound by the terms of the agreement between the agent and his principal. *North Am., etc. T. Co. v. Colonial, etc. Co.*, 83 Fed. Rep. 796 (1897). A corporation may give a mortgage to raise an attachment which was levied on land prior to its purchase by the corporation. *Leonard, etc. Co. v. Bank of America*, 86 Fed. Rep. 502 (1898).

<sup>1</sup> *Hurd v. N. Y. etc. Co.*, 167 N. Y. 89 (1901), rev'g 52 N. Y. App. Div. 467. Where one corporation is merged into another under the New York statute, the latter is not liable for the debts of the former, unless it expressly

assumed them, but the creditor, after exhausting his legal remedies, may by suit in equity follow the assets of the merged corporation as though there had been no merger. *Irvine v. New York Edison Co.*, 207 N. Y. 425 (1913). Where a corporation as licensee of patents consolidates with another corporation, the consolidated company, if it continues to manufacture the articles, is liable under the provisions of the license, even for similar articles not manufactured under the patents, the original license contract being to that effect. *Wilson v. Mechanical, etc. Co.*, 170 N. Y. 542 (1902). A consolidation differs from a sale by one company to another in that a creditor of one of the constituent companies may hold the consolidated company liable on his claim. *Morrison v. American Snuff Co.*, 79 Miss. 330 (1901). Where one street railway company transfers all its property to another street railway company for bonds and stock of the latter, to be distributed among the bondholders and stockholders of the former, in exchange for their bonds and stock in the former, the purchasing company is liable on the debts of the selling company, the transaction being practically a consolidation. *Shadford v. Detroit, etc. Ry.*, 130 Mich. 300 (1902).

<sup>2</sup> *Tanzer v. Chicago, etc. R. R.*, 170 Fed. Rep. 240 (1909); s. c., 191 Fed. Rep. 546. A company taking over all the assets of another company may by its acts assume a note of the latter. *Parsons Mfg. Co. v. Hamilton, etc. Co.*, 78 N. J. L. 309 (1909). Even though a company purchases the property of another company it is not liable on the contracts of the latter unless it proceeds to carry out such contracts and takes the benefit of them. *Edgar Lumber Co. v. Cornie Stave Co.*, 95 Ark. 449 (1910).



It is also a principle of law that a corporation buying all the property of another corporation, and paying therefor in stock of the former corporation issued to the stockholders of the latter corporation, must either pay the obligations of the latter corporation or have the property sold to pay such obligations.<sup>1</sup> This is on the principle of law that property transferred may be subjected to the debts of the vendor and the vendee corporation is personally liable if it has disposed of, misapplied, or converted the property in fraud of the rights of creditors.<sup>2</sup> A creditor of the old company may sue the new company to charge the assets taken over by it with payment of the old company's debts, and may recover his *pro rata* share of the value thereof.<sup>3</sup> A mere device by which corporate

<sup>1</sup> Quoted and approved in *Cooper v. Utah*, etc. Ry., 35 Utah, 570 (1909). *Grenell v. Detroit*, etc. Co., 112 Mich. 70 (1897). See also § 672, *supra*.

<sup>2</sup> *Boyd v. Northern*, etc. Ry., 170 Fed. Rep. 779 (1909); *aff'd*, 228 U. S. 482.

<sup>3</sup> *First Nat. Bank v. Chattanooga*, etc. Co., 97 Tenn. 308 (1896). See also § 672, *supra*. A corporation taking over all the property of a partnership assumes its debts to the value of the assets so taken over. *Baker, etc. Co. v. Hall*, 76 Neb. 88 (1906). A judgment creditor of a corporation that has sold all its property to a new corporation to which it is indebted may hold the latter liable in a suit at law, where it is clear that the new corporation is but a continuation of the old one. *Douglas, etc. Co. v. Over*, 69 Neb. 320 (1903). Where a corporation sells all its property, leaving debts unpaid, the creditors may hold the purchaser liable for the value of the property if he took with notice. *Clevenger v. Galloway & Garrison*, 104 S. W. Rep. 914 (Tex. 1907). Where an insolvent corporation sells all its property to another corporation for stock of the latter to be issued to stockholders of the former, the latter corporation is liable for the former's debts to the extent of the value of the property received. *Sharples Co. v. Harding, etc. Co.*, 78 Neb. 795 (1907). Where an insolvent corporation causes land owned by it to be conveyed to a new corporation formed by its directors, and in which its directors subscribed for stock, and both corporations pass into the hands of receivers, the subscriptions for

stock in the new corporation may be collected for the benefit of creditors of the old corporation. *Butler v. Cockrill*, 73 Fed. Rep. 945 (1896). A corporation may be liable for the debts of another corporation whose property it takes, to the extent that such property is impressed with a trust. In this case all the property of an insolvent company was leased to another company. *Chicago, etc. Ry. v. Third Nat. Bank*, 134 U. S. 276 (1890). Where an insolvent corporation transfers its assets to another corporation for stock of the latter, the latter is liable for the debts of the former to the extent of the value of the property so acquired. *City of Altoona v. Richardson, etc. Co.*, 81 Kan. 717 (1910). Where railroad property purchased at foreclosure sale was transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals held that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors." *Vilas v. Page*, 106 N. Y. 439, 465 (1887). In some cases the creditors of the old company may follow its property into the hands of a new company to which the property is sold by an ordinary sale. *Marshall v. Western, etc. R. R.*, 92 N. C. 322 (1885); *Western N. C. R. R. v. Rollins*, 82 N. C. 523 (1880); *Young v. Rollins*, 85 N. C. 485 (1881), involving a receiver. A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations, and also claim that



property is sold under an execution, is purchased by a person interested in the corporation, and then transferred to a new corporation having the same stockholders as the old one, is void as against creditors of the first corporation. They may hold the new corporation liable to the extent of the value of the property so conveyed.<sup>1</sup> A foreclosure which is brought about by the stockholders for the purpose of buying in the property and reorganizing the property so as to protect the mortgage bondholders, and also the stockholders, but to cut off the claims of unsecured creditors, and particularly to cut off a guaranty on the bonds of another corporation, is illegal, and if such facts are proved the foreclosure sale will be set aside.<sup>2</sup>

the company was not duly incorporated, and also bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets — all in one bill brought to collect the debt. *Jefferson Nat. Bank v. Texas Inv. Co.*, 74 Tex. 421 (1889). Where a company leases all its property to another, the stockholders in both companies being the same, a mechanic's lien good against the latter is good also against the former. *Hatcher v. United Leasing Co.*, 75 Fed. Rep. 368 (1896). A new corporation taking the assets of an old corporation is liable to creditors of the latter to the extent of the property so taken. *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140 (1883); *Hibernia Ins. Co. v. New Orleans Transp. Co.*, 13 Fed. Rep. 516 (1882); *Hibernia Ins. Co. v. St. Louis, etc. Co.*, 10 Fed. Rep. 596 (1882). For a case where the stockholders of the new corporation gave a bond to pay the debts of the old one, see *Planters' Ins. Co. v. Wicks*, 4 S. W. Rep. 172 (Tenn. 1887). Where a corporation sells all its property to another corporation in exchange for stock of the latter, a creditor of the former may hold the latter liable to the extent of the value of the property so turned over. *United States, etc. Co. v. Isaacs*, 23 Ind. App. 533 (1899).

<sup>1</sup> *Hancock v. Holbrook*, 40 La. Ann. 53 (1888). See also *Railroad v. Howard*, 7 Wall. 392 (1868). Where the officers and stockholders of one corporation form another, and convey all the property of the former to it in fraud of creditors, the latter will be

regarded as a continuation of the former, and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt.\* *Blanc v. Paymaster Min. Co.*, 95 Cal. 524 (1892). A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the questions submitted to a jury. *Houston, etc. Ry. v. Shirley*, 24 S. W. Rep. 809 (Tex. 1894). In *Angle v. Chicago, etc. Ry.*, 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company, which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the decision below, held that a demurrer to the bill was not good. See also §§ 674, 890, *infra*. A reorganized company which has purchased the property at judicial sales is not liable in a suit at law for the old company's debts, even though in equity it might be liable if there has been fraud. *Armour v. E. Bement's Sons*, 123 Fed. Rep. 56 (1903).

<sup>2</sup> *Louisville, etc. Ry. v. Louisville*



A very important principle of law in this connection is that a corporation issuing stock to the stockholders of another corporation in payment for the latter's property is not a *bona fide* purchaser as against the creditors of the latter company, and hence such creditors may have recourse to the property.<sup>1</sup> Where the officers of a corporation in their individual

Trust Co., 174 U. S. 674 (1899), the court saying (p. 683): "No such proceedings can be rightfully carried to consummation which recognize and preserve an interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based on the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." *Northern, etc. Ry. v. Boyd*, 228 U. S. 482 (1913). Where corporate property is sold on foreclosure and a new corporation is organized, which then purchases the property, the latter is not liable for the debts of the old corporation, even though it has the same members. *Allen v. North Des Moines Church*, 127 Iowa, 96 (1905).

<sup>1</sup> *Luedecke v. Des Moines, etc. Co.*, 140 Iowa, 223 (1908). *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197 (1892). See also §§ 727, 890, *infra*. A corporation organized to take over the assets and assume the liability of another corporation is not a *bona fide* purchaser of a note held by the latter. *Paulson v. Boyd*, 137 Wis. 241 (1908). A vendor's lien on real estate is not lost by the vendees

transferring it to a corporation for its stock which they take and hold. *Re V. & M. Lumber Co.*, 182 Fed. Rep. 231 (1910). The vendor's lien on land for the unpaid purchase price is good as against a corporation which the vendee forms to take over the land, the directors and stockholders being dummies, and all the stockholders having knowledge of the lien. *Finnell v. Finnell*, 156 Cal. 589 (1909). Where an owner of land knows of a flaw in the title and he turns it over to a corporation for stock, the corporation is not a *bona fide* purchaser, even though subsequently *bona fide* stockholders subscribe to or purchase their stock in good faith and in ignorance of the defect. *Wilson Coal Co. v. United States*, 188 Fed. Rep. 545 (1911). Where a partition suit has been instituted and the defendant then forms a corporation to buy the property and issue stock to him in payment therefor, the corporation is not a *bona fide* purchaser. *Mound City Co. v. Castleman*, 177 Fed. Rep. 510 (1910); *aff'd*, 187 Fed. Rep. 921, holding also that where an individual forms a company to buy his property and it issues stock to him in payment therefor, it is not a *bona fide* holder. Where a copartnership engaged in manufacturing lumber incorporates and takes stock in payment for the property, and they become the officers of the corporation, the corporation is bound by their knowledge that a part of the land which they conveyed to the corporation was obtained by fraudulent patents from the United States. *McCaskill Co. v. United States*, 216 U. S. 504 (1910). Where railroad property purchased at foreclosure sale was transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals held that such corporation "paid no value, and held the property subject to any



capacity took part in a transaction before the corporation was formed, whereby a business was taken over by the corporation on an agreement that title should not pass until payment was made, the corporation takes with notice of the facts.<sup>1</sup> And where a person owning all the stock of a corporation sells it under circumstances which induce the purchaser to believe that the former has no claim against the corporation, he may be enjoined from enforcing any such claim.<sup>2</sup> The subject of "dummy" corporations is considered elsewhere.<sup>3</sup>

Sometimes the statutes of the state make the purchasing corporation liable, especially in cases of consolidation.<sup>4</sup>

Similar rules to the above prevail as to liability of a corporation that issues stock in payment for the property of an insolvent individual or copartnership. A corporation that has taken over the property of a partnership is not liable for the debts of the latter unless there was an express contract assuming such liability, or the transaction was a mere continuation of the partnership.<sup>5</sup> A corporation taking over the busi-

equitable lien to which it was subject in the hands of its grantors." *Vilas v. Page*, 106 N. Y. 439, 465 (1887). See p. 2220, n. 1.

<sup>1</sup> *Adams v. Roscoe, etc. Co.*, 159 N. Y. 176 (1899). Where one of the organizers of the corporation, who is also its president, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. *Wyeth v. Renz-Bowles Co.*, 66 S. W. Rep. 825 (Ky. 1902).

<sup>2</sup> *Given v. Times-Republican, etc. Co.*, 114 Fed. Rep. 92 (1902).

<sup>3</sup> See §§ 663, 664, *supra*.

<sup>4</sup> See cases in § 897, *infra*, relative to consolidation; also *Indianola R. R. v. Fryer*, 56 Tex. 609 (1882); *Louisville, etc. Ry. v. Boney*, 117 Ind. 501 (1888); *Indianapolis, etc. R. R. v. Jones*, 29 Ind. 465 (1868); *Columbus, etc. Ry. v. Powell*, 40 Ind. 37 (1872); *Montgomery, etc. R. R. v. Boring*, 51 Ga. 582 (1874); *Thompson v. Abbott*, 61 Mo. 176 (1875), where the property of the old was given by the legislature to the new corporation—a municipal case. See also *Rome, etc. R. R. v. Ontario, etc. R. R.*, 16 Hun, 445 (1879). Where the consolidated com-

pany is by statute liable for the debts of the old company, a creditor of one of the latter who has the right to demand stock in exchange may demand the same of the consolidated company and hold it liable in damages if it refuses. *John Hancock, etc. Co. v. Worcester, etc. R. R.*, 149 Mass. 214 (1889). A creditor of an old corporation may follow its property into the hands of a consolidated company to which it was transferred, stock being therefor issued to the old stockholders. *Martin v. Zellerbach*, 38 Cal. 300 (1869).

<sup>5</sup> *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412 (1896). *Cf. Reed Bros. Co. v. First Nat. Bank*, 46 Neb. 168 (1895). See § 890, *infra*. A corporation to which an insolvent firm has transferred their property for stock is not liable on the debts of such individuals unless it has expressly assumed or has ratified or adopted the same. *Hart, etc. v. Coryell*, 8 Kan. App. 496 (1898). Where a creditor of an individual consents to his transferring his property to a corporation for stock, which the creditor then takes as collateral security, such creditor cannot hold the corporation liable on the debt even though the corporation afterward voluntarily gave a note and a mortgage to secure the same. *State, etc. v. Shapleigh, etc. Co.*, 147 Mo.



ness of a partnership may assume any contract of the latter, but the assumption of one contract does not prove the assumption of other

366 (1898). A corporation to which all of a partnership's assets have been transferred for stock is not liable on a debt incurred by a member of the firm in his own behalf, even though the corporate name was illegally signed to the note. *National, etc. v. Hollingsworth*, 135 N. C. 556 (1904). A corporation is not liable for the debts of a copartnership whose assets it takes over in exchange for its stock where a part of its stock was issued to an outsider for cash to carry on the business. *Baker, etc. Co. v. Hall*, 76 Neb. 88 (1907), rev'g previous decision in 107 N. W. Rep. 117. Even though an insolvent person transfers his property to a corporation for stock of the latter and distributes it among his creditors and the corporation then fails, his creditors cannot file their claims against such corporation. *Re Alleman, etc. Co.*, 158 Fed. Rep. 119 (1907). A corporation to which an insolvent individual transfers all his property in exchange for stock of the corporation is not liable on a chattel mortgage which it gives to one of the creditors of such individual, the corporation not having assumed the debt. *Durlacher v. Frazer*, 8 Wyo. 58 (1898). A corporation is not liable for the debts of an insolvent copartnership, even though the cash of the latter is paid to the corporation in payment for its stock. *Byrne, etc. Co. v. Willis-Dunn Co.*, 23 S. Dak. 221 (1909). Where a corporation sells its assets to a partnership, a corporate creditor may follow the assets, but cannot hold the partnership personally liable, such partnership not having assumed the debts. *Midland, etc. Bank v. Prouty Co.*, 158 Mich. 656 (1909). A corporation is not liable for the debts of a copartnership, even though it buys the property of the latter, unless it expressly assumes the same. *Swing v. Taylor & Crate*, 68 W. Va. 621 (1911). A corporation buying the business of a person by the issue of stock is not thereby liable for his debts incurred in the business. *Mooney*

*v. Mooney Co.*, 128 Pac. Rep. 225 (Wash. 1912).

There are decisions, however, to the contrary as follows: Where a partnership incorporates a company and transfers to that company all the firm's assets in exchange for stock, the corporation is liable for the debts of the partnership. Such transaction is not a purchase, but simply a change in the mode of doing business. *Andres v. Morgan*, 62 Ohio St. 236 (1900). Where an insolvent firm purchases goods on credit by false representations and then transfers its assets to a corporation without consideration, the vendor may follow the proceeds of the goods into the hands of the corporation. *Sheffield v. Mitchell*, 31 N. Y. App. Div. 266 (1898). Under the facts in *Bremen, etc. Bank v. Branch, etc. Co.*, 104 Mo. 425 (1891), it was held that a corporation organized by a business man, and to which he had conveyed all his property, was liable on his note, although it had not assumed any of his debts. See also *Fort Worth Pub. Co. v. Hitson*, 80 Tex. 216 (1891). Where a partnership turns itself into a corporation, the latter is not a *bona fide* holder of notes owned by the former. *McElwee Mfg. Co. v. Trowbridge*, 62 Hun, 471 (1891). A corporation taking all the assets of a partnership under an agreement with the partners that it would pay the liabilities to the extent of the assets, cannot be made liable on a debt due one of the partners until it is ascertained that the assets exceed the liabilities and until it has agreed to pay the liabilities. *Adams v. Empire, etc. Co.*, 4 N. Y. Supp. 738 (1889). As regards the power of the corporation to assume the obligations of the copartnership, see *McLellan v. Detroit File Works*, 56 Mich. 579 (1885). A corporation may be liable for the debts of the partnership where it has placed such liabilities on its books as a part of the corporate liabilities, and upon becoming insolvent the corporation may give a preference to such liabili-



contracts. The assumption of such a contract may arise by the corporation proceeding to live up to it and carry it out.<sup>1</sup> Where a company after buying out another company continues business in the name of the latter and incurs debts, the former is liable therefor.<sup>2</sup>

§ 674. *Rights and liabilities of mortgagees of a corporation that purchases property and issues stock in payment therefor.* — Where a corporation transfers all its property to another corporation, and the latter company immediately gives a mortgage on all the property, a judgment creditor of the former company may cause the sale and the mortgage to be set aside as a fraud upon his rights, and the property may be subjected to the payment of his debt.<sup>3</sup>

ties. *Shufeldt v. Smith*, 139 Mo. 367 (1897).

<sup>1</sup> *Hall v. Herter*, 83 Hun, 19 (1894). A corporation succeeding a firm may, by carrying out a contract of the firm, assume the obligation thereof. *Hall v. Herter*, 90 Hun, 280 (1895); *aff'd*, 157 N. Y. 694. Where a firm is turned into a corporation, the latter may assume a contract of the former for a purchase of lumber, by adopting it through its manager. *Pratt v. Oshkosh Match Co.*, 89 Wis. 406 (1895). Where the corporation assumes the debts of the partnership which it buys out, its liability is not released by the fact that the partnership subsequently gives notes for such debts. *Johnston v. Gumbel*, 19 S. Rep. 100 (Miss. 1895).

<sup>2</sup> *Taylor Co. v. Gulf Land, etc. Co.*, 119 La. 426 (1907).

<sup>3</sup> And a receiver will be appointed. *Cole v. Millerton Iron Co.*, 133 N. Y. 164 (1892). Where a creditor of a vendor corporation accepts bonds of the vendee corporation in settlement of his claim, he cannot sue to set aside the sale and the mortgage, on the ground of fraud, unless the trustee of the mortgage is made a party. *United, etc. Co. v. Hess*, 159 Fed. Rep. 889 (1908). A corporate creditor may attack a transfer of all the corporate property to another corporation, even though the latter agrees to pay the debts of the former. A trustee of a mortgage given by the vendee company on the property is not *bona fide* when the officers of the two companies are the same and the trustee knew thereof. The bondholders are charge-

able with notice of facts known to the trustee. *Cole v. Millerton Iron Co.*, 59 Hun, 217 (1891). Bondholders who took with notice that the property was received by the corporation from another corporation in payment for stock, and that the latter corporation was in debt, cannot hold as against such creditors. *Blair v. St. Louis, etc. R. R.*, 22 Fed. Rep. 36 (1884). Where a corporation conveys all its property to another corporation in payment for its stock, the latter corporation agreeing to pay all the debts of the former, a mortgagee of the latter company takes precedence over the judgment of a creditor of the former company, such judgment being subsequent to the mortgage. *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 684 (1885); *aff'd*, 133 U. S. 534. But *contra*, if the mortgagee took with actual knowledge. *Blair v. St. Louis, etc. R. R.*, 24 Fed. Rep. 148 (1885). A creditor of a corporation owning an uncompleted railroad cannot claim a lien thereon prior to that of the mortgage of a subsequent corporation which purchased the road, when there never was any record evidence of any lien and the subsequent corporation had no actual notice of the claim. *Blair v. St. Louis, etc. R. R.*, 27 Fed. Rep. 176 (1886); *aff'd*, 133 U. S. 534. A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the question submitted to a jury. *Houston, etc. Ry. v. Shirley*, 24 S. W. Rep. 809 (Tex.



Where a corporation issues stock for property it is not a *bona fide* purchaser of that property.<sup>1</sup> But a claim against one company, which is assumed by another company upon the latter company buying out the former, is not to be paid out of the assets of the latter company in preference to a mortgage upon all of its property.<sup>2</sup>

In case property is sold to the corporation for shares of stock, and the corporation issues a mortgage on the property and refuses to deliver the stock, the claim of the vendor for damages does not have priority over the mortgage.<sup>3</sup>

Where a stockholder of a vendor corporation sets aside the sale of the railroad as *ultra vires*, a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee.<sup>4</sup>

A mortgage by a consolidated railroad may not take precedence over the unsecured debts of the constituent companies, and by statute the consolidated company may be liable for those debts, unless the articles of consolidation provide otherwise.<sup>5</sup> Although a corporation sells all

1894). Where the property of an insolvent corporation is sold to another corporation without consideration, and the latter issues mortgage bonds the creditors of the former may attack such bonds. *Bramblet v. Commonwealth, etc. Co.*, 83 S. W. Rep. 599 (Ky. 1904). Where liquidating trustees sell the property to one of their number and he conveys it to a new corporation and the latter sells it, a *bona fide* purchaser is protected, but the profits will go to the stockholders of the first corporation. *Eberhardt v. Christian, etc. Co.*, 81 Atl. Rep. 774 (Del. 1911). A conditional sale, even though not recorded as required by statute, is good as against a corporation to whom the purchaser transfers the property for stock and as against a mortgage taken from such corporation by such purchaser. *York Mfg. Co. v. Brewster*, 174 Fed. Rep. 566 (1909).

<sup>1</sup> *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197 (1892). A corporation purchasing property from an insolvent person and issuing stock to him in payment, is not a *bona fide* purchaser. *Roberts v. Hughes Co.*, 83 Atl. Rep. 807 (Vt. 1912). A judgment against individuals cancelling land grants for fraud is binding on a corporation to which they turned over such grants

in exchange for its stock, even though other people had purchased stock relying on such grants, the existence of the corporation being unknown at the time of the suit. *Linn, etc. Co. v. United States*, 196 Fed. Rep. 593 (1912). See p. 2216, n. 1. *Cf.* § 727, *infra*, on notice, and § 890, *infra*, and § 673, *supra*.

<sup>2</sup> *Fogg v. Blair*, 133 U. S. 534 (1890). See also § 860, *infra*.

<sup>3</sup> *Farmers', etc. Co. v. Toledo, etc. R. R.*, 54 Fed. Rep. 759 (1893).

<sup>4</sup> *Knoxville v. Knoxville, etc. R. R.*, 22 Fed. Rep. 758 (1884).

<sup>5</sup> *Compton v. Jesup*, 167 U. S. 1 (1897). *Cf.* *Tysen v. Wabash Ry.*, 15 Fed. Rep. 763 (1883); but see *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority.



its property to an individual for purchase-money mortgage bonds, and distributes these bonds among its stockholders without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors.<sup>1</sup>

Where an insolvent corporation gives a mortgage to secure bonds and insists that its creditors shall accept the bonds in payment of its debts or else have recourse to the equity of redemption, the mortgage is illegal, and a suit to foreclose may be contested by a receiver of the corporation.<sup>2</sup>

Even though an insolvent partnership is turned into a corporation, and bonds of the corporation are given to a creditor of the partnership for this debt, yet such bonds may be legal.<sup>3</sup>

His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895). The case *Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien on the property of the old company, and were prior in right to the mortgage bonds of the consolidated company, refusing to follow *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). Mortgage bonds issued in exchange for notes held by a former company must be clearly and fully explained in a foreclosure suit based thereon. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 90 Fed. Rep. 584 (1898).

<sup>1</sup> A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. *Lebeck v. Fort Payne Bank*, 115 Ala. 447 (1897). Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant and serves

them by publication, and, two of the trustees having died, causes successors to be appointed by the court, and obtains decrees against the corporation and the trustees of the mortgage canceling their title to the land, the decree is effective; and even though the mortgage is afterwards foreclosed, the purchaser at such sale takes no title to such land, he having waited thirty years before attacking such decree. *Bump v. Butler County*, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality whereby it conveyed land to a corporation, the court will not grant it any relief. *Rummel v. Butler County*, 93 Fed. Rep. 304 (1899).

<sup>2</sup> *Jenkins v. John Good, etc. Co.*, 56 N. Y. App. Div. 573 (1900); *aff'd*, 168 N. Y. 679. An insolvent New Jersey corporation cannot, as against some of its creditors, issue mortgage bonds to other creditors. *Skirm v. Eastern, etc. Co.*, 57 N. J. Eq. 179 (1898). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. *National Bank v. Sprague*, 21 N. J. Eq. 530 (1870).

<sup>3</sup> *Seligman v. Prince*, [1895] 2 Ch. 617. Where a corporation is in debt,



§§ 675-677. *Consolidations, leases, and sales of railroads.* — This subject is considered elsewhere.<sup>1</sup>

§ 678. *A corporation cannot be a partner in a partnership.* — This is an old principle of law, but it is subject to exceptions. It is held to be an *ultra vires* act, because the stockholders are entitled to have their directors conduct the business without sharing that power with a partner.<sup>2</sup> But if a partnership has been formed with an individual, the latter cannot throw the business into statutory insolvency proceedings;<sup>3</sup> and the corporation cannot avoid the payment of a liability which the partnership has incurred;<sup>4</sup> nor can an obligation

and in order to enable it to borrow money the chief stockholder, who is also in debt, transfers valuable property to the corporation, and then the corporation gives a mortgage upon all its property, including the property so transferred, a *bona fide* holder of the bonds is protected as against a creditor of the stockholder. *King v. Holland T. Co.*, 8 N. Y. App. Div. 112 (1896). In the case *Badger v. Sutton*, 30 N. Y. App. Div. 294 (1898), where an insolvent person and corporation had transferred their property to another corporation and had taken back purchase-money mortgage bonds, the court set the transaction aside at the instance of creditors of the former.

<sup>1</sup> §§ 892-897, *infra*.

<sup>2</sup> "It is a violation of law for corporations to enter into a partnership," and their charters may be forfeited for the offense. *People v. North River, etc. Co.*, 121 N. Y. 582, 623 (1890). A contract between two companies, by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contracts, and pay dividends on its stock, is illegal. *James v. Eve*, L. R. 6 H. L. 335 (1873).

<sup>3</sup> *Whittenton Mills v. Upton*, 76 Mass. 582 (1858).

<sup>4</sup> *Catskill Bank v. Gray*, 14 Barb. 471 (1852). *Contra*, *Gunn v. Central R. R. etc. Co.*, 74 Ga. 509 (1885), where a railroad was held not liable for injuries to a passenger sustained while traveling upon a boat operated by the road and an individual as partners. But see *Block v. Fitchburg R. R.*, 139 Mass. 308 (1885). Even

though a national bank takes an interest in a partnership in payment of a debt, yet it cannot be held liable as a partner. It is liable only for its proportionate part of the debts. *Merchants', etc. Bank v. Wehrman*, 69 Ohio St. 160 (1903). *Cf. Merchants' Nat'l Bk. v. Wehrman*, 202 U. S. 295 (1906). Even though a street railway company cannot become a member of a partnership, yet if it takes part in improving a park and is to have a part of the proceeds it may be liable for such improvements. *Breinig v. Sparrow*, 39 Ind. App. 455 (1907). A corporation and a person to whom it has agreed to sell its property may be liable as partners to creditors of the former. *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152 (1887). A corporation cannot avoid liability for the debt of a firm, in which firm it is a member, on the ground that it had no power to become a partner. *Cameron v. First, etc. Bank*, 34 S. W. Rep. 178 (Tex. 1896). Under the New York statutes bonds may be issued to take up past-due notes, and where the business of a partnership and of a corporation is carried on as one institution, such bonds are valid, even though some of the notes so taken up grew out of the business of the partnership, but were indorsed by the corporation. *Matter of Snyder*, 29 N. Y. Misc. Rep. 1 (1899). A corporation as a member of a copartnership may be liable on a note given by said copartnership and indorsed by the corporation. *Johnson v. Weed, etc. Co.*, 103 Wis. 291 (1899). A department store corporation is not liable for supplies furnished to a restaurant in it, even though it was a



to the corporation be repudiated on that ground.<sup>1</sup> The cash which a corporation has invested in a copartnership as a partner cannot be recovered back by the corporation after the insolvency of the partnership, as against creditors of the partnership, even though the corporation had no power to so invest.<sup>2</sup> If the corporation has but one stockholder, he may make it a partner in a partnership.<sup>3</sup> Sometimes the relationship is held to be that of principal and agent instead of partnership.<sup>4</sup> A

partner, such partnership being secret. *Franz v. William, etc. Co.*, 132 Mo. App. 8 (1908).

<sup>1</sup> *French v. Donohue*, 29 Minn. 111 (1882). A bank cannot refuse to repay a deposit on the ground that it was made by a partnership between an individual and a corporation. *Wiley v. Crocker, etc. Bank*, 72 Pac. Rep. 832 (Cal. 1903); s. c., 141 Cal. 508. A partnership consisting of a corporation and an individual may collect damages for breach of a contract for sale of goods, inasmuch as the buyer is estopped from setting up that the partnership was illegal. *Huguenot Mills v. George F. Jempson & Co.*, 68 S. C. 363 (1904). A corporation may enforce an accounting in a partnership of which it is a member. *Standard Oil Co. v. Scofield*, 16 Abb. N. Cas. 372 (1885). Where in an *ultra vires* contract two railroads are operated as one, and more of the income is used to repair one railroad than the other, the latter may sue the former for reimbursement. *Nashua, etc. R. R. v. Boston, etc. R. R.*, 164 Mass. 222 (1895). Where a national bank forms a partnership to operate a mill, it may recover moneys loaned by the bank to the partnership. Although the manager of the mill is vice-president of the bank, yet the bank is not liable for his mismanagement. The bank as a partner is, however, chargeable with notice of a rule of its other partner, a joint-stock association, that no money should be borrowed except by the board of directors of the latter. *Cameron v. First Nat. Bank*, 4 Tex. Civ. App. 309 (1893); s. c., 34 S. W. Rep. 178. A party receiving work and materials from a partnership consisting of a corporation and an individual cannot defend against the price on the ground

that the corporation had no right to enter a partnership. *Wilson v. Carter, etc. Co.*, 46 W. Va. 469 (1899). A firm consisting of an individual and a foreign corporation which is not authorized to do business in the state cannot enforce a contract in the state. *Harris v. Columbia, etc. Co.*, 108 Tenn. 245 (1901). A partnership may recover for goods sold by it, even though one of the partners is a corporation. *Stahr v. Hickman, etc. Co.*, 132 Ky. 696 (1909).

<sup>2</sup> *Wallerstein v. Ervin*, 112 Fed. Rep. 124 (1901). Where a corporation has entered into a copartnership which becomes insolvent it cannot, as against other creditors, file claims as a creditor of such copartnership on the ground that the copartnership was *ultra vires*. *In re Ervin*, 109 Fed. Rep. 135 (1901).

<sup>3</sup> *Allen v. Woonsocket Co.*, 11 R. I. 288 (1876). Even though two individuals buy all the stock of a company and agree to operate it as a part of their copartnership business, with dummy directors, and then they disagree, this does not entitle them to ignore the corporate existence and place the corporate property in the hands of a court of equity as a part of the copartnership assets. *Jackson v. Hooper*, 76 N. J. Eq. 592 (1910), rev'g 76 N. J. Eq. 185.

<sup>4</sup> *Marine Bank v. Ogden*, 29 Ill. 248 (1862). Under the California statute the stockholders by a two-thirds vote may authorize a lease of the corporate property for five years, the rental to be one fourth of the profits, and such a lease will not be construed as constituting a copartnership. *McTigue v. Arctic, etc. Co.*, 130 Pac. Rep. 165 (Cal. 1912). In *Holmes v. Old Colony R. R.*, 71 Mass. 58 (1855), where the corporation shared in the profits only,



stockholder in a street railway company cannot enjoin the company from making an agreement with the city whereby existing doubtful franchises are surrendered and a new franchise taken in return, and such contract may be made by the board of directors without consulting the stockholders. Such a new contract is not invalid, even though by its terms the city is to have fifty-five per cent. of the net earnings after making certain payments, this not being a partnership. Neither is the contract void, even though it gives the control of the street railway to a board of supervising engineers.<sup>1</sup> Where a corporation has been a partner in a partnership, it must account to the other partners, even though such partnership was illegal.<sup>2</sup> The corporation also may enforce the provisions of the contract.<sup>3</sup> A corporation that has entered

no partnership was held to exist. A lease whereby the lessee is to pay the operating expense and the interest on the debt and the cost of betterments, and is then to pay one half of the balance to the lessor, is not a copartnership, inasmuch as the lessor is not to pay any losses. *South Carolina, etc. R. R. v. Augusta, etc. R. R.*, 107 Ga. 164 (1899). Even though a corporation in renting premises is to receive a proportion of the gross receipts in excess of a specified rental, yet this is not a partnership and is legal. *Nantasket, etc. Co. v. Shea*, 182 Mass. 147 (1902). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. *Dupignac v. Bernstrom*, 76 N. Y. App. Div. 105 (1902). While a corporation cannot be a partner, yet it may share profits in a contract on which it makes advances. *L. J. Mestier & Co. v. A. Chevalier, etc. Co.*, 108 La. 562 (1901). A mining corporation may at common law lease its property for five years for a rental, payable in a certain portion of the product of the mine. A stockholder cannot complain, even

though the contract be an error of judgment. *Hennessey v. Muhleman*, 40 N. Y. App. Div. 175 (1899). Even though a corporation, as lessee of an opera house, contracts with the manager, giving him an interest in profits, this is not a partnership and is not *ultra vires*. *Markowitz v. Greenwall, etc. Co.*, 75 S. W. Rep. 74 (Tex. 1903). A corporation which has entered into a contract with a copartnership by which each is entitled to a certain portion of the gross profits of the other, cannot defend against the contract on the ground that it was *ultra vires*. *Fechteler v. Palm Bros.*, 133 Fed. Rep. 462 (1904).

<sup>1</sup> *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908).

<sup>2</sup> *Boyd v. American, etc. Co.*, 182 Pa. St. 206 (1897). Where all the creditors, including a corporation, form a partnership to dispose of the assets, and the assets are so disposed of, the corporation cannot defend against a bill for an accounting on the ground that it was *ultra vires* for it to enter the partnership. *Kelly v. Biddle*, 180 Mass. 147 (1901). A corporation cannot be a partner, and hence where two corporations carry on the business jointly in an assumed name the assets belong one half to each. *Geurinek v. Alcott*, 66 Ohio St. 94 (1902).

<sup>3</sup> A contract whereby a manufacturing corporation and all of its stockholders agree to sell a certain portion of the capital stock of said company, and to substitute two persons nominated by the vendee as directors



into a partnership for a certain period of time cannot recover damages for the failure of the other party to continue the partnership during that time.<sup>1</sup> There have been many dicta to the effect that a corporation cannot be a partner;<sup>2</sup> and the question has arisen indirectly in many cases involving railroad traffic and pooling contracts,<sup>3</sup> and in still other cases where illegal combinations in restraint of trade have been made;<sup>4</sup> but there are few authorities bearing directly on the subject.<sup>5</sup> Where three companies join in the execution of debentures creating a lien on their property, each will be required to pay such part as it received, although such debentures are *ultra vires*.<sup>6</sup> A corporation is not liable for the debts of a copartnership, even though it has acquired all its property.<sup>7</sup>

§ 679. *A corporation cannot be an executor or an administrator or a trustee, unless specially authorized by statute.*—The duties of the office are personal and incapable of being delegated to an agent. Since a corporation acts only through agents, it cannot assume the duties of an executor.<sup>8</sup> A person who makes a note to a corporation

in such corporation, is not presumed to be *ultra vires*, and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation. *Rider Life Raft Co. v. Roach*, 97 N. Y. 378 (1884).

<sup>1</sup> *Sabine, etc. Co. v. Baneroft*, 16 Tex. Civ. App. 170 (1897). A mere allegation that one company is liable for the debts of another on the ground that they are partners is an insufficient allegation. *White v. Pecos, etc. Co.*, 18 Tex. Civ. App. 634 (1898).

<sup>2</sup> *New York, etc. Canal Co. v. Fulton Bank*, 7 Wend. 412 (1831). *Cf.* 1 *Lindley, Partn.*, p. 86.

<sup>3</sup> See ch. LIII, *infra*. Where two railroads are jointly operating another road they are jointly liable for negligence thereon and it is no defense that the corporation cannot be a partner. *Harrill v. South Carolina, etc. R. R.*, 135 N. C. 601 (1904).

<sup>4</sup> Ch. XXIX, *supra*.

<sup>5</sup> A stage company may be a co-owner of a stage line with an individual. *Calvert v. Idaho Stage Co.*, 25 Oreg. 412 (1894). In *State v. Port Royal, etc. Ry.*, 79 Fed. Rep. 397 (1897), a lease of a railroad seems to have been owned by a corporation and an individual as partners. A cor-

poration owning water-works outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one, and the profits to be divided equally. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549 (1895). A corporation may enter into a land speculation with an individual, the profits and losses to be divided equally, if the corporation is to have entire control of the business. *Bates v. Coronado Beach Co.*, 109 Cal. 160 (1895). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. *St. Louis, etc. R. R. v. Kirkpatrick*, 52 Kan. 104 (1893).

<sup>6</sup> *Re Johnston, etc. Co. Ltd.*, [1904] 2 Ch. 234. A trust company authorized to buy and sell securities may join with a railroad in signing a note for the benefit of the railroad company which it is financing, especially where all the stockholders ratify the transaction. *First Nat. Bank, etc. v. Guardian T. Co.*, 187 Mo. 494 (1905).

<sup>7</sup> *Culberson v. Alabama, etc. Co.*, 127 Ga. 599 (1907). See also § 673, *supra*.

<sup>8</sup> *Georgetown College v. Browne*, 34



as administrator, however, cannot defeat it by alleging that the corporation was not authorized to act as such.<sup>1</sup> The charter of the corporation may, however, expressly authorize it to act as executor or trustee. But where the statutes of a state provide that no foreign corporation shall transact business which a domestic corporation cannot transact, and domestic corporations are not allowed to act as executors, a foreign corporation cannot act as such in the state.<sup>2</sup> In England where individuals and a corporation are named as executors, the practice is to appoint the individuals without the corporation or the corporation without the individuals.<sup>3</sup> An officer of a corporation is not entitled to claim administratorship even though the corporation is a creditor of an estate and a statute states that a creditor may be entitled to letters of administration.<sup>4</sup>

As to trusts the rule is not so rigid. The old rule that corporations could not take property in trust for the use of others is now obsolete.<sup>5</sup> A corporation may be a trustee to hold property in trust for purposes within the corporate power.<sup>6</sup> If a corporation be incompetent to act as trustee, the devise or grant will not thereby become void; a court of equity will appoint a proper trustee to carry out and execute the trust.<sup>7</sup>

Md. 450 (1871), where it was also held that a corporation will not be allowed, as in England, to designate a person to administer with the will annexed. See also *Re Thompson*, 33 Barb. 334 (1861).

<sup>1</sup> *Union, etc. Co. v. Wright*, 58 S. W. Rep. 755 (Tenn. 1900).

<sup>2</sup> *Farmers', etc. Co. v. Smith*, 74 Conn. 625 (1902). In California by statute certain corporations may act as executors. *Kilborn v. Title, etc. Co.*, 5 Cal. App. 161 (1907). A will may appoint a foreign corporation as a trustee. *Bell v. White*, 76 N. J. Eq. 49 (1909).

<sup>3</sup> In the Goods of Martin, 90 L. T. Rep. 264 (1904).

<sup>4</sup> *Re Owens' Estate*, 30 Utah, 351 (1906).

<sup>5</sup> *Vidal v. Girard*, 2 How. 127, 187 (1844), where Mr. Justice Story said: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust in the same manner and to the same extent as a private person may do;" *Chapin v. Winchester School Dist.*, 35 N. H. 445 (1857), holding that a corporation may be trustee of a charity if consistent with the object

of its creation. See also § 694, *infra*; *Phillips Academy v. King*, 12 Mass. 546 (1815), holding that a corporation aggregate may be a trustee; *Perry, Trusts*, §§ 42 *et seq.*; *Robertson v. Bullions*, 11 N. Y. 243 (1854), a religious society. *Re Howe*, 1 Paige, 214 (1828), holds that while corporations cannot be trustees in matters in which they have no interest, yet if property be devised or granted to a corporation upon trust, partly for itself and partly for another, it may execute the trust. One mission society corporation may take property in trust for another mission society corporation. *Sheldon v. Chappell*, 47 Hun, 59 (1888).

<sup>6</sup> *White v. Rice*, 112 Mich. 403 (1897). A corporation may execute a trust if it is within the general scope of its charter or will promote and aid its general purposes. *Hossack v. Ottawa, etc. Ass'n*, 244 Ill. 274 (1910).

<sup>7</sup> *Vidal v. Girard*, 2 How. 127, 187 (1844); *Chapin v. Winchester School Dist.*, 35 N. H. 445 (1857). If a trust in itself is valid the court will appoint a new trustee if the trustee named in the trust is a corporation which has no power to administer it. *Chase v. Dickey*, 212 Mass. 555 (1912).



It is no defense to an action by a bondholder to reach a sinking fund that the corporation holding the fund had no charter right to act as custodian, and that such custodian had illegally guaranteed the bonds.<sup>1</sup> A purchaser at a foreclosure sale cannot attack the sale on the ground that the trustee of the mortgage was a bank acting without power.<sup>2</sup> *Quo warranto* proceedings do not lie to test the right of a private corporation to act as trustee for certain shares of its own stock which a stockholder has placed in trust.<sup>3</sup>

§ 680. *Stockholder's right to prevent the corporation from undertaking a new business.* — It is *ultra vires* of a corporation to undertake to carry on a business which is not fairly within the scope of the business described in its charter. When such an attempt is made on the part of the directors or a majority of the stockholders, a dissenting stockholder may insist upon the corporate business being confined to the limits of the corporate charter; and he may enjoin or set aside any acts which do not conform to those limits. Thus, a corporation formed to manufacture iron cannot go into the flour and mill business.<sup>4</sup> And a corporation to build and operate a summer hotel has no power to divide its property into lots and sell them.<sup>5</sup> A national bank which is a creditor of an insolvent manufacturing company has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails the bank is not liable as a stockholder on a statutory double liability attaching to such stock.<sup>6</sup> A national bank which has taken as security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on such stock, its acquisition having been *ultra vires*.<sup>7</sup> It is a violation of the interstate commerce act for a railroad company engaged in interstate commerce to buy and sell coal at prices which do not net the railroad the cost of purchase and the cost of delivery and the published freight rates.<sup>8</sup> A natural-gas company may not have power to engage in manufacturing artificial gas, even though the natural gas has given out.<sup>9</sup> A cottonseed-oil company, even though it has power to make fertilizers in connection with a cottonseed mill, has no power to buy and sell other kinds of fertilizers, and hence

<sup>1</sup> Central, etc. Co. v. Farmers', etc. Co., 116 Fed. Rep. 700 (1901), aff'g 114 Fed. Rep. 263.

<sup>2</sup> Southern Cotton Mills v. Ragan, 136 Ga. 789 (1911).

<sup>3</sup> State v. Higby Co., 130 Iowa, 69 (1906).

<sup>4</sup> Cherokee Iron Co. v. Jones, 52 Ga. 276 (1874). See also § 681, *infra*.

<sup>5</sup> Stacy v. Glen, etc. Co., 223 Ill. 546 (1906).

<sup>6</sup> First National Bank v. Converse, 200 U. S. 425 (1906).

<sup>7</sup> Merchants' National Bank v. Wehrmann, 202 U. S. 295 (1906).

<sup>8</sup> New York, etc. R. R. v. Interstate, etc., 200 U. S. 361 (1906).

<sup>9</sup> Consumers', etc. Co. v. Quinby, 137 Fed. Rep. 882 (1905).



notes given for the purchase price are void, but it is liable for the value of the fertilizers actually purchased and received and sold by it.<sup>1</sup> Where a canal is sold to a private manufacturing corporation and a bill of equity is filed by a person to restrain such corporation from charging illegal tolls and excluding boats from the canal, the corporation cannot claim that its purchase was *ultra vires*.<sup>2</sup> A national bank may be liable for losses on purchases and sales of stock by its cashier made with its consent and for its benefit, where it has received large profits therefrom.<sup>3</sup> A lumber company may be liable on its bond that a contractor will complete a building for which the company furnishes the lumber.<sup>4</sup> Even though a railroad company has no power to carry on commercial telegraph business, yet if it does so it is liable for failure to deliver a message.<sup>5</sup> Although a lumber company has no charter power to insure its employees against accidents, yet if it does make such a contract it cannot repudiate the same when sued thereon.<sup>6</sup> A manufacturing corporation has no power to insure the life of its president, even though his management is very essential to the corporate success, and hence a stockholder may enjoin payment of the premiums.<sup>7</sup> A lumber company may agree with an employee that in case of sickness it will furnish a physician.<sup>8</sup> A corporation receiving goods *ultra vires* to sell on commission is nevertheless liable for breach of contract as to the price of the sale.<sup>9</sup>

An iron and steel manufacturing company has no power to operate a public or private warehouse. Hence, warehouse receipts issued by the corporation on its own property are not protected like the ordinary warehouse receipts, and corporate creditors who hold such receipts are not protected thereby, and the transaction may not amount to a pledge.<sup>10</sup> A bank sued as bailee for a loss of special deposit cannot set up *ultra vires*.<sup>11</sup> A bank cashier cannot buy boots and shoes for another person in the name of the bank.<sup>12</sup> A party with whom an iron company contracts to deliver ice cannot recover damages for a breach of the contract.<sup>13</sup> A warehouse company will not be allowed to set up *ultra vires* as a defense to notes given by it in payment for grain, the articles

<sup>1</sup> Richmond, etc. Co. v. Farmers', etc. Co., 126 Fed. Rep. 712 (1903).

<sup>2</sup> New York, etc. Co. v. Consolidated, etc. Co., 178 N. Y. 167 (1904).

<sup>3</sup> National Bank, etc. v. Fridenberg, 206 Pa. St. 243 (1903).

<sup>4</sup> Central Lumber Co. v. Kelter, 201 Ill. 503 (1903).

<sup>5</sup> Arkansas, etc. Ry. v. Stroude, 77 Ark. 109 (1905).

<sup>6</sup> Arkadelphia, etc. Co. v. Posey, 74 Ark. 377 (1905).

<sup>7</sup> Victor v. Louise Cotton Mills, 148 N. C. 107 (1908).

<sup>8</sup> Neil v. Flynn Lumber Co., 77 S. E. Rep. 324 (W. Va. 1913).

<sup>9</sup> Union Hardware Co. v. Plume, etc. Co., 58 Conn. 219 (1889).

<sup>10</sup> Franklin Nat. Bank v. Whitehead, 149 Ind. 560 (1898).

<sup>11</sup> First Nat. Bank v. Strang, 138 Ill. 347 (1891); Pattison v. Syracuse Nat. Bank, 80 N. Y. 82 (1880).

<sup>12</sup> North Star, etc. Co. v. Stebbins, 2 S. Dak. 74 (1891).

<sup>13</sup> Simmons v. Troy Ironworks, 92 Ala. 427 (1890).



of incorporation having provided therefor, although probably illegally so.<sup>1</sup> A land company must pay for services rendered in organizing other companies to rent and locate on the land of the former.<sup>2</sup>

Where a bank carries on a mercantile business without the charter right to do so, and fails, the creditors of the bank in its legitimate business will be preferred over the creditors in the mercantile business.<sup>3</sup> After a land company has purchased a stock of goods and sold them, it cannot defeat an action for the price of the sale to it by the defense of *ultra vires*. The contract has been executed.<sup>4</sup> A manufacturing corporation cannot enforce a contract of sale of oil to it, which it bought to resell.<sup>5</sup> A traction company which, in purchasing land for a canal to obtain water, agrees to furnish water to the seller without charge, cannot repudiate the contract as *ultra vires*.<sup>6</sup> Where a manufacturing corporation enters into a contract with a municipality to build conduits, such contract is *ultra vires*, and for a breach thereof by the municipality before the contract is carried out the company cannot collect damages.<sup>7</sup> Although an educational institution is operating a ferry without power so to do, yet, if a person is injured by the ferry, the institution is liable in damages.<sup>8</sup> A sale of stock of a land company which does no land business but carries on a coöperative scheme is void as between parties who participated therein.<sup>9</sup>

A corporation organized to manufacture railway cars has no power to lay out a town around its works and build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theater, a gas plant, a system of water-works and a brick plant, and to own and run a farm for supplies to sell and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor to passengers on its cars, and may sell surplus steam power.<sup>10</sup>

§ 681. *Miscellaneous ultra vires acts — Enforcement of ultra vires*

<sup>1</sup> Carson City Sav. Bank v. Carson City Elev. Co., 90 Mich. 550 (1892).

<sup>2</sup> Schurr v. New York, etc. Co., 18 N. Y. Supp. 454 (1892).

<sup>3</sup> State v. Bank of Hemingford, 58 Neb. 818 (1899).

<sup>4</sup> Sherman, etc. Co. v. Morris, 43 Kan. 282 (1890).

<sup>5</sup> Bosshardt, etc. Co. v. Crescent Oil Co., 171 Pa. St. 109 (1895).

<sup>6</sup> Dorsett v. Black Hills, etc. Co., 138 N. W. Rep. 808 (S. Dak. 1912).

<sup>7</sup> Safety, etc. Co. v. Baltimore, 74 Fed. Rep. 363 (1896).

<sup>8</sup> Nims v. Mount Hermon Boys' School, 160 Mass. 177 (1893).

<sup>9</sup> Todd v. Ferguson, 161 Mo. App. 624 (1912).

<sup>10</sup> The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state; or that a legislative committee had reported that the real estate was properly taxed. People v. Pullman's Palace Car Co., 175 Ill. 125 (1898).



*contracts.* — “The doctrine of *ultra vires* originated at a time when nearly all corporations were created for public purposes, and there is no reason why it should ever have been applied to private corporations any more than to the powers of individuals in a partnership.” Such is the language of the New York Appellate Division Court.<sup>1</sup> Where a contract is not on its face beyond the powers of a corporation, it is presumed that the corporation has power to make the contract.<sup>2</sup> A judgment on an *ultra vires* contract may be impeached to the same extent that the contract itself might have been impeached.<sup>3</sup> A by-law that employees shall participate in surplus earnings may constitute a contract with them if they have performed.<sup>4</sup> Where a building society illegally carries on the banking business, the depositors cannot claim priority over the shareholders of the society.<sup>5</sup>

A stockholder may enjoin a railway from donating its funds to an exhibition, even though it is claimed that thereby the corporate receipts will be increased.<sup>6</sup> A railroad cannot guarantee certain receipts to another corporation in a different line of business.<sup>7</sup>

<sup>1</sup> *Holm v. Claus, Lipsius, etc. Co.*, 21 N. Y. App. Div. 204 (1897). See also *Seymour v. Spring, etc. Assoc.*, 144 N. Y. 333, 341 (1896).

<sup>2</sup> *Choctaw, etc. R. R. v. Bond*, 160 Fed. Rep. 403 (1908).

<sup>3</sup> *Great, etc. Ry. v. Charlebois*, [1899] A. C. 114.

<sup>4</sup> *Zwolanek v. Baker Mfg. Co.*, 150 Wis. 517 (1912).

<sup>5</sup> *Re Birkbeck, etc. Soc.*, [1912] 2 Ch. 183.

<sup>6</sup> In the case *Tomkinson v. South-Eastern Railway Co.*, L. R. 35 Ch. Div. 675, decided in 1887, where both the directors and the stockholders by a vote of 10,229 against 175 had authorized the subscription of £1,000 towards the erection of an Imperial Institute, the court held that the donation was illegal. The court said: “The Imperial Institute has no more connection with this railway company than the present exhibition of pictures at Burlington House, or the Grosvenor Gallery, or Madame Tussaud’s, or any other institution in London that can be mentioned. The only ground for the suggestion that this company has the right to apply its funds, which it has been allowed to raise for specific purposes, to this purpose, is, that the Imperial Institute, if it succeeds, will

very probably increase greatly the traffic of this company. If that is a good reason, then, as I pointed out during the argument, any possible kind of exhibition which, by being established in London, would probably increase the traffic of a railway company by inducing people to come up to see it, would be an object to which a railway company might subscribe part of its funds. I never heard of such a rule, and, as far as I understand the law, that clearly would not be a proper application of the moneys of a railway company. I cannot distinguish this case from that at all, though, of course, I do not mean to disparage the enormous importance of the Imperial Institute. It may be established for the highest possible objects of interest to this country; but still, the only reason given to me why this railway company thinks it right to spend part of its funds in subscribing to it is this, that it will probably greatly increase the traffic of the company by inducing many people to travel up to visit this Institute. I cannot accept that as a reason for a moment.” See also § 64, *supra*, and §§ 775, 909, *infra*.

<sup>7</sup> *Davis v. Old Colony R. R.*, 131 Mass. 258 (1881), where the guaranty



It is illegal for the directors or a majority of the stockholders to give away the assets of the corporation for the promotion of other enterprises.<sup>1</sup> Although it is *ultra vires* for an insurance company to contribute to political campaign expenses, it is not a criminal act, and hence an officer who acts as intermediary is not criminally liable.<sup>2</sup> An improvement company having wide powers may give a part of its stock to a railway company, in order to have the road built to the property of the improvement company. A stockholder who has voted therefor

by a corporation of the expenses of a musical festival was held *ultra vires*. A railroad subscription to a state fair was enforced in State Board of Agriculture v. Citizens' Street Ry., 47 Ind. 407 (1874). Cf. § 64, *supra*, and §§ 775, 909, *infra*.

<sup>1</sup> See § 64, *supra*, and §§ 775, 909, *infra*. Back pay cannot be voted to the directors. It is an illegal gift. See § 657, *supra*. But an educational institution may donate money to the construction of a railroad. Louisville, etc. R. R. v. St. Rose Literary Soc., 91 Ky. 395 (1891). A town-site corporation may give away certain lots and give a sum of money to a party who, in consideration thereof, agrees to remove a barn, etc., to another location. Sherman, etc. Co. v. Russell, 46 Kan. 382 (1891); Sherman, etc. Co. v. Fletcher, 46 Kan. 524 (1891). A railroad cannot be held liable on its contract to pay for the examination of mines of which the railroad is the outlet. George v. Nevada Cent. R. R., 22 Nev. 228 (1894). But directors may compromise corporate claims. Frankfort Bank v. Johnson, 24 Me. 490 (1884), and § 750, *infra*. Directors cannot legally pay out money which is not owed. Salem Bank v. Gloucester Bank, 17 Mass. 1, 30 (1820). Directors should not use corporate funds to sue for a libel on themselves as directors; but where the stockholders were informed of the payment it will not be disturbed. Studdert v. Grosvenor, L. R. 33 Ch. D. 528 (1886); overruled on another point in Peel v. London, etc. Ry., 95 L. T. Rep. 897 (1906). The money of a city cannot be used to buy a gold chain for the mayor. Attorney-General v. Batley, 26 L. T. Rep. 392 (1872). Nor to give

extra pay to a clerk. *Ex parte* Melish, 8 L. T. Rep. 47 (1863). Nor can lodge funds be given to outside charitable purposes. Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 53 (1861). Where a stockholders' meeting has recommended that a week's extra pay, as a gratuity to the workmen of a manufacturing corporation, be given, and the directors give it, a dissenting stockholder cannot hold the directors liable therefor. Hampson v. Price's, etc. Co., 45 L. J. (Ch.) 437 (1876); Clarke v. Imperial Gas Light & C. Co., 4 B. & Ad. 315 (1832), upholding a grant of an annuity to a disabled clerk. A bank may make a gift to the children of a deceased superintendent. Henderson v. Bank of Australasia, L. R. 40 Ch. D. 170 (1888). As against its creditors, a corporation cannot give away any part of its assets. Mason v. Fischer, etc. Co., 21 S. Rep. 5 (Miss. 1896). Where the directors have been paid for their services, majority stockholders on the winding up cannot vote the sum of £7,800 to them as a gratuity as against the dissent of a minority stockholder. Stroud v. Royal, etc., 89 L. T. Rep. 243 (1903). An incorporated volunteer fire department which has been supplanted by a regular organized municipal fire department has no power to put its property in trust for charitable purposes. The property must be divided among existing members. Hopkins v. Crossley, 132 Mich. 612 (1903).

<sup>2</sup> *People v. Moss*, 113 N. Y. App. Div. 329 (1906); *aff'd*, 187 N. Y. 410. A mining company has no power to donate funds for political purposes. *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904).



cannot afterwards complain.<sup>1</sup> A street railroad may donate money to a baseball park.<sup>2</sup> And a land-improvement company may agree to pay one third of the expense of a bridge in the public highway.<sup>3</sup> A corporation organized to improve an office building may donate funds to secure the location of a stock exchange near by.<sup>4</sup> A bank has no power to make a donation to a paper mill.<sup>5</sup> A stockholder's suit to compel his railroad company to take back certain stocks, bonds, mines, etc., in which the railroad had no power to invest and which the railroad had transferred to other companies, and asking that such property when taken back shall be sold and the assets distributed among the stockholders, is not multifarious, and on its face makes out a case, it being charged that part of the property had been put into a trusteeship and trust certificates therefor issued to stockholders of the railroad company, even though the transaction is eight years old.<sup>6</sup> Where a commission in the sale of treasury stock was to be a certain amount of such stock the board of directors cannot pay the commission unless the sale is made.<sup>7</sup> A contract whereby a manufacturing corporation and all of its stockholders agreed to sell a certain proportion of the capital stock of said company and to substitute two persons nominated by the vendee as directors in such corporation is not presumed to be *ultra vires*, and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation.<sup>8</sup> Even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the note are used to take it up, the money cannot be recovered back.<sup>9</sup> Even though a corporation is selling its product below cost, in order to force another corporation to combine with it, yet a stockholder in the former cannot enjoin such sales, where neither of the corporations has a natural monopoly, and no bad faith or palpably bad judgment is shown.<sup>10</sup> Minority stockholders may main-

<sup>1</sup> *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262 (1893). A business corporation may donate money to secure the location of a post office near its place of business. *B. S. Green Co. v. Blodgett*, 159 Ill. 169 (1895).

<sup>2</sup> *Temple, etc. Ry. v. Hellman*, 103 Cal. 634 (1894).

<sup>3</sup> *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294 (1894). The directors may regulate the rates and may give away free passes within reasonable limits. *Hasson v. Venango Bridge Co.*, 1 Pa. Dist. 521 (1892). A land company may agree with a town to aid in the construction of a bridge which will enable a street railway to

be built to its property. *Board of Trustees v. Piedmont, etc. Co.*, 134 N. C. 41 (1903).

<sup>4</sup> *Merchants', etc. Co. v. Chicago, etc. Co.*, 210 Ill. 26 (1904).

<sup>5</sup> *Robertson v. Buffalo, etc. Bank*, 40 Neb. 235 (1894).

<sup>6</sup> *Venner v. Great Northern Ry.*, 117 Minn. 447 (1912).

<sup>7</sup> *Lyon v. Dailey, etc. Co.*, 126 Pac. Rep. 931 (Mont. 1912).

<sup>8</sup> *Rider Life Raft Co. v. Roach*, 97 N. Y. 378 (1884).

<sup>9</sup> *McClure v. Trask*, 161 N. Y. 82 (1899).

<sup>10</sup> *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901). *Mandamus* will



tain a bill in equity to cancel a lease which their corporation has made of its property with a view to establishing an illegal monopoly.<sup>1</sup> A contract of a corporation is legal if it is not expressly prohibited, and if it has "a natural and reasonable tendency to aid in the accomplishment of the objects for which the corporation was created."<sup>2</sup>

A mercantile or manufacturing company may loan its surplus funds temporarily when not needed in the business.<sup>3</sup> Where three companies join in the execution of debentures creating a lien on their property, each will be required to pay such part as it received, although such debentures are *ultra vires*.<sup>4</sup>

A corporation cannot legally be organized to practice law, even though the statute authorizes incorporation for any lawful business.<sup>5</sup> A corporation cannot practice law even by employing others to carry on the law business intrusted to it.<sup>6</sup> A corporation cannot be organized to practice medicine, and under the New York statute it is guilty of a misdemeanor for such practice. The word "person" in a statute authorizing the practice of medicine does not apply to hospitals, etc. organized under the corporation statute.<sup>7</sup> Although a department store corporation furnishes a dentist, as a part of its business, without chartered right so to do and in violation of a statute regulating dentistry, it cannot set up this defense in a suit against it for malpractice.<sup>8</sup> A corporation cannot take out a license to practice medicine,<sup>9</sup> but may contract to furnish medical assistance.<sup>10</sup>

An agreement of a national bank that it will pay all checks of a person is not enforceable by a party who cashes such checks relying on such agreement, it appearing that the bank had no funds of the former to meet such checks. This is an *ultra vires* contract of guar-

not be granted to allow a stockholder to examine the books of the company where such stockholder owns only one thirteenth of one per cent. of the preferred stock, and his reason for examining the books is that he believes the company is selling its product at less than cost by reason of competition, and that consequently he has received no dividends, it not being shown that the market price of the stock has been decreased. *Matter of Pierson*, 28 N. Y. Misc. Rep. 726 (1889); *aff'd*, 44 N. Y. App. Div. 215.

<sup>1</sup> *Shawnee, etc. Co. v. Anderson*, 209 U. S. 423 (1908).

<sup>2</sup> *Colorado, etc. Co. v. American, etc. Co.*, 97 Fed. Rep. 843 (1899).

<sup>3</sup> *Garrison, etc. Co. v. Stanley*, 133 Iowa, 57 (1907). See also § 690, *infra*.

<sup>4</sup> *Re Johnston, etc. Co. Ltd.*, [1904] 2 Ch. 234.

<sup>5</sup> *Matter of Coöperative Law Co.*, 198 N. Y. 478 (1910). In New York a corporation cannot practice law although it may do a collection business without legal proceedings. *Matter of Associated Lawyers' Co.*, 134 N. Y. App. Div. 350 (1908).

<sup>6</sup> *Matter of City of New York*, 144 N. Y. App. Div. 107 (1911).

<sup>7</sup> *People v. Woodbury, etc. Inst.*, 192 N. Y. 454 (1908).

<sup>8</sup> *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244 (1901).

<sup>9</sup> *State, etc. Inst. v. State*, 74 Neb. 40 (1905).

<sup>10</sup> *State, etc. Inst. v. Platner*, 74 Neb. 23 (1905).



anty.<sup>1</sup> Where the statutes in existence at the time of incorporation provide for the extension of corporate charters, a stockholder cannot prevent the corporation from extending its existence in accordance with such statutes.<sup>2</sup>

The board of directors of an insurance company have no power to employ an agent on a basis which will give the agent an interest in premiums for ten years, and certainly an executive committee has no such power.<sup>3</sup> But a contract with an insurance agent whereby he has an interest in all policies placed by him is not an interference with the discretion of future boards of directors.<sup>4</sup> The board of directors of a hotel company may in anticipation of the completion of the hotel make a ten-year contract with a manager.<sup>5</sup> A board of directors cannot make a contract with an attorney for three years' services where the statute authorizes the board to remove officers, agents, and servants at any time.<sup>6</sup> A corporation may be liable on its agreement to give a percentage of its profits to a manufacturer of certain machinery, other corporations having also agreed to do the same.<sup>7</sup> Where the salary of a salesman is a proportion of the profits, salaries paid to directors are to be deducted from the receipts before arriving at the profits.<sup>8</sup> The board of directors of an insurance company have no power to employ a person for life.<sup>9</sup> But the directors of a trading company may pension a retiring officer or servant.<sup>10</sup>

There being nothing in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers.<sup>11</sup> It has been held that a stockholder cannot enjoin his corporation from paying money to a rival company to induce the latter to discontinue business.<sup>12</sup> A contract of a company to pay a

<sup>1</sup> *Bowen v. Needles, etc. Bank*, 94 Fed. Rep. 925 (1899).

<sup>2</sup> *Smith v. Eastwood, etc. Co.*, 58 N. J. Eq. 331 (1899).

<sup>3</sup> *Caldwell v. Mutual, etc. Assoc.*, 53 N. Y. App. Div. 245 (1900).

<sup>4</sup> *Schrimplin v. Farmers', etc. Ass'n*, 123 Iowa, 102 (1904). See § 534, *supra*.

<sup>5</sup> *Brooklyn Heights, etc. Co. v. Kurtz*, 115 N. Y. App. Div. 74 (1906). An executive committee has no power to make a contract appointing a sole selling agent for five years and giving him six per cent. on all goods sold by him or any one else. Moreover, such a contract is unilateral and not binding when the agent does not agree to sell any goods. *Commercial, etc. Co.*

*v. Northampton, etc. Co.*, 115 N. Y. App. Div. 388 (1906); *aff'd*, 190 N. Y. 1. See also p. 1559, note 2, *supra*.

<sup>6</sup> *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319 (1911).

<sup>7</sup> *Good v. Daland*, 121 N. Y. 1 (1890). See N. Y. L. J., July 23, 1913.

<sup>8</sup> *Gaul v. Kiel, etc. Co.*, 199 N. Y. 472 (1910).

<sup>9</sup> *Carney v. New York, etc. Co.*, 162 N. Y. 453 (1900).

<sup>10</sup> *Normandy v. Ind. etc. Co. Ltd.*, [1908] 1 Ch. 84. *Cf. Beers v. N. Y. etc. Ins. Co.*, 66 Hun, 75 (1892).

<sup>11</sup> *Re Bulawayo, etc. Co. Ltd.*, [1907] 2 Ch. 458.

<sup>12</sup> *Leslie v. Lorillard*, 110 N. Y. 519 (1888).



certain amount to another company if the latter would not compete for a job, cannot be enforced by the latter.<sup>1</sup> Any misapplication or waste of the property of a corporation may be remedied by a member thereof.<sup>2</sup> A note given by an improvement company to adjust a contract by which it had agreed to give a right of way, terminals, and a bonus to a street railway may be enforced.<sup>3</sup>

It is legal for the directors to send out proxies printed at the expense of the company and to inclose postage stamps paid for by the company, even though the proxies named were named by them.<sup>4</sup> Where the charter authorizes an extension of the business and the directors propose to the stockholders a modification of the by-laws so as to authorize such extension and inclose a form of proxy, the expense of so doing may be paid by the company, even though the directors refuse to print and circulate the arguments of a dissenting minority.<sup>5</sup> Where the directors think it wise to extend the business, as allowed by charter, they may use the funds, machinery, and officers of the company to circulate their recommendations among the shareholders, and need not circulate the opposing arguments of dissenting shareholders.<sup>6</sup> It is legal for the corporate officers to spend money to obtain an amendment to the charter.<sup>7</sup>

A stockholder may enjoin any act on the part of the state which is in violation of the charter which it granted to the corporation. It was to enjoin a tax by the state under such circumstances that the case of *Dodge v. Woolsey*<sup>8</sup> arose.

Even though a national bank buys bonds which it has no power to buy, and agrees to sell back to the vendor at a certain price, yet it cannot set up a plea of *ultra vires* when it is sued by the vendor for refusal to resell.<sup>9</sup> Even if a navigation company purchases a hotel

<sup>1</sup> *Marshalltown, etc. Co. v. Des Moines Brick, etc. Co.*, 149 Iowa, 141 (1910).

<sup>2</sup> *Armstrong v. Church Soc.*, 13 Grant Ch. (U. C.) 552 (1867).

<sup>3</sup> *Llano Imp. etc. Co. v. Pacific Imp. Co.*, 66 Fed. Rep. 526 (1895).

<sup>4</sup> *Peel v. London, etc. Ry.*, [1907] 1 Ch. 5; overruling *Studdert v. Grosvenor*, 33 Ch. Div. 528.

<sup>5</sup> *Campbell v. Australian, etc. Society*, 99 L. T. Rep. 3 (1908).

<sup>6</sup> *Campbell v. Australian, etc. Soc.*, 99 L. T. Rep. 3 (1908).

<sup>7</sup> *Perkins v. Coffin*, 84 Conn. 275 (1911).

<sup>8</sup> 18 How. 331 (1855). The court, however, refused to sustain a stockholder's action to enjoin the corporation from paying a license tax im-

posed by the United States government in the case *Corbus v. Alaska, etc. Co.*, 187 U. S. 455 (1903). A stockholder cannot enjoin the payment of an alleged illegal tax on its income imposed by act of Congress. *Straus v. Abrast Realty Co.*, 200 Fed. Rep. 327 (1912). Stockholders may enjoin the company from discounting paper usuriously and in a manner contrary to its charter, i.e., without the paper being passed on by the directors. The injunction lies on the ground that the charter is endangered. *Manderson v. Commercial Bank*, 28 Pa. St. 379 (1857).

<sup>9</sup> *Logan County Bank v. Townsend*, 139 U. S. 67 (1891); s. c., 3 S. W. Rep. 122 (Ky. 1887).



property *ultra vires*, yet its lessee cannot refuse to pay the rent on that ground, nor can bondsmen for the payment of such rent defend on that ground.<sup>1</sup> A stockholder in a company organized to purchase a certain mine may enjoin the company from purchasing a mine in another country, even though the certificate of incorporation contains some general powers.<sup>2</sup> Even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue.<sup>3</sup>

A national bank has power to take a lease of land and erect an office building thereon for its own use and for the purpose of renting what it does not need.<sup>4</sup> A stockholder in a hotel company cannot enjoin the managers from leasing a part of the property for other purposes, there being sufficient accommodation left for the hotel.<sup>5</sup> The charter of a company formed to carry on an opera house will not be forfeited merely because it leases the opera house.<sup>6</sup> A bank owning a bank building may tear it down and erect a larger one, even though it intends to rent the extra space.<sup>7</sup>

In a suit by a lessee to enjoin the lessor from taking possession of the property for an alleged breach of the lease, the lessor cannot set up that the lease was *ultra vires*, at the same time retaining the past benefits of the lease.<sup>8</sup> Where the statute prohibits incorporation for acquiring and holding land, a corporation cannot be formed to take a lease of land and erect a building upon it to rent, and hence such a corporation cannot maintain a suit for use and occupation.<sup>9</sup> A railroad which has no further use for certain terminal land cannot deed it to trustees to develop and sell for the benefit of the railroad company and other persons who might become interested in the trust.<sup>10</sup>

The vice president of a trust company has no power to bind it by a contract under seal whereby the trust company guarantees to the owner of certain stocks and bonds that such stocks and bonds can be sold within

<sup>1</sup> Nantasket, etc. Co. v. Shea, 182 Mass. 147 (1902).

<sup>2</sup> Stephens v. Mysore, etc. Co., [1902] 1 Ch. 745.

<sup>3</sup> Anderson v. Midland Ry., [1902] 1 Ch. 369.

<sup>4</sup> Brown v. Schleier, 118 Fed. Rep. 981 (1902), holding also that a receiver in a national bank cannot maintain a suit to recover back from the lessor of premises to the bank the rent and cost of improvements, on the ground that the lease was *ultra vires*, especially where the lease has

been in existence for ten years; aff'd, 194 U. S. 18.

<sup>5</sup> Simpson v. Westminster, etc. Co., 8 H. L. Cas. 712 (1860).

<sup>6</sup> People v. Walker, etc. Co., 249 Ill. 106 (1911).

<sup>7</sup> Wingert v. First Nat. Bank, 175 Fed. Rep. 739 (1909).

<sup>8</sup> Pittsburgh, etc. R. R. v. Altoona, etc. R. R., 196 Pa. St. 452 (1900).

<sup>9</sup> Imperial Bldg. Co. v. Chicago, etc., 238 Ill. 100 (1908).

<sup>10</sup> Williams v. Johnson, 208 Mass. 544 (1911).



a specified period at a certain price, the purpose being to protect the price. The authority of the trust company to buy and sell stock and bonds did not authorize it to engage in promoting schemes for the sake of large profits.<sup>1</sup> A savings bank and trust company cannot be held liable for losses on speculations in cotton, although it represented that its orders were for responsible customers.<sup>2</sup> The contract of a railroad company not to oppose the passage of a law giving land to another corporation, the land to be divided subsequently, is illegal and not enforceable.<sup>3</sup> Many instances and examples of what acts and contracts of a railroad corporation are *ultra vires* are given elsewhere.<sup>4</sup>

Where the lessee of a car-company plant repudiates the lease on the ground of *ultra vires* and refuses to pay rent, and the court holds that it cannot be compelled to pay rent, the lessor company may compel the lessee to pay for the property so taken, including the value of the contracts taken over.<sup>5</sup> Where a debt to a national bank is paid by the bank guaranteeing a loan which its creditor gets from another bank, the guaranty may be *ultra vires*, but the first-named bank must account for the money so received by it.<sup>6</sup> Where a creamery corporation is about to fail and a bank practically takes it over by taking its stock and paying a portion of its debt, and continuing the business in the name of the creamery company, and the bank fails, such of its assets as were really derived from the creamery business will be distributed among those creditors, not as carrying out the *ultra vires* act of a national bank doing a mercantile business, but as compelling restitution of property of another obtained without authority of law.<sup>7</sup>

Where one railroad company agrees to expend certain money on another railroad, and the repayment of the money is guaranteed by a third person, such third person cannot repudiate the guaranty after the money has been expended, on the ground that the act was *ultra vires*.<sup>8</sup>

<sup>1</sup> *Gause v. Commonwealth, etc. Co.*, 196 N. Y. 134 (1909).

<sup>2</sup> *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135 (1890); s. c., 44 Hun, 412.

<sup>3</sup> *Chippewa, etc. Ry. v. Chicago, etc. Ry.*, 75 Wis. 224 (1889).

<sup>4</sup> See § 909, *infra*.

<sup>5</sup> In *Pullman's P. C. Co. v. Central Transp. Co.*, 171 U. S. 138 (1898), the court held that, where a lease of property was *ultra vires* and void, the only compensation for the actual use would be for the tangible property, and not for the good-will, patents, and contracts which expired during the lease. Accordingly, where the stipulated

rental was \$264,000 a year, the lower court allowed for use the value of the capital stock of the lessor, inasmuch as such value had been consumed in connection with the lease, and such value was fixed at upwards of \$2,500,000 and interest, but the supreme court reduced the compensation to \$727,000 and interest, being the actual value of the tangible property.

<sup>6</sup> *Citizens' Nat. Bank v. Appleton*, 216 U. S. 196 (1910).

<sup>7</sup> *Rankin v. Emigh*, 218 U. S. 27 (1910).

<sup>8</sup> *Alexandria, etc. R. R. v. Johnson*, 58 Kan. 175 (1897).



A business corporation cannot defeat an accommodation note if all the stockholders assented thereto and there are no creditors.<sup>1</sup> The implied powers of a corporation are not limited to those which are indispensably necessary, but include those which are appropriate, convenient, and suitable for carrying out the express powers.<sup>2</sup>

Many examples and illustrations of *ultra vires* acts and *intra vires* acts are given in the notes hereto.<sup>3</sup>

<sup>1</sup> Perkins v. Trinity, etc. Co., 69 N. J. Eq. 723 (1905), the court saying: "To permit stockholders of corporations to unanimously make a disposition of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud." See also § 774, *infra*. A corporation may file a bill in equity to enjoin the foreclosure of a mortgage securing bonds, which have been issued to the stockholders as a dividend illegally, and to compel the surrender of the bonds for cancellation, it appearing that no other rights have intervened. Gunnison, etc. Co. v. Whitaker, 91 Fed. Rep. 191 (1898). Cf. § 546, *supra*.

<sup>2</sup> Flaherty v. Portland, etc. Soc., 99 Me. 253 (1904).

<sup>3</sup> In Safety, etc. Co. v. Mayor, 74 Fed. Rep. 363, 370 (1896), the court said in regard to *ultra vires* acts: "It is evident that no general principle can be laid down whereby, with absolute certainty, it can be determined that many transactions are or are not among the incidents to the business of a corporation authorized by its charter. The answer to the question must depend upon the facts of each particular case." See cases in § 909.

*Federal Courts:* See the cases at the beginning and end of this section. Even though a corporation has made an *ultra vires* contract and given a mortgage to secure it, the court will not cancel the mortgage unless the consideration is returned. Jenson v. Toltec Ranch Co., 174 Fed. Rep. 86 (1909). A corporate contract is pre-

sumed to be *intra vires*. Mine, etc. Co. v. Stockgrowers' Bank, 173 Fed. Rep. 859 (1909). The question of whether a corporation has capacity to sue can be raised only by the state. La Moine, etc. Co. v. Kesterson, 171 Fed. Rep. 980 (1909); s. c., 190 Fed. Rep. 355. Except where public rights are involved, a corporation cannot set up a defense of *ultra vires* when it will not advance justice, but would accomplish a legal wrong, and hence an attorney may collect his fees for obtaining a charter in one state for a corporation in another state. Wayte v. Red Cross, etc. Soc., 166 Fed. Rep. 372 (1909). A stockholder in a state bank in Kansas may enjoin the state bank commissioner and treasurer from using a deposit which the bank by a vote of its directors and a majority of its stockholders has deposited with the state to carry out the bank guaranty statute in Kansas, such deposit being illegal as not due process of law and as impairing the obligation of the contract between the stockholder and the bank and the state by taking its property for the payment of debts which the bank has not contracted, and not even the reserved right of the state to amend the charter will sustain such act. Larabee v. Dolley, 175 Fed. Rep. 365 (1908); *aff'd*, 219 U. S. 121. A corporation which has taken a note in payment for its stock may pledge the note with the stock as security, and where a part of the note has been paid, may borrow money from a mining company to redeem the pledge and the mining company may collect the debt. Stambaugh v. Refugio Syndicate, 196 Fed. Rep. 143 (1912). It is no defense to a suit by a corporation that the latter acquired the claim *ultra vires*. Peru, etc. Co. v. Harker, 144 Fed. Rep. 673 (1906). A corpora-



Out of the various cases set forth in this chapter, a few general rules may be clearly drawn and stated. First, there is no clearly-defined

tion in buying property may agree to pay therefor by paying an annual sum to the vendor during his life. *Burnes v. Burnes*, 137 Fed. Rep. 781 (1905). The board of directors may at the expense of the corporation publish and also issue to the stockholders notice of a proposed scheme of consolidation or for an exchange of the stock for stock in another corporation, even though the plan is not consummated. *Raseover v. American, etc. Co.*, 135 Fed. Rep. 341 (1905). A contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby. *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561. Even though the charter of a corporation limits the amount of property which it may receive, yet this is for the benefit of the public, and hence the heirs of a testator cannot object that he has given to the corporation more property than it is entitled to receive. *Brigham v. Peter, etc. Hospital*, 126 Fed. Rep. 796 (1903); *aff'd*, 134 Fed. Rep. 513. A receiver cannot have a contract of a corporation set aside as *ultra vires* and cannot recover back payments already made thereon, especially where the contract was carried out by the corporation for several years, and was then canceled by mutual agreement before the receiver was appointed, the contract in this case being a ninety-nine year lease of real estate to a bank, upon which real estate the bank erected a building for its own use and for rental. *Brown v. Schleier*, 112 Fed. Rep. 577 (1901); *aff'd*, 194 U. S. 18. A corporation formed to publish a paper in a particular trade may publish a directory of that particular trade. *Jewelers', etc. v. Jacobs*, 109 Fed. Rep. 509 (1901). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of Congress upon such corporation for doing business in Alaska. *Corbus v. Alaska, etc. Co.*, 99 Fed. Rep. 334 (1899); *aff'd*, 187 U. S. 455. A bank which as pledgee causes by its statements a party to purchase the stock held in pledge may be held liable in damages if such statements were false. *Hindman v. First Nat. Bank, etc.*, 98 Fed. Rep. 562 (1899). A state bank has no power to purchase stock in a national bank as an investment, and hence is not liable on such stock in case the national bank becomes insolvent. *Schofield v. Goodrich, etc. Co.*, 98 Fed. Rep. 271 (1899). A national bank has power to purchase the assets and assume the liabilities of another national bank. *Schofield v. State Nat. Bank, etc.*, 97 Fed. Rep. 282 (1899). Although a hardware corporation has no power to become a stockholder in and borrower from a building association, yet if it does so it cannot repudiate a mortgage which it gave in connection with the transaction. *Bowman v. Foster, etc. Co.*, 94 Fed. Rep. 592 (1899). A stockholder may enjoin the corporation from obeying an illegal order of railroad commissioners of a state requiring shippers to pay a war revenue stamp tax. *Dinsmore v. Southern, etc. Co.*, 92 Fed. Rep. 714 (1899); *rev'd* on another point in 102 Fed. Rep. 794. A stockholder in a railroad corporation that has taken a lease from another railroad corporation cannot object thereto on the ground that the lessor had no power originally to acquire and own the railroad. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). Under the statute authorizing corporations for any lawful "business" or "pursuit," a corporation may be formed to guarantee the bonds of an educational institution, and at any rate the stockholders in such corporation cannot question the power of the corporation to make such guaranty. *Maxwell v. Akin*, 89 Fed. Rep. 178 (1898). Even though a contract by which one railroad operates another is *ultra vires*, and even though the operating road



principle of law that determines whether a particular act is *ultra vires* or *intra vires*. The courts are becoming more liberal, and many acts

by another *ultra vires* contract consents to a mortgage being placed upon the other road, and agrees to protect the latter by paying the interest if necessary, nevertheless, in case of a default and foreclosure, the operating road cannot claim a lien for betterments in priority to such mortgage. *Terre Haute & I. R. R. v. Harrison*, 88 Fed. Rep. 913 (1898). Even though it may be *ultra vires* for a national bank to take charge of securities and collect and reinvest the proceeds, yet the bank must account for the same. *Emmerling v. First Nat. Bank, etc.*, 97 Fed. Rep. 739 (1899). A national bank may give a bond to secure funds deposited with it. *State of Nebraska v. First Nat. Bank*, 88 Fed. Rep. 947 (1898). A national bank owning stock in a savings bank may defeat the statutory liability attached thereto by a plea of *ultra vires*. *California Bank v. Kennedy*, 167 U. S. 362 (1897). Cf. *Citizens' State Bank v. Hawkins*, 71 Fed. Rep. 369 (1896) (this decision was qualified in *East St. Louis, etc. Ry. v. Jarvis*, 92 Fed. Rep. 744), and *Cooper Ins. Co. v. Hawkins*, 71 Fed. Rep. 372 (1896). Notes given by a lumber manufacturing corporation to pay for the stock in a bank cannot be enforced. *Sumner v. Marcy*, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384. A corporation is presumed to have power to purchase a patent whose use pertains to the business indicated by the name of the corporation. *Dorsey, etc. Co. v. Marsh*, 6 Fish. Pat. Cas. 387 (1873); s. c., 7 Fed. Cas. 939. In *Germania, etc. Co. v. Boynton*, 71 Fed. Rep. 797 (1896), it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them. A national bank may agree that a person going security on an attachment bond will be protected by the bank, although the bond is not given for the benefit of the bank. *Seeber v. Com-*

*mercial Nat. Bank*, 77 Fed. Rep. 957 (1897).

*Alabama*: The defense of *ultra vires* must be pleaded to be available. *Perryman & Co. v. Farmers', etc. Co.*, 167 Ala. 414 (1910). A corporation organized to purchase all articles of merchandise may purchase bottles. *Jebeles, etc. Co. v. Hutchinson & Son*, 171 Ala. 106 (1910). A mining company is not liable for the price of goods which it purchases to carry on an *ultra vires* mercantile business. *Chewacla Lime Works v. Dismukes*, 87 Ala. 344 (1889). Where a lime and limestone corporation engages in the mercantile business, it is not liable for the price of goods sold and delivered to it. *Chewacla Lime Works v. Dismukes*, 87 Ala. 344 (1889).

*Arkansas*: Where a corporation allows its general manager to hold it out as owning and operating a theater and receives the income, it is liable for the debts. *Arkansas, etc. Assoc. v. Higgins*, 96 Ark. 493 (1910). After the corporation has received the benefits of a contract it cannot repudiate the obligation on the ground that the contract is *ultra vires*. *Bloom v. Home, etc.*, 91 Ark. 367 (1909). A town-site company that owns a hotel is liable on a contract of employment where it has received the benefit of the services. *Western, etc. Co. v. Caplinger*, 86 Ark. 287 (1908). A defense that a contract was illegal cannot be raised for the first time on appeal. *Simon v. Calfee*, 80 Ark. 65 (1906). A railroad company cannot defeat a suit for rent on a lease which it has entered into by setting up the defense that the lessor corporation had no power to make the lease. *White River, etc. Ry. v. Star, etc. Co.*, 77 Ark. 128 (1905). An insurance company cannot defend against a policy of insurance on the ground that it was *ultra vires*. *Minneapolis, etc. Co. v. Norman*, 74 Ark. 190 (1905).

*California*: A brewery may take a lease of a building and sublet it for the purposes of a saloon to sell its beer. *McQuaide v. Enterprise, etc.*



which fifty years ago would have been held to be *ultra vires* would now be held to be *intra vires*. The courts have gradually enlarged the im-

Co., 14 Cal. App. 315 (1910). *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83 (1870), holding that a corporation empowered to buy, *improve*, etc., real estate may appropriate a portion of its funds to a railroad in consideration of lower rates and more frequent trains. Where an improvement company engages in the hotel business, it cannot repudiate the liabilities of an innkeeper on the ground that the hotel business was beyond its powers. *Magee v. Pacific Imp. Co.*, 98 Cal. 678 (1893). A mortgagor of land to a national bank cannot defend against it on the ground that the bank had no power to take the mortgage. *Camp v. Land*, 122 Cal. 167 (1898).

*Colorado*: A land company cannot be surety on an appeal bond. *Eagan v. Mahoney*, 121 Pac. Rep. 108 (Colo. 1912). Even though a bank has no authority to establish branch banks, yet if it does so, and fails, the stockholders cannot defend against their statutory liability on that ground. *Kipp v. Miller*, 47 Colo. 598 (1910). Minority stockholders may complain when the majority hold stockholders' meetings out of the state, keep no office or books in the state, appropriate treasury stock, etc. *Jones v. Pearl Min. Co.*, 20 Colo. 417 (1894). An improvement company has no power to purchase a cause of action for damages to land, by reason of a public improvement, even though prior thereto it had purchased the land itself, and if it sues the city for such damages the defense of *ultra vires* is good. *City of Pueblo v. Shutt Inv. Co.*, 28 Colo. 524 (1901).

*Connecticut*: All persons who deal with a corporation are conclusively presumed to know the contents of the certificate of incorporation. *Butler v. Beach*, 82 Conn. 417 (1909). A corporation organized in Connecticut to take over the assets of an insolvent trading concern, may issue preferred stock to creditors and agree to accept the preferred stock in payment for goods thereafter purchased, not exceeding \$1,000 a year, the corporation

thereupon to have power to reissue and sell such stock. Even though the corporation becomes insolvent, this right of the preferred stock continues. *Butler v. Beach*, 82 Conn. 417 (1909). Where a copartnership organizes a corporation to take over its property and take stock in payment, it cannot afterwards use the funds of the corporation to adjust equities between the former partners as against corporate creditors. *Baldwin v. Wolff*, 82 Conn. 559 (1909). See 87 Atl. Rep. 358.

*Dakota*: A party who loans money to a corporation, knowing that the money is to be used by the company to buy shares of its own capital stock, cannot collect his debt, the act being *ultra vires*. *Adams, etc. Co. v. Deyette*, 8 S. Dak. 119 (1895).

*Delaware*: Directors have authority to dedicate to the public spaces between lots which are being sold. *Poole v. Commissioners of Rehoboth*, 80 Atl. Rep. 683 (Del. 1911).

*Georgia*: A national bank is not liable for the action of its directors or officers in swearing out a warrant for the arrest of a person criminally. *Hansford v. National Bank*, 10 Ga. App. 270 (1912). A purchaser at a foreclosure sale cannot attack the sale on the ground that the trustee of the mortgage was a bank acting without power. *Southern Cotton Mills v. Ragan*, 136 Ga. 789 (1911). A fertilizer company may purchase cotton if that is a necessary part of the business. *Dublin Fertilizer Works v. Carter*, 6 Ga. App. 835 (1909). A guarantee by a paving company that the pavement will be good for ten years cannot be enjoined at the instance of a stockholder where the pavement has been completed. *Fisher v. Georgia, etc. Co.*, 121 Ga. 621 (1905). A bank which buys in a manufactory on an execution sale, in order to protect itself, may carry on the business and is liable for debts incurred thereby. *Reynolds v. Simpson*, 74 Ga. 454 (1885). A cotton ginning company cannot defend against its note in *bona fide* hands, given by the company to pur-



*plied* powers of ordinary corporations, until now such corporations may do almost anything that an individual may do, provided the state and

chase an ice machine, especially where there is no attempt to rescind. *Towers, etc. Co. v. Inman*, 96 Ga. 506 (1895). Where one corporation sells its property to another, and, after part payment is made, the president of the vendee turns back the property, but the vendee corporation sues for the return of the property, such vendee corporation cannot afterwards claim that the transaction was *ultra vires*. *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329 (1896). Where a corporation sues on notes which it has purchased, the defense of *ultra vires* is not sufficient. The answer must be more specific. *Hart v. Phenix, etc. Co.*, 113 Ga. 859 (1901).

*Idaho*: A corporation may agree to employ a person as assistant general manager at a specified salary so long as he retains certain stock which he has purchased. *Darknell v. Cœur D'Alene, etc. Co.*, 18 Idaho, 61 (1910).

*Illinois*: A stockholder in a street railway company cannot enjoin the company from making an agreement with the city whereby existing doubtful franchises are surrendered and a new franchise taken in return, and such contract may be made by the board of directors without consulting the stockholders. Such a new contract is not invalid, even though by its terms the city is to have fifty-five per cent. of the net earnings after making certain payments, this not being a partnership. Neither is the contract void, even though it gives the control of the street railway to a board of supervising engineers. *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908). A state has no right to enjoin a railroad from discontinuing the operation of its elevators as public warehouses where it has no power to act as a public warehouseman. *People v. Illinois, etc. Co.*, 233 Ill. 378 (1908). A brewing corporation may foreclose a mortgage to secure a loan which it has made to enable a borrower to erect a saloon to sell the company's beer. *Kraft v. West Side, etc. Co.*, 219 Ill. 205 (1905). *Assumpsit* is the proper remedy for

a corporation to recover money paid to a person in pursuance of an *ultra vires* contract. *Leigh v. American, etc. Co.*, 205 Ill. 147 (1903). A building corporation being sued for breach of its contract to keep property insured cannot set up that it had no power to insure. *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 453 (1872). A bank may establish a savings department and may pay interest on the savings deposits, and may assign in trust certain securities to secure such deposits. *Ward v. Johnson*, 95 Ill. 215 (1880). Having enjoyed the benefits of a contract, a corporation cannot refuse payment of the amount due on the plea of *ultra vires*. So held where a brewing company took a lease of a saloon. *Heims Brewing Co. v. Flannery*, 137 Ill. 309 (1891). Inasmuch as a national bank cannot transact business until authorized so to do by the comptroller of the currency, a lease made before such consent is void, and the only recovery can be for use and occupation. *McCormick v. Market Nat. Bank*, 162 Ill. 100 (1896). A building association having statutory power to purchase land on which it has a lien has no power to purchase land upon which it has no lien, and hence the association cannot be held liable for a deficiency in the foreclosure of a mortgage which rested upon such property, when purchased by the association and which the association assumed, it being shown also that the transaction had not been authorized by the board of directors, but that on the contrary they repudiated it. *National, etc. Assoc. v. Home, etc. Bank*, 181 Ill. 35 (1899). A corporation organized to carry on the brewing business and to manufacture and sell soda water may rent a place for a "saloon," inasmuch as such "saloon" may be to sell soda water only. *Brewer, etc. Co. v. Boddie*, 181 Ill. 622 (1899). A brewing company cannot become surety on an appeal bond, even though thereby it continues to sell beer to the appealing party. The



the stockholders and creditors do not object. In the case of railroads the courts are more strict. The public are interested in the acts and

company is not liable. *Best, etc. Co. v. Klassen*, 185 Ill. 37 (1900). The plea of *ultra vires* may be interposed in a collateral proceeding only when the corporation has performed an act which it is not under any circumstances authorized to perform, even in part. *Rector v. Hartford Deposit Co.*, 190 Ill. 380 (1901). A second mortgagee cannot complain that the first mortgage has been purchased *ultra vires* by a corporation. *Daniels v. Belvidere, etc. Assoc.*, 193 Ill. 181 (1901). A water-power corporation organized under a special act of the legislature by which the various owners of the riparian rights and of the dam and of the water-power therefrom became interested in such company, no stock being issued, but each owner of water-power being entitled to one vote, cannot maintain suit against a city for diverting the water where the title to the water rights was not vested in the corporation, the business of the corporation being to maintain the dam and raceways and preserve the water-power, the expense being paid by assessment. *Elgin, etc. Co. v. City of Elgin*, 194 Ill. 476 (1902). A company organized to deal in pneumatic bells is not liable for the price of mica washers delivered to it on its contract to pay for the same. *Chicago, etc. Co. v. Jones, etc. Co.*, 91 Ill. App. 547 (1899).

*Indiana*: Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* purpose, yet he may enforce the same. *Wright v. Hughes*, 119 Ind. 324 (1889). Where a lumber company becomes surety on the bond of a contractor against mechanics' liens on a building which he is about to build and for which the company is to furnish the lumber, the defense of *ultra vires* is not good. *G. F. Wittmer, etc. Co. v. Rice*, 23 Ind. App. 586 (1900). See also §§ 774, 775, *infra*. A person loaning money to a corporation on its note may collect it, even though he knew the money was to be used

for an *ultra vires* purpose, provided he did not take part in such use, and such use was not made a condition of the loan. *Marion, etc. Co. v. Crescent, etc. Co.*, 27 Ind. App. 451 (1901).

*Iowa*: A creamery corporation that has purchased five cream separators, and sold one of them, cannot defend against the purchase price on the ground of *ultra vires*. *Vermont, etc. Co. v. De Sota, etc. Co.*, 145 Iowa, 491 (1909). A wholesale drug company cannot after buying a retail drug store rescind on the ground it was *ultra vires*, the retail business having been destroyed so that the seller could not be restored to his former position. *Iowa Drug Co. v. Souers*, 139 Iowa, 72 (1908). Where the charter of an insurance company authorizes it to insure against burglary, and it does so, it cannot defend against a loss on the ground that such insurance was *ultra vires*. *Bankers', etc. Co. v. First Nat. Bank*, 131 Iowa, 456 (1906). An *ultra vires* act cannot be set aside by a stockholder unless it works a substantial injury, where it cannot be set aside by the corporation itself. *Wisconsin Lumber Co. v. Greene, etc. Co.*, 127 Iowa, 350 (1904). When the corporation sues on a contract assigned to it, its want of power to take the assignment must be proved by the defendant. *Wardner, etc. Co. v. Jack*, 82 Iowa, 435 (1891). Where the statute requires gas and electric-light franchises to be voted on by the people, an electric-light company is not liable in damages for failure to supply the number of lights called for by its contract with the city, where the people had not voted on the franchise. Even though the city had paid for lights furnished, this is the rule. *Keokuk v. Ft. Wayne Elec. Co.*, 90 Iowa, 67 (1894). A mutual insurance company cannot take insurance from a stockholder on a premium paid. In case of a loss the company may defend on that ground. *In re Mutual, etc. Ins. Co.*, 107 Iowa, 143 (1899). An insurance company cannot defend against a



operations of railroads. Hence, ordinarily, the courts will not sustain the acts of railroads in selling, leasing, or mortgaging their property, or

policy on the ground that the assessments called for by the policy were lower than was allowed by the charter of the company. *Watts v. Equitable, etc. Assoc.*, 111 Iowa, 90 (1900).

*Kansas*: As against the lessee of a corporation, the lease having been duly authorized, the majority stockholders cannot defend against a suit for forcible entry and detainer by setting up that the corporation had no power to make the lease. *Kelley v. Forney*, 80 Kan. 145 (1909). *Ultra vires* cannot be proved under a plea of the general issue. *Royal Fraternal Union v. Crosier*, 70 Kan. 85 (1904). A town-site company may be liable for the contract of its general agent with a storekeeper, guaranteeing that a railroad would be constructed to the town site within a certain time. *Arkansas Valley, etc. Co. v. Lincoln*, 56 Kan. 145 (1895). A foreign corporation, authorized by its charter to do certain business, may transact that business in another state, even though the statutes of such state do not authorize incorporation for that purpose, the purpose itself being legal. *Haskins v. Kelly*, 77 Kan. 155 (1908). An opera house company which has taken stock in a building association, in order to obtain a loan, cannot repudiate the loan on the ground that it was not authorized to take such stock. *Blue, etc. Co. v. Mercantile, etc. Assoc.*, 53 Pac. Rep. 761 (Kan. 1898). In the case of *City of Kansas City v. Wyandotte, etc. Co.*, 9 Kan. App. 325 (1900), the court said: "The plea of *ultra vires*, when interposed for or against a corporation, ought not to be permitted to prevail when it would not advance justice," and the court applied this rule to the defense of a city against a gas bill. A corporation organized to do a real estate business may act as agent in taking charge of real estate, collecting rents, etc. *Neosho, etc. Co. v. Hannum*, 10 Kan. App. 499 (1900).

*Kentucky*: A water-works company may be liable for the act of its watchman in shooting a man who has tres-

passed. *Strader's Admrs. v. President, etc. Co.*, 146 Ky. 580 (1912). Even though a manufacturing company has no charter power to manufacture brushes, yet if it buys machinery and stock for that purpose it cannot refuse to pay the price. *Albin Co. v. Commonwealth*, 128 Ky. 295 (1908). Warehouse receipts issued by a glass manufacturing company do not create a lien on the property mentioned in the receipts. *Bell, etc. Co. v. Kentucky, etc. Co.*, 48 S. W. Rep. 440 (Ky. 1898); s. c., 106 Ky. 7. A gas company organized to carry on business under a specified contract with a city has power to accept a new franchise in lieu thereof. *Keith v. Johnson*, 109 Ky. 421 (1900). A corporation cannot hold its agent liable for money which it paid him to buy articles which it had no power to buy, the goods having been delivered. *Louisville, etc. Co. v. Stewart*, 70 S. W. Rep. 285 (Ky. 1902).

*Louisiana*: A brewing company having two breweries may sell one. *McCloskey v. New Orleans, etc. Co.*, 128 La. 197 (1911). Even though a corporation acts as auctioneer illegally, yet it cannot refuse to pay over to a customer money received by it on a sale of goods. *Lyon, etc. Co. v. Stern, etc.*, 110 La. 473 (1903). The state may enjoin a foreign railroad company from carrying on the warehouse business, except so far as the same is incidental to the railroad business, the charter of such company not including warehouse business as a business in itself. *State v. Southern, etc. Co.*, 52 La. Ann. 1822 (1900).

*Maine*: In Maine it is held that a corporation cannot maintain the defense of *ultra vires* unless the act is hurtful to the public or expressly prohibited by the charter. *Oakland Elec. Co. v. Union, etc. Co.*, 107 Me. 279 (1910), the court applying the rule to a contract by one electric company to furnish electricity to another electric company.

*Maryland*: In the case *Maryland Trust Co. v. National Mechanics'*



engaging in any outside business, unless the public assent through the legislature. But as to the ordinary private corporation the rules of *ultra vires* have been greatly relaxed.

Bank, 102 Md. 608 (1906), the court held that an *ultra vires* act is not necessarily an illegal act and will often be upheld by the courts. A contract by a packet company to pay for harbor improvements is *ultra vires* and not enforceable. *Abbott v. Baltimore, etc. Co.*, 1 Md. Ch. 542 (1850).

**Massachusetts:** An insurance company cannot avoid a policy on the ground that its regulations required the insured to be a member of the company, but that fact was not known to the insurer. *Timberlake v. Supreme Commandery, etc.*, 208 Mass. 411 (1911). A corporation may buy and take over a business as of a date prior to its corporate existence. *Myott v. Greer*, 204 Mass. 389 (1910). A corporation organized to manufacture and sell printing presses may, in making a sale, agree not to sell similar presses to any one else. *New York, etc. Co. v. Kidder, etc. Co.*, 192 Mass. 391 (1906). A publishing corporation in selling its business may sell the use of its name. *Lothrop, etc. Co. v. Lothrop, etc. Co.*, 191 Mass. 353 (1906). *City Hotel v. Dickinson*, 72 Mass. 586 (1856), holds that a hotel company may let a part of its building for shops. A ferry company having a surplus boat may rent it. *Brown v. Winnisimmet Co.*, 93 Mass. 326 (1865). A company engaged in manufacturing and selling glass may purchase glass in order to keep up its stock. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315 (1873). In *Dupee v. Boston Water Power Co.*, 114 Mass. 37 (1873), the sale by the company of surplus land, receiving in payment stock of the corporation itself, was upheld as against a dissenting stockholder's action. A bank which has bought in property on a foreclosure sale, with a secret agreement that it will hold the property in trust for certain purposes, cannot repudiate the trust on the ground that it is *ultra vires*. *Whitney v. Leominster Sav. Bank*, 141 Mass. 85 (1886). A

manufacturing corporation which runs a store and sells goods may collect for goods thus sold, though the sales were made by its undisclosed agent. *Slater Woolen Co. v. Lamb*, 143 Mass. 420 (1887); *Chester Glass Co. v. Dewey*, 16 Mass. 94 (1819). Stockholders cannot enjoy an *intra vires* act on the ground that it was promised that the corporation would not enter into that act. *Converse v. Hood*, 149 Mass. 471 (1889). Although the charter of a water-works company limits the amount of property which it may hold, yet if it holds a greater amount, a municipality cannot condemn the property on the basis of the charter limit. Only the state can object that the company holds more property than is allowed by law. *West Springfield v. West Springfield Aqueduct Co.*, 167 Mass. 128 (1896). The general incorporating law of Massachusetts, which does not allow incorporation for manufacturing liquor, does not prevent incorporation for selling liquor, and hence a foreign corporation may sell liquor in that state. *Enterprise, etc. Co. v. Grimes*, 173 Mass. 252 (1899).

**Michigan:** A state cannot maintain *quo warranto* against a lumber company that for years with the knowledge of the state has manufactured salt in connection with its lumber business, using its lumber mill and sawdust, etc., for that purpose. *People v. Buckley, etc. Lumber Co.*, 164 Mich. 625 (1911). In Michigan it has been decided that "the doctrine of *ultra vires* cannot be applied to contracts not prohibited, either expressly or by necessary implication, in the statute." *Ely v. Oakland, etc.*, 162 Mich. 466 (1910). A brewing company may agree to protect the bondsman on a bond in a retail liquor store which the brewery supplies. *Timm v. Grand Rapids, etc. Co.*, 160 Mich. 371 (1910). A person who has taken from a corporation an exclusive right to manufacture under a patent, and has so



Second, the decision in any particular case turns largely on the questions of who is complaining; against whom the complaint is made;

manufactured, cannot defeat an action for the royalties agreed upon for the goods already manufactured by alleging that the contract was *ultra vires*. Hall Mfg. Co. v. American, etc. Co., 48 Mich. 331 (1882). A person having sold and partly delivered an article to a corporation which the corporation had no right to purchase may refuse to complete delivery, and may sue for the part delivered. Day v. Spiral, etc. Co., 57 Mich. 146 (1885). A subscriber or donator of money to a factory cannot prevent its moving away if it is a losing enterprise. Ayres v. Dutton, 87 Mich. 528 (1891). A corporation that has purchased a judgment and collected it cannot refuse to pay the vendor of the judgment on the ground of *ultra vires*. Clement, etc. Co. v. Michigan, etc. Co., 110 Mich. 458 (1896). Where a corporation organized to do a jewelry business is really a scheme to carry on an illegal and fraudulent investment business, a person defrauded may file a bill in equity to hold the corporation and its officers and stockholders personally liable and enjoin them from disposing of the assets and for discovery. Edwards v. Michigan, etc. Co., 132 Mich. 1 (1902).

*Minnesota*: The admission that a contract was executed by a corporation is an admission that the corporation had power to make it, and the officer had power to sign it. Bausman v. Credit Guarantee Co., 47 Minn. 377 (1891). A corporation organized to improve a river for driving logs cannot itself drive logs or collect therefor. Northwestern, etc. Co. v. O'Brien, 75 Minn. 335 (1899).

*Mississippi*: A corporation may offer a reward for the detection of criminals who have committed a crime against it. Norwood, etc. Co. v. Andrews, 71 Miss. 641 (1894). Although two cotton compress companies have agreed to consolidate, and have put their property in the hands of a governing committee to manage until a new charter is obtained, yet either corporation may withdraw

from the arrangement, it being *ultra vires*. Greenville, etc. Co. v. Planters', etc. Co., 70 Miss. 669 (1893). A loan in excess of the amount allowed by charter may nevertheless be collected. Fargason v. Oxford, etc. Co., 78 Miss. 65 (1900).

*Missouri*: Creditors of a lessee corporation may hold the lessor liable for the value of the lease where it has been canceled by mutual agreement without default. Barrie v. United Rys. Co., 138 Mo. App. 557 (1909). With the consent of all the stockholders the officers of a manufacturing company may use fuel owned by the corporation if creditors are not injured. Jorndt v. Reuter, etc. Co., 112 Mo. App. 341 (1905). The maker of a note to a corporation cannot defend on the ground that the corporation had no power to take it. Russell v. Cassidy, 108 Mo. App. 577 (1904). A coal mining and transporting corporation may purchase and use a steamboat for transporting coal. Callaway, etc. Co. v. Clark, 32 Mo. 305 (1862). A contract to convey land for purposes of speculation to a company in consideration of a certain location of a railroad was held unenforceable as against public policy. Pacific R. R. v. Seely, 45 Mo. 212 (1870). See also § 650, *supra*. A private party seeking to enjoin a corporation from using public property which the city has leased to such corporation cannot set up that the lessee corporation is acting *ultra vires*. Only the state or the stockholders can raise that objection. Belcher, etc. Co. v. St. Louis, etc. Co., 101 Mo. 192 (1890). It is *ultra vires* for a bank to allow an overdraft. Market Street Bank v. Stump, 2 Mo. App. 545 (1876). A pledge is not illegal though it secures a greater amount than the pledgee bank is entitled to loan to one person. McClintock v. Central Bank, etc., 120 Mo. 127 (1894). A trust company authorized to accept deposits and pay interest thereon has no power to accept deposits without paying interest there-



and what relief is sought. The stockholder's action is looked upon most favorably if he is not guilty of delay. But an action by the state

on. *State v. Lincoln Trust Co.*, 144 Mo. 562 (1898).

*Montana*: Even though a "trust" has purchased stock in a corporation, yet another stockholder cannot maintain a suit in equity to have such stock forfeited to the corporation itself. His remedy is to compel the corporation to abandon any illegal contract or connection. Hence, the mere fact that the Amalgamated Copper Company, a New Jersey corporation, has acquired a majority of the stock of a Montana copper company, as well as of other companies, is not sufficient to enable a minority stockholder in a Montana company to obtain an injunction against the voting of such stock or the paying of dividends thereon, or the directors acting as such. *MacGinniss v. Boston*, etc. Co., 29 Mont. 428 (1904). A corporation having a claim against another corporation may purchase a lien on the property of the latter corporation in order to protect its claim. *Mathoney v. Butte Hardware Co.*, 19 Mont. 377 (1897).

*Nebraska*: A corporation may give or take a long time lease even though it exceeds the term of its corporate existence. *Lancaster County v. Lincoln*, etc. Assoc., 87 Neb. 87 (1910). A corporation with a capital stock of \$10,000 and limited by its charter to debts of \$2,000 has no power to speculate in pork and grain in a single day to the amount of \$40,000 and hence such transactions are void, the party dealt with having knowledge of the charter. *Farmers', etc. Ass'n v. Adams Grain Co.*, 84 Neb. 752 (1909). A brewing corporation may become surety on a liquor dealer's bond. *Horst v. Lewis*, 71 Neb. 365 (1905). A general denial does not raise the defense of *ultra vires*. *Citizens' State Bank v. Pence*, 59 Neb. 579 (1900).

*New Jersey*: The Attorney-General may by an information obtain a decree declaring void an agreement of insurance companies to regulate insurance rates and to eliminate competition, and may enjoin them from continuing

to act under such agreement. *McCart v. Firemen's Ins. Co.*, 74 N. J. Eq. 372 (1909), rev'g 70 N. J. Eq. 291. If a national bank seeks to compete with a savings institution the latter may object thereto. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425 (1903), holding also that a depositor in a savings bank may maintain a bill in equity to prevent dissolution thereof, where the purpose is to turn over the business to a trust company. While it is true that a stockholder may enjoin his company from proceeding with its business, if the objects thereof have become unattainable or illegal, yet an unconstitutional statute in Indiana forbidding the piping of natural gas to places outside of the state does not justify the suit of a stockholder in a New Jersey construction company to enjoin his company from proceeding to construct a pipe line from Indiana to Chicago. *Benedict v. Columbus Const. Co.*, 49 N. J. Eq. 23 (1891). A stockholder may enjoin the company from removing the plant from the state, where the charter provides for the manufacturing to be done in the state. *Stickle v. Liberty*, etc. Co., 32 Atl. Rep. 708 (N. J. 1895). The fact that a charter authorizes a corporation to do business at a certain place outside of the state does not prevent its doing business in other states. *Meredith v. New Jersey*, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1900). In a suit to enjoin a corporation from engaging in *ultra vires* business the articles of incorporation should be alleged in part at least. *Trimble v. American*, etc. Co., 61 N. J. Eq. 340 (1901). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction



to enjoin the act or to forfeit franchises is an unusual, extraordinary, and somewhat harsh remedy, and is not favored by the courts. So,

before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of stock. *Geer v. Amalgamated, etc. Co.*, 61 N. J. Eq. 364 (1901).

*New Mexico*: One water-works company cannot enjoin another such company from taking the water of a certain river on the ground that the latter has no charter right to do so and is an illegal corporation. The remedy is *quo warranto*. *Community Ditches, etc. v. Tularosa Community Ditch*, 120 Pac. Rep. 301 (N. Mex. 1911).

*New York*: The important cases are *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875); *Rider Life Raft Co. v. Roach*, 97 N. Y. 378 (1884); *Leslie v. Lorillard*, 110 N. Y. 519 (1888), the court saying (p. 531) "that the plea of *ultra vires* should not prevail when it would not advance justice, but on the contrary would accomplish legal wrong"; *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890); *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24 (1896); *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333, 341 (1895), s. c. 157 N. Y. 697, the court saying in 144 N. Y. 341 that "that kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state." A non-union employee of a printing company, even though he is also a stockholder, cannot enjoin the company from making a contract with a labor union excluding non-union labor from the company's employ. *Kissam v. United States, etc. Co.*, 199 N. Y. 76 (1910). A corporation is not liable for an accident due to its automobile which is being used for pleasure by its secretary and treasurer. *Power v. Arnold, etc. Co.*, 142 N. Y. App. Div. 401 (1911). A life insurance company may voluntarily take care of employees who have tuberculosis and may buy land to erect a hospital for that purpose. *People v. Metropolitan, etc. Co.*, 136 N. Y. App. Div. 150 (1909). The defense of *ultra vires*

to a note given by a brewing company must be pleaded to be available. *Bacon v. Montauk Brewing Co.*, 130 N. Y. App. Div. 737 (1909). Even though a corporation borrows money to pay the obligations of an insolvent debtor of such corporation without consideration, yet if thereafter all of the former's stock is sold on the basis of such loan being legal, the corporation cannot thereafter repudiate it. *Remington, etc. Co. v. Caswell*, 126 N. Y. App. Div. 142 (1908). An agreement preliminary to incorporation that the directors shall be twelve in number does not prevent the corporation reducing the number below twelve. *Bond v. Atlantic, etc. Co.*, 137 N. Y. App. Div. 671 (1910). The expense of printing and sending out a proxy and a statement of questions in dispute cannot be collected from the company, even though it was sent out by a majority of the board of directors. *Lawyers', etc. Co. v. Consolidated, etc. Co.*, 187 N. Y. 395 (1907), holding, however, that the expense of printing notices of a special stockholders' meeting may be paid by the company. Under a denial by a corporation that it executed a contract, it may show that the president was not authorized to sign its name thereto, nor the secretary to attach its seal thereto. *Quackenboss v. Globe & Rutgers, etc. Co.*, 106 N. Y. App. Div. 466 (1905). Where there are but two stockholders in a corporation one may contract with the other that certain profits shall belong to the latter. *Given v. Gans*, 91 N. Y. App. Div. 37 (1904); *aff'd*, 181 N. Y. 538. Where a corporation issues its stock in payment of a debt and guarantees certain dividends thereon, and afterwards repudiates the guarantee as *ultra vires*, the stockholder may return the stock and sue for the money he paid therefor. *McVity v. Albro Co.*, 90 N. Y. App. Div. 109 (1904); *aff'd*, 180 N. Y. 554. In order to raise the question of *ultra vires* in regard to a foreign corporation, the foreign statute must be pleaded in order to bring up the



also, an action by the corporation itself, or by the party contracted with, to repudiate an *ultra vires* act is not favored by the courts. Such

powers conferred by such statute. *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903). A lease between two Maine corporations executed in Maine and covering property in Maine, cannot be enforced in New York if it could not be enforced in Maine on account of being *ultra vires*. *Bath Gas Light Co. v. Rowland*, 84 N. Y. App. Div. 563 (1903); *aff'd*, 178 N. Y. 631. It is within the power of a bank to receive special deposits of bonds, etc., for safe-keeping, gratuitously and for mere accommodation, and the bank is liable for their loss by gross negligence. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82 (1880). A corporation and stockholders agreed to turn over to defendant and others the control, but the latter were to account for rafts built. *Held*, they could not set up *ultra vires*. Each of the defendants is liable for all as to accounting. *Rider Life Raft Co. v. Roach*, 97 N. Y. 378 (1884). A lock company sued for the price of locks sold to it by a company incorporated to manufacture firearms cannot defeat the suit by setting up that the latter corporation had no power to manufacture such articles. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875). One director may enjoin other directors from using corporate funds to buy liabilities of an insolvent competing concern for the purpose of suing thereon, and from paying money to prevent the rival concern getting its work done. *Colles v. Trow, etc. Co.*, 11 Hun, 397 (1877). A manufacturing corporation selling a store with a guaranty of the continued patronage of its employees, or else a fixed sum as indemnity, is liable thereon. *De Groff v. American Linen T. Co.*, 21 N. Y. 124 (1860). A mining corporation may purchase smelting works. *Moss v. Averell*, 10 N. Y. 449 (1853). Persons who with a corporation jointly purchase property cannot defend against the price by alleging that it was *ultra vires* of the corporation to purchase. *State v. Woram*, 6

Hill, 33 (1843). In *Lafond v. Deems*, 81 N. Y. 507 (1880), a voluntary benevolent association, having been compelled to hire more room than it needed, was held to have power to fit up and let the portion not required. *Temple Grove Seminary v. Cramer*, 98 N. Y. 121 (1885), holds that a seminary of learning may let its building as a boarding-house during the summer vacation. A rural cemetery company may sell a large number of its lots although the vendee intends to resell them. *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429 (1890). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. *Peck v. Doran, etc. Co.*, 57 Hun, 343 (1890). Power to manufacture and sell goods does not give power to buy and sell goods. *People v. Campbell*, 144 N. Y. 166 (1894), a taxation case. Even if the agreement of a building association with a member is *ultra vires* in that the association agrees to pay more than it ought, yet if the member has carried out his part of the contract and made full payments, he is entitled to the amount the association has agreed to pay, the latter being "estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power." *Vought v. Eastern Bldg. etc. Assoc.*, 172 N. Y. 508 (1902). A receiver of a savings bank may enforce a bond given to it by an individual agreeing to pay to the bank a certain sum if it would continue business, which the bank did. *Hurd v. Kelly*, 78 N. Y. 588 (1879), *aff'g* 17 Hun, 327 (1879). A manufacturing corporation borrowing bonds in order to use them as collateral to a loan is liable to the owner for their return. *Beckwith v. Rochester Iron, etc. Co.*, 12 N. Y. Week. Dig. 528 (1881). A brewery company may guarantee the rent of a saloon-keeper who buys his beer of the company. *Koehler & Co. v. Rein-*



an action is an attempt by a party to evade the contract by means of principles of law which both parties have violated or waived the benefit of. The court is not swift to grant relief in such cases.

heimer, 26 N. Y. App. Div. 1 (1898). An indorser of a corporate note cannot set up that such note is *ultra vires*. *Donohoe v. Meeker*, 35 N. Y. App. Div. 43 (1898). A mining company has no power to furnish the play and performers for a theater, and a contract to that effect cannot be enforced, even though all the stockholders, except the owner of four shares, assent thereto. *Broadway, etc. Co. v. Dessau Co.*, 45 N. Y. App. Div. 475 (1899). A corporation is bound by its superintendent's employment of an undertaker to bury an employee killed in the employ of the company. *Noll v. Archer-Pancoast Co.*, 60 N. Y. App. Div. 414 (1901). *Ultra vires* is an affirmative defense and must be pleaded. *Keating v. American, etc. Co.*, 62 N. Y. App. Div. 501 (1901). The defense of *ultra vires* is not good unless pleaded. *Hess v. Sloane*, 66 N. Y. App. Div. 522 (1901); *aff'd*, 173 N. Y. 616. Where the president of a bank is acting as the agent of a person and sells to the latter securities of the bank by means of false representations, the bank is liable, even though the purchaser did not know that the sale was in behalf of the bank. *Carr v. National Bank & L. Co.*, 167 N. Y. 375 (1901).

*North Carolina*: A drug company cannot repudiate a note given by its own manager for a piano if the company has paid part of it. *Johnson, etc. Bank v. Scoggin Drug Co.*, 152 N. C. 142 (1910). The decision in *Lewis v. Clyde S. S. Co.*, 131 N. C. 652, was reviewed on a petition for rehearing in 132 N. C. 904 (1903), and a new trial granted, but the court still held that *ultra vires* must be pleaded in order to be a good defense. *Gruber v. Washington, etc. R. R.*, 92 N. C. 1 (1885), holds that a lumber company, in providing transportation for its product, could, as incidental to its business, carry the goods of others and also passengers.

*Ohio*: A corporation in acquiring the assets of a partnership may acquire a cause of action which the latter has against another corporation for negligence and may enforce such cause of action, even though it would have had no power to buy it separately from the other property. *Central, etc. Co. v. Capital, etc. Co.*, 60 Ohio St. 96 (1899). A college need not obtain an amendment to its charter in order to add a new subject to its curriculum. *State v. Hygeia, etc. College*, 60 Ohio St. 122 (1899).

*Oregon*: A hardware company is liable for lime purchased, even though it was not organized for the purpose of dealing in that commodity. *Re Pendleton, etc. Co.*, 24 Ore. 330 (1893). A corporation may by its charter be given the power to act as an attorney in fact, and it may execute a deed as such attorney. *Killingsworth v. Portland Trust Co.*, 18 Ore. 351 (1890). A lumber manufacturing company may take an assignment of a judgment and bring suit thereon. *Capital, etc. Co. v. Learned*, 36 Ore. 544 (1899).

*Pennsylvania*: A contractor who has assigned his contract to a corporation, which latter then proceeds to carry it out, is not personally liable to the employees, even though the assignment was prohibited by law and the employees may not have known for whom they were working. *Patton v. McDonald*, 204 Pa. St. 517 (1903). A stockholder may enjoin his company from doing acts forbidden by statute. *Sparhawk v. Union Pass. Ry.*, 54 Pa. St. 401, 452 (1867). A corporation with power to own land and promote settlement may build saw-mills and erect a hotel. *Watts's Appeal*, 78 Pa. St. 370 (1875). A corporation with power to manufacture and supply gas may deal in gas appliances. *Malone v. Lancaster, etc. Co.*, 182 Pa. St. 309 (1897). A corporation has no right to change the grade of its road as



Third, if a contract or act is *ultra vires*, and has not yet been performed, either the corporation or the party contracted with may re-

fixed by its charter when such change would place it in a different category under the statutes relative to railroads. *Western, etc. Ry. v. Buffalo, etc. Ry.*, 193 Pa. St. 127 (1899). In a suit by a bridge company against a street railway for tolls, in accordance with a contract, the street railway cannot set up that all the stock of the bridge company has been purchased by the city and that the purchase was *ultra vires*. *Monongahela, etc. Co. v. Pittsburg, etc. Co.*, 196 Pa. St. 25 (1900).

*South Carolina*: A building association which has obtained a subscription on an *ultra vires* agreement as to repayment is liable in a suit at law for the money so paid to it. *Williamson v. Eastern, etc. Assoc.*, 54 S. C. 582 (1899).

*Tennessee*: A manufacturing company is liable for goods purchased by a store owned by it. *Searight v. Payne*, 6 Lea (Tenn.), 283 (1880), aff'g 2 Tenn. Ch. 175, where an iron furnace company ran a store. Where an insurance company has issued a policy which is not authorized by its charter, the policy cannot be enforced by the party who is insured. The court said in a dictum that his remedy is a suit in disaffirmance and for an accounting. *Miller v. Insurance Co.*, 92 Tenn. 167 (1893). Even though an ice company purchases, without power so to do, beer from a brewing company, and even though it passes into a receiver's hands, yet the latter may file a petition asking in the alternative to be allowed the price, or, if the contract is disaffirmed, the value thereof. *Tennessee Ice Co. v. Raine*, 107 Tenn. 151 (1901). In this case the court said that all the authorities hold that a corporation obtaining the benefits of an *ultra vires* contract is estopped from defending against the contract on the ground that it is *ultra vires*, but that while in many of the states the corporation cannot prevent recovery on the contract according to its terms, yet that in other states the

recovery is on a *quantum meruit* or on a *quantum valebat*.

*Texas*: A company organized to manufacture and sell building material is not bound by a contract to make an excavation and construct a part of a building, but the sureties on a bond that it will do so are liable. *Mitchell v. Hydraulic, etc. Co.*, 129 S. W. Rep. 148 (Tex. 1910). A national bank cannot certify a check payable if a building contract is not performed, there being no money to respond to the check. *Fidelity, etc. Co. v. National Bank, etc.*, 48 Texas Civ. App. 301 (1908). In suing to enforce a corporate contract it is not necessary to allege that the contract was within its powers. *San Antonio, etc. Co. v. Josey*, 91 S. W. Rep. 598 (Tex. 1906). The maker of a note cannot set up that the payee corporation discounted it *ultra vires*. *Logan v. Texas, etc. Assoc.*, 8 Tex. Civ. App. 490 (1894). Where a corporation has taken a lease of a wharf from a city, it cannot avoid the payment of rental, after using the premises, on the ground of *ultra vires*. *Corpus Christi v. Central, etc. Co.*, 8 Tex. Civ. App. 94 (1894). Where a bank has agreed to see that a vendor of feed is paid, the vendee being a depositor in the bank, and an arrangement having been made between him and the bank for such payment, the bank cannot avoid payment on the ground that its agreement was *ultra vires*. *First Nat. Bank v. Greenville, etc. Co.*, 24 Tex. Civ. App. (1901). In Texas it is held that where a corporate contract is executed, and the corporation has received the benefits of it, the corporation cannot invoke its want of power as a defense to the contract. *Continental, etc. Assoc. v. Masonic, etc. Co.*, 26 Tex. Civ. App. 139 (1901).

*Vermont*: A manufacturing company is liable for goods purchased by a store owned by it. *Dauchy v. Brown*, 24 Vt. 197 (1852). As regards the charter or corporate power to confer a degree, see *Townshend v. Gray*, 62 Vt. 373 (1890).

*Virginia*: A dry-dock company



fuse to complete the contract. No damages can be collected for such refusal. So, also, if the contract has been partly performed, and the

may, if necessary for its business, erect a breakwater and bulkhead and fill in the space. *Newport, etc. Co. v. Jones*, 105 Va. 503 (1906).

*Washington*: A coal company may sell its coal lands, especially as it may use the proceeds to buy other lands. *Smith v. Flathead, etc. Co.*, 66 Wash. 408 (1911). A lumber company may become surety on a building contractor's bond where it is customary for such companies so to do in order to obtain business. *Wheeler, etc. Co. v. Everett Land Co.*, 14 Wash. 630 (1896). Where a corporation dealing in other goods buys clothing and uses the same to fill certain orders, it cannot then recover back the purchase price. *Graton, etc. Co. v. Redelsheimer*, 28 Wash. 370 (1902).

*Wisconsin*: The attorney-general cannot maintain a suit to recover back funds and to remove directors of a street railway company on account of their using corporate funds to bribe public officers and obtain franchises. *State v. Milwaukee, etc. Co.*, 136 Wis. 179 (1908). Where a national bank completes a construction contract which has been assigned to the bank, it may collect the contract price thereof. *Security, etc. Bank v. St. Croix, etc. Co.*, 117 Wis. 211 (1903). Where an insolvent creamery corporation is indebted to a bank, and the bank takes over the business and operates the creamery, agreeing to pay the patrons the entire proceeds of the product less a commission, it cannot refuse to pay over on the ground that the contract is *ultra vires*. *Emigh v. Earling*, 134 Wis. 565 (1908). Where a river packet company purchases grain and pays partly therefor, it may recover back the money paid, but not damages for refusal of vendor to deliver. *Northwestern, etc. Co. v. Shaw*, 37 Wis. 655 (1875). A corporation formed to make and sell beer may guarantee the rent of a customer. *Winterfield v. Cream City B. Co.*, 96 Wis. 239 (1897). "The doctrine of *ultra vires* cannot be invoked by a corporation for the

purpose of escaping a burden resulting from a contract so far executed that the corporation has received the benefit thereof. That most wholesome doctrine is well established." *Bullon v. Milwaukee, etc. Co.*, 109 Wis. 41 (1901). Forfeiture of a water-works grant from the city will not be decreed except in a clear case and where no other punishment will adequately remedy the mischief. *City of Ashland v. Ashland, etc. Co.*, 110 Wis. 94 (1901).

*England*: Even though a corporation goes into an illegal lottery business, yet it cannot be convicted of an offense as a rogue and vagabond under the Lotteries Act of Parliament. *Hawke v. Hulton and Co. Ltd.*, [1909] 2 K. B. 93. A suit by a copper trading company for damages against a person who had refused to accept iron which he had agreed to purchase of the plaintiff fails. *Copper Miners v. Fox*, 16 Q. B. 229 (1851). In *Simpson v. Westminster, etc. Co.*, 8 H. L. Cas. 712 (1860), a lease by a hotel company of part of its building during its completion was held valid. A company formed to work a patent may purchase it. *Leifchild's Case*, L. R. 1 Eq. 231 (1865). Brokers employed by directors to sell property of the corporation cannot recover damages from the directors for a failure of sale due to the vendee alleging that the directors had no power to sell, it being proved by the directors that they did have such power. *Wilson v. Miers*, 10 C. B. (N. S.) 348 (1861). Where a stockholder institutes a suit to remedy a wrong to the corporation, and while it is pending new directors are elected and they proceed to carry on the suit at the corporate expense, any dissenting stockholder may enjoin such use of the corporate funds. To allow it would be to prejudice the suit. *Kernaghan v. Williams*, L. R. 6 Eq. 228 (1868). The organization of a company to carry on the lottery business in foreign countries was held legal in *Macnee v. Persian Corp.*, L. R. 44



unperformed part is separable from the rest, either party may refuse to complete. But where one party has completely performed and carried out its part of the contract, the other party cannot refuse to perform, while at the same time retaining the benefits of performance by the first-named party.<sup>1</sup>

The courts differ widely in their decisions on the enforceability of *ultra vires* contracts. The New York court of appeals, in a series of consistent and ably-reasoned decisions, has established the rule in that state that an *ultra vires* contract is enforceable if there has been substantial performance and the stockholders have not objected and the creditors have not been injured.<sup>2</sup> The New York court of appeals says that "that kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."<sup>3</sup>

Practically the same conclusion has been reached in Massachusetts<sup>4</sup> and Wisconsin.<sup>5</sup>

Ch. D. 306 (1890). A corporation which holds stock in another corporation may agree to surrender a part of such stock in order to enable the latter company to proceed with its business, and such surrender is not *ultra vires*. *Thompson v. Trustees, etc. Corp.*, [1895] 2 Ch. 454. Where a company has to give a bond, and the bond is given by a director, the company is liable to him. *Southern Counties Dep. Bank v. Boaler*, 73 L. T. Rep. 155 (1895). A corporation is a "person," within the meaning of a statute rendering persons liable for misrepresenting the responsibility of another party. *Hirst v. West, etc. Co.*, [1901] 2 K. B. 560.

*Canada*: A company receiving a deposit *ultra vires* is nevertheless bound to repay it. *Walmsley v. Rent Guarantee Co.*, 29 Grant Ch. (Can.) 484 (1881).

<sup>1</sup> Speaking of *ultra vires* acts, the New York court of appeals said: "As artificial creations, they have no powers or faculties except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be, Is the act prohibited as prejudicial to some public

interest, or is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of *ultra vires* should not prevail when it would not advance justice, but on the contrary would accomplish legal wrong." *Leslie v. Lorrillard*, 110 N. Y. 519 (1888). See also discussion in *Camden, etc. R. R. v. May's Landing, etc. R. R.*, 48 N. J. L. 530 (1886); *Martin v. Niagara, etc. Co.* 122 N. Y. 165 (1890).

<sup>2</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875); *Martin v. Niagara, etc. Co.* 122 N. Y. 165 (1890); *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 29-34, 37 (1896), per Andrews, Ch. J., reviewing many cases, discussing the subject in an able and exhaustive manner, and holding that past-due rent may be recovered on an *ultra vires* lease.

<sup>3</sup> *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333, 341 (1895); s. c., 157 N. Y. 697. Quoted and approved in *Watts Mercantile Co. v. Buchanan*, 92 Miss. 540 (1908). An article on the legal effect of an *ultra vires* lease is found in 14 Harvard Law Rep., p. 332 (1901).

<sup>4</sup> Chief Justice Bigelow, in *Brown v.*

<sup>5</sup> The old rule of *ultra vires* has been changed so that now only the state or a party interested in the cor-

poration can complain. *Farwell Co. v. Wolf*, 96 Wis. 10 (1897).



In the federal courts, on the contrary, the old rule against *ultra vires* contracts is upheld in all its rigor and applied with all its severity. The tendency of modern jurisprudence to relax on that subject finds no favor in the federal courts.<sup>1</sup> Even in the federal courts, how-

Winnisimmet Co., 93 Mass. 326, 334 (1865), said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated." In *Nims v. Mount Hermon Boys' School*, 160 Mass. 177 (1893), the court said that an *ultra vires* contract not yet executed will not be enforced by the courts; but, "on the other hand, courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract, and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong." The court, however, declined to pass upon this principle of law.

<sup>1</sup> "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law." *McCormick v. Market Bank*, 165 U. S. 538, 549 (1897). See also the cases in the

notes *supra*. "A railroad corporation, unless authorized by its act of incorporation or by other statutes so to do, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful and void, and incapable of being made good by ratification or estoppel." *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 567 (1899). In *Salt Lake City v. Hollister*, 118 U. S. 263 (1886), the court said that in cases of *ultra vires* contracts, upon which corporations could not be used, "the courts have gone a long way to enable parties who had parted with money and property on the faith of such a contract to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." In a dictum in *Jacksonville, etc. Nav. Co. v. Hooper*, 160 U. S. 514, 524 (1896), the court emphasized the statement that no estoppel or part performance can sustain a contract that is forbidden by a charter or is contrary to public policy. See also *Oregon Ry. etc. Co. v. Oregonian Ry.*, 130 U. S. 1 (1889); *Pennsylvania R. R. v. Keokuk, etc. Co.*, 131 U. S. 371, 384, 389 (1889). "Every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public," and especially so as regards corporations organized under general laws. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49 (1891). A national bank which has taken a security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on said stock, its acquisition having been *ultra vires*. *Merchants' National Bank v. Wehrmann*, 202 U. S. 295 (1906). A national bank which



ever, if property or services have been received by a corporation *ultra vires*, a suit based on *quantum meruit* will lie<sup>1</sup> and the same result is often accomplished in that way.<sup>2</sup>

§ 682. *Personal liability of the directors and officers for ultra vires and other acts.* — There can be no doubt that, if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they may be required to make good the loss out of their private estates.<sup>3</sup> Directors and officers have been held personally liable for libel published by the company;<sup>4</sup> for infringement;<sup>5</sup>

is a creditor of an insolvent manufacturing company has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails the bank is not liable as a stockholder on a statutory double liability attaching to such stock. *First National Bank v. Converse*, 200 U. S. 425 (1906). Where a New York building association has agreed to return a member's money on a specified date, it cannot set up that the agreement is *ultra vires* when sued therefor. *Eastern Building Ass'n v. Williamson*, 189 U. S. 122 (1903). The rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation becomes insolvent. *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893); *rev'd on another point in Marbury v. Kentucky, etc. Co.*, 62 Fed. Rep. 335 (1894).

<sup>1</sup> *Citizens Nat. Bank v. Appleton*, 216 U. S. 196 (1910); *Rankin v. Enright*, 218 U. S. 27 (1910); *Richmond, etc. Co. v. Farmers', etc. Co.*, 126 Fed. Rep. 712 (1903).

<sup>2</sup> The supreme court of Louisiana approved on the above summary and said: "We are informed by the same text writer that the courts are becoming more liberal, and many acts which fifty years ago would have been *ultra vires* will now be held to be *intra vires*, and that the courts have grad-

ually recognized the implied powers in ordinary corporations, and that these corporations may do many things that individuals do in business, provided that the stockholders and creditors do not object; that *ultra vires* has been relaxed." *McCloskey v. New Orleans, etc. Co.*, 128 La. 197 (1911).

<sup>3</sup> *North Hudson, etc. Assoc. v. Childs*, 82 Wis. 460 (1892), citing *Thompson, Liab. Off.* 375, § 16; *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381 (1869); *Re Exchange Banking Co.*, L. R. 21 Ch. D. 519 (1882); *Franklin F. Ins. Co. v. Jenkins*, 3 Wend. 130 (1829). See also the cases in § 702, *infra*. 132 Pac. Rep. 80.

<sup>4</sup> See § 15*b*, *supra*.

<sup>5</sup> A director who votes in favor of a resolution that the agents of a company manufacture and sell an infringing article is liable personally for such infringement, even though he acted in good faith and did not know that an infringement would be the result. *National, etc. Co. v. Leland*, 94 Fed. Rep. 502 (1899). Where a judgment is obtained against a corporation for infringement of patent, the United States court cannot on that ground alone, charge the directors with the payment of it as joint trespassers. *Cook v. Beecher*, 172 Fed. Rep. 166 (1909). Where persons organize a corporation with a small capital stock to infringe patents, they may be held liable with the corporation. *Crown, etc. Co. v. Brooklyn, etc. Co.*, 172 Fed. Rep. 323 (1911); *s. c.*, 190 Fed. Rep. 225. Persons who organize a corporation with a small capital for the sole purpose of infringing a patent may be liable personally for the infringe-



for loaning money in violation of the charter;<sup>1</sup> for exacting illegal rebates from a railroad;<sup>2</sup> for false representations;<sup>3</sup> for borrow-

ment, especially where they have continued the business after the property has been destroyed by fire. *Crown, etc. v. Brooklyn, etc. Co.*, 172 Fed. Rep. 225 (1909). Stockholders and directors in a company, which has infringed a patent, are not personally liable unless they took part in the infringement. *John-Pratt Co. v. Sachs Co.*, 175 Fed. Rep. 70 (1909). An officer is not personally liable for an infringement by the corporation, unless it is insolvent or is a mere dummy to protect others. *Loomis, etc. Co. v. Manhattan, etc. Co.*, 117 Fed. Rep. 325 (1902). The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark. They may be held liable so far as they took part in the infringement. *Armstrong v. Savannah Soap Works*, 53 Fed. Rep. 124 (1892); *St. Louis Stamping Co. v. Quinby*, 5 Ban. & Ard. 275 (1880); *Goodyear v. Phelps*, 3 Blatchf. 91 (1853); s. c., 10 Fed. Cas. 711; *Smith v. Standard, etc. Co.*, 19 Fed. Rep. 826 (1883); *Nichols v. Pearce*, 7 Blatchf. 5 (1869); s. c., 18 Fed. Cas. 204. The directors and officers of a corporation which has infringed upon a patent cannot be held personally liable for the profits of such infringement. *Mergenthaler, etc. Co. v. Rider*, 65 Fed. Rep. 853 (1895), reviewing the cases. A general agent of an infringing company is personally liable. *Cramer v. Fry*, 68 Fed. Rep. 201 (1895). A judgment against a corporation as to the infringement of a patent is not binding on the stockholders in subsequent suits against them, even though they were present at the trial and testified. *Wilgus v. Germain*, 72 Fed. Rep. 773 (1896). The officers, stockholders, and agents of a corporation may be enjoined from infringing a patent, even though the corporation itself is not within the jurisdiction of the court. *Edison, etc. Co. v. Packard Elec. Co.*, 61 Fed. Rep. 1002 (1893), holding also that they are liable personally. 204 id. 282.

<sup>1</sup> See § 690, *infra*. Directors of a bank are liable for wrongful diversion of its funds by making illegal loans, this not being ordinary negligence, but an *ultra vires* act in violation of law. *Greenfield Sav. Bank v. Abercrombie*, 211 Mass. 252 (1912). Where directors of an insurance company loan its money in violation of statutory requirements, its receiver may hold them liable therefor. *New Haven T. Co. v. Doherty*, 75 Conn. 555 (1903). A director who does not attend a meeting is not liable for a loan made to an officer in violation of the charter. *Thomas v. Penniman*, 105 Md. 475 (1907). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. *National Bank, etc. v. Wade*, 84 Fed. Rep. 10 (1897). A stockholder in a bank may sue to compel the president to restore \$45,000 which he caused the bank to loan without security, the money being used to pay a debt due to the president himself. *Wickersham v. Crittenden*, 93 Cal. 17 (1892).

<sup>2</sup> Where a corporation secures a rebate from a railroad company, not only on shipments made by it, but on shipments made by other parties, the active agents of such corporation receiving such moneys may be held personally liable to other shippers for such money. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense." *Brundred v. Rice*, 49 Ohio St. 640 (1892).

<sup>3</sup> See chs. IX and XX, *supra*. A person who buys stock in a national



ing in excess of the company's power;<sup>1</sup> for accepting bills without authority.<sup>2</sup> They may be liable for maintaining a nuisance.<sup>3</sup> A corporate officer is liable for an explosion of an article manufactured by

bank relying on a report of the condition of the bank signed by directors, in accordance with the acts of Congress, may hold the directors so signing the report personally liable in damages if it transpire that the report was absolutely false and that the stock was worthless, but he cannot hold liable the directors who did not sign the report. *Gerner v. Mosher*, 58 Neb. 135 (1899). See also *Stuart v. Bank of Staplehurst*, 57 Neb. 569 (1899). Where the president of a bank has been held liable in damages for deceit in inducing a person to purchase stock from the bank, he cannot compel the bank to reimburse him, on the ground that the bank had obtained the benefit of the act. *Trimble v. Exchange Bank*, 62 S. W. Rep. 1027 (Ky. 1901). The vice president is not liable for false statements in the papers which he sends in a letter, the papers having been prepared by subordinates and he not being aware of the falsity. *Ray County, etc. v. Hutton*, 224 Mo. 42 (1909). Where the president of a corporation acting as agent causes his corporation to take a secret profit from the principal, the latter may hold both the president and the corporation liable. *Messer-Moore, etc. Co. v. Trotwood, etc. Co.*, 170 Ala. 473 (1910). A stockholder may hold the directors liable for false representations inducing him to loan money to the company where they told him that the company was solvent, when in fact it was insolvent, and they knew it so to be. *Kinkler v. Junica*, 84 Tex. 116 (1892). A director may buy stock from a stockholder at less than its real value, and there is no fraud in the fact that the director knew the real value while the stockholder did not. *Crowell v. Jackson*, 53 N. J. L. 656 (1891). See also § 320, *supra*. A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three fourths of the

stock, to the Cotton Seed Oil Trust, and that the trust then dissolved the corporation by a three fourths vote as allowed by statute, although the director as such voted for the dissolution. *Trisconi v. Winship*, 43 La. Ann. 45 (1891). As to misrepresentations as to what a mortgage covers, see p. 2268 *infra*. For a complaint seeking to hold national bank directors liable for the loss of money deposited, the deposit being induced by erroneous and fraudulent advertisements and reports as to the condition of the bank, see *Prescott v. Haughey*, 65 Fed. Rep. 653 (1895). A depositor, suing the directors of a bank for false statements inducing him to deposit in the bank, must allege that but for such statements he would have withdrawn his deposit before the failure. *Brady v. Evans*, 78 Fed. Rep. 558 (1897). Where a stockholder receives an offer for his stock and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages. *Rothmiller v. Stein*, 143 N. Y. 581 (1894).

<sup>1</sup> See ch. XLVI, *infra*.

<sup>2</sup> See ch. XLVI, *infra*.

<sup>3</sup> See § 15b, *supra*. Persons who are maintaining a nuisance in the way of a dam continue to remain liable if they sell it to a corporation which continues to maintain it, they being officers of the corporation. *Karns v. Allen*, 135 Wis. 48 (1908). The directors of a corporation organized to deal in hardware, merchandise, and powder are personally liable for damages due to an explosion of powder illegally stored in its warehouse, even though the directors did not know of the same, it being shown that if they had exercised ordinary diligence they would have known of it. *Cameron v. Kenyon-Connell, etc. Co.*, 22 Mont. 312 (1899). A person driving on the highway who is injured by a telephone pole falling upon him, may hold personally liable the president, who is also general manager and inspector



the company where he had knowledge of its dangerous character and actively took part in manufacturing and selling it.<sup>1</sup> Where a corporation has been held liable in damages for malicious libel, a stockholder may compel the directors who were guilty of it to reimburse the corporation.<sup>2</sup> In an early and important case Chancellor Walworth sustained a stockholder's action to hold the corporate directors liable for corporate funds lost by speculation in the stocks of other corporations.<sup>3</sup> Where a bank holds stock as collateral, and on sale purchases the same, the stock being in a coal company, it should sell the stock within a reasonable time. If it continues to hold it and a large loss results, the president is personally liable.<sup>4</sup> Directors who waste the funds of the company in purchasing the worthless stock of another corporation, are personally liable to a receiver for the amount so expended.<sup>5</sup> The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six years' statute of limitations is a bar to a stockholder's suit to hold them liable, no fraud being alleged.<sup>6</sup> The directors are personally liable where they advance corporate funds to the vendee of stock of the company in order to enable him to purchase the stock.<sup>7</sup>

Directors who knowingly authorize the issue of watered stock are liable therefor to the company,<sup>8</sup> but they are not liable to corporate

and repairer of the lines, where the decay in the pole was visible and he had negligently inspected it a short time before. He may be held liable jointly with the company. *Murray v. Cowherd*, 148 Ky. 591 (1912).

<sup>1</sup> *Wines v. Crosby & Co.*, 135 N. W. Rep. 96 (Mich. 1912). 132 Pac. Rep. 241.

<sup>2</sup> *Hill v. Murphy*, 212 Mass. 1 (1912). See also 26 Harvard Law Review, 267, commenting on this case.

<sup>3</sup> *Robinson v. Smith*, 3 Paige, Ch. 222 (1832). See also *Combination Trust Co. v. Weed*, 2 Fed. Rep. 24 (1880); *Hardon v. Newton*, 14 Blatchf. 376 (1878) s. c., 11 Fed. Cas. 500; *Smith v. Rathbun*, 22 Hun, 150 (1880). Cf. *Land Credit Co. v. Fermoyle*, L. R. 5 Ch. App. 763 (1870), rev'g L. R. 8 Eq. 7, where some of the directors used corporate funds to "rig the market," i.e. to purchase and thereby sustain the market price of the stock. Officers are liable for losses due to speculating in grain. *Hingston v. Montgomery*, 21 Mo. App. 451 (1906).

<sup>4</sup> *Stone v. Rottman*, 183 Mo. 552 (1904).

<sup>5</sup> *Bowers v. Male*, 186 N. Y. 28 (1906).

<sup>6</sup> *Whitwam v. Watkin*, 78 L. T. Rep. 188 (1898). The directors of a building and loan association who use its funds to purchase stock in a manufacturing corporation are personally liable for any loss incurred thereby. *Gerhard v. Welsh*, 82 Atl. Rep. 871 (N. J. 1912).

<sup>7</sup> *Green v. Hedenberg*, 159 Ill. 489 (1896). Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself, which he and other stockholders have purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re Brockway Mfg. Co.*, 89 Me. 121 (1896).

<sup>8</sup> *London Trust Co. v. MacKenzie*, 68 L. T. Rep. 380 (1893), the court saying, however: "If, acting fairly, honestly, and reasonably, directors mistake the legal powers of the company, they may not be made answerable; but if they in fact know, or with due care ought to have known,



creditors who are not injured or defrauded thereby, it appearing that the corporate assets were not decreased by the transaction.<sup>1</sup> A minority stockholder in a railroad company may hold the directors personally responsible to the corporation for issuing increased capital stock in exchange for the stock of a terminal company which has little or no value, it being shown that the terminal company was to transfer the stock without consideration to a syndicate in which the directors were personally interested.<sup>2</sup> Directors are not personally liable for damages due to negligence on the part of the corporation.<sup>3</sup> The treasurer of a grocer's association may deposit its funds with a trading corporation of which he is president and he is not personally liable, if the latter fails, unless the by-laws prescribe otherwise.<sup>4</sup> A director is not liable for failure to institute legal proceedings to set aside the *ultra vires* acts of other directors.<sup>5</sup> The directors of a national bank may be liable for money spent by the bank in operating a mill in which the bank had an interest.<sup>6</sup> Where the directors, upon an increase of the capital stock, issue a part of the stock for worthless notes, the directors, upon the bank becoming insolvent, are liable to the receiver for the par value

that the acts done are beyond the powers of the company, then, if they do those acts even in the honest belief of necessity in the interests of the company, they take the risk of the consequences." Where the directors issue stock to a mining expert at ninety cents on the dollar in consideration of an examination and report by him, they are liable to the company for the remaining ten cents on the dollar, but not for surplus value which the stock afterwards acquired. *Hirsche v. Sims*, [1894] A. C. 654. A person purchasing stock for twenty-five cents on the dollar cannot hold the president liable personally, even though he signed the certificate but stated that the stock was fully paid and non-assessable when he knew that it had been issued for property at an overvaluation. *Nutt v. Wheeler*, 30 Ohio Circuit 86 (1907). As to the personal liability of the president see also § 716, *infra*.

<sup>1</sup> *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561. See also ch. III, *supra*.

<sup>2</sup> *Pollitz v. Wabash R. R.* 207 N. Y. 113 (1913).

<sup>3</sup> *Demarest v. Flack*, 128 N. Y. 205 (1891). A director is not personally

liable for the negligence of the corporation in the construction of a building where he did not personally take part, even though it is alleged that an incompetent man was put in charge. *Henry v. Brackenridge Lumber Co.*, 48 La. Ann. 950 (1896). See also § 724, *infra*. The directors of an amusement company are not personally liable, although they are a committee having charge of the construction of a general stand that falls and injures a person. *Van Antwerp v. Linton*, 89 Hun, 417 (1895); *aff'd*, 157 N. Y. 716. The directors are not personally liable for damages due to the negligence of a person employed by them to give a fireworks exhibition for the corporation. *Bianki v. Greater, etc. Co.*, 3 Neb. Unof. 656 (1902). After dissolution the directors cannot be sued personally for negligence of the corporation. *Cunningham v. Glauber*, 61 N. Y. Misc. Rep. 443 (1908); *aff'd*, 133 N. Y. App. Div. 10.

<sup>4</sup> *Re Smith, etc. Co.*, 170 Fed. Rep. 900 (1909).

<sup>5</sup> *Re Lands Allotment Co.*, [1894] 1 Ch. 616. *Ex parte Johnson*, 3 Eq. 479 (1855).

<sup>6</sup> *Cockrill v. Abeles*, 86 Fed. Rep. 505 (1898).



of such stock, unless they can show the stock could not have been otherwise issued or sold.<sup>1</sup> If the directors of a business corporation accept paper in its name for accommodation, they are personally liable for payments made or liabilities incurred on such paper.<sup>2</sup> And where an officer causes a manufacturing company to indorse, for accommodation, the note of a party, all of whose goods it purchases, he is not personally liable to the former company unless it is proved that the directors and stockholders were ignorant thereof and hence did not acquiesce therein.<sup>3</sup> The directors are not personally liable for errors of judgment.<sup>4</sup> But the stockholders may sue the directors for gross mismanagement and for damages where fraudulent mortgages have been placed by them on the corporate property.<sup>5</sup> But directors are not liable for honest mistakes as to the legal extent of their authority.<sup>6</sup>

Where a bank has no power to make a guaranty, the officer signing the bank's name to such guaranty is not personally liable thereon.<sup>7</sup> Officers incur no personal liability when avowedly con-

<sup>1</sup> *Cockrill v. Abeles*, 86 Fed. Rep. 505 (1898). Even though the stockholders of a bank assent to notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor. *Coddington v. Canaday*, 157 Ind. 243 (1901).

<sup>2</sup> *Hutchinson v. Sutton Mfg. Co.*, 57 Fed. Rep. 998 (1893). A corporate officer who issues its notes as an accommodation, a small commission being paid to him, is liable to the corporation therefor. *Shepard v. Morgan*, 123 N. Y. App. Div. 128 (1908). A president is not liable personally on an accommodation note to which he signs the corporate name, he supposing the corporation had power to sign. *Wolfe & Sons v. McKeon*, 57 S. Rep. 63 (Ala. 1911).

<sup>3</sup> *Willard v. Holmes*, 142 N. Y. 492 (1894).

<sup>4</sup> *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894).

<sup>5</sup> *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895).

<sup>6</sup> *Beattie v. Ebury*, L. R. 7 Ch. App. 777 (1872), and L. R. 7 H. L. 102. See also § 702, *infra*.

<sup>7</sup> *Thilmany v. Iowa, etc. Co.*, 108 Iowa, 357 (1899). The manager of a company has no power to make it a surety or guarantor, nor is he personally liable, he not having expressly agreed to be. *Haupt v. Vint*, 68

W. Va. 657 (1911). Cf. *Austin v. Daniels*, 4 Denio, 299 (1847), where stock was purchased by the company. See also *Franklin F. Ins. Co. v. Jenkins*, 3 Wend. 130 (1829), and cases in chs. XXXIX, XL, *supra*, and ch. XLII, *infra*. Where the president has been authorized to make an *ultra vires* contract he incurs no personal liability by so doing. *Hermitage, etc. Co. v. Dyer*, 125 Tenn. 302 (1911). A president is not liable personally on an accommodation note to which he signs the corporate name, he supposing the corporation had power to sign. *Wolfe & Sons v. McKeon*, 2 Ala. App. 421 (1911). If the corporation had no charter power to do the act in question, in England it seems that the officer or agent is not liable to the third person. *Eaglesfield v. Londonderry*, L. R. 4 Ch. D. 693 (1876); *aff'd* (H. L.) 26 W. R. 540. But see *West, etc. Bank v. Kitson*, L. R. 13 Q. B. D. 360 (1884), where a note was issued; *Nicholls v. Diamond*, 9 Exch. 154 (1853), where an acceptance was made. The secretary is not liable for a representation as to the power of the company to issue debentures which had been issued. *Rashdall v. Ford*, L. R. 2 Eq. 750 (1866). As to liability of directors to the company for losses due to their *ultra vires* acts, see *Re Faure*,



tracting on behalf of the company.<sup>1</sup> And a corporate agent executing a security in the corporate name without authority is not guilty of forgery under the New York statute.<sup>2</sup> But where trustees, who are bound to wind up the affairs of a corporation, sell its property with a covenant that they had authority to sell, they are liable personally if the assignment was void, there being no covenant against personal liability.<sup>3</sup> And where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such prefer-

etc. Co., L. R. 40 Ch. D. 141 (1888). A director is liable for money used, *ultra vires*, to buy land. *Grimes v. Harrison*, 26 Beav. 435 (1859). The president executing an ordinary guaranty in the name of the corporation without authority is personally liable thereon. *Nelligan v. Campbell*, 20 N. Y. Supp. 234 (1892). The officers of a corporation are not personally liable on a guaranty which it has made. *Kellogg-Mackay Co. v. Havre Hotel Co.*, 199 Fed. Rep. 727 (1912). In this case the president and secretary wrote a letter stating that the contractor was to be paid by the company in a certain way, and that a person would be safe in selling material to him. A person cannot hold corporate officers personally liable on an *ultra vires* contract which he has made with the corporation where he knew it was *ultra vires*. *State v. Williams, etc. Co.*, 58 S. Rep. 1033 (La. 1912). In a suit against a corporation to enjoin its using the name of the complainant the directors of the defendant are not proper parties where the only acts by them were as corporate officers. *Vassar College v. Loose-Wiles, etc. Co.*, 197 Fed. Rep. 982 (1912).

<sup>1</sup> *Beeson v. Lang*, 85 Pa. St. 197 (1877). Where the president of a land company agrees with an adjoining owner that an excavation will be made in a certain way and does so without authority, and the excavation is not made in that way and damage is done, he is personally liable. *Malone v. Pierce*, 231 Pa. St. 534 (1911). Where the president of a bank performs an act which he had no power to perform, he does not bind the bank, neither is he personally liable where he made no misrepresen-

tations. *First Nat. Bank v. Commercial Nat. Bank*, 99 Tex. 118 (1905). The president is not personally liable on a purchase made by him for the company, even though he had no authority, and the company is not bound. *Standard, etc. Co. v. Southern, etc. Co.*, 134 S. W. Rep. 429 (Tex. 1911). Managers of a syndicate are not personally liable on their contracts as managers if the syndicate itself is known, because an agent of a disclosed principal is not so liable. *Jones v. Gould*, 123 N. Y. App. Div. 236 (1908), rev'd on another ground in 200 N. Y. 18; see also § 705, *infra*. The officers of a building association who transferred its assets to a trust company without authority, are liable to the stockholders of the former upon the trust company becoming insolvent and not paying the price, but such officers are entitled to the benefit of any security given by the trust company. *Brinekerhoff v. Holland T. Co.*, 171 Fed. Rep. 781 (1909). A director is not liable for work done for the corporation, even though there was some indefinite talk that he would be liable, it appearing that the party relied upon the credit of the corporation. *Detroit Savings Bank v. Loveland*, 168 Mich. 163 (1911). Where a property owner sells a right of way for a railroad to its agent personally, and to others whom he might authorize, the latter is personally liable. *Polk v. Haworth*, 95 N. E. Rep. 332 (Ind. 1911).

<sup>2</sup> *Mann v. People*, 15 Hun. 155 (1878); aff'd, *People v. Mann*, 75 N. Y. 484.

<sup>3</sup> *Shannon v. Mastin*, 108 S. W. Rep. 1116 (Mo. 1908).



ence, and even though one of them resigns, the liability continues for the benefit of past as well as future creditors.<sup>1</sup> And where the corporation has power to do a certain act, but does not authorize a person or officer to do that act, it has been held that the person or officer doing such act is liable personally therefor. He is liable as an unauthorized agent.<sup>2</sup> Where the treasurer issues a check signed by him as treasurer, he is personally liable if there are no funds of the corporation to pay the check.<sup>3</sup> The officers and agents of a foreign corporation are not liable as partners on account of its doing business in the state without complying with the statute.<sup>4</sup> A person who of his own accord goes to an office of a corporation, having its name on the door, and sells goods cannot hold the agent liable therefor on the ground that he had not disclosed his principal.<sup>5</sup> When a contract is made for the corporation, and this fact appears in the contract, but the officer or agent signs the contract, not in the corporate name, but *in his own name*, he is

<sup>1</sup> *Nix v. Miller*, 26 Colo. 203 (1899). Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside, the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved. *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781 (1906).

<sup>2</sup> If two directors without authority order a bank to honor the checks of the manager of their corporation and he overdraws, they are personally liable for the overdrafts. *Cherry v. Colonial Bank*, L. R. 3 P. C. 24 (1869). But see *Beattie v. Ebury*, L. R. 7 H. L. 102 (1874), aff'g L. R. 7 Ch. App. 777, and rev'g L. R. 7 Ch. App. 788, n. A corporate agent who signs the corporate name to a note without authority is liable personally thereon. *Frankland v. Johnson*, 147 Ill. 520 (1893). An officer making a corporation note without authority is personally liable thereon. *Miller v. Reynolds*, 92 Hun, 400 (1895). Where two of the officers of a corporation employ a broker to sell its assets at a certain price, and he finds a purchaser, they are liable for his commissions, if the corporation does not accept the price. *Norman v. Hopper*, 38 Wash. 415 (1905). Corporate officers

are not personally liable *ex contractu* on corporate instruments executed by them without authority, but may be liable *ex delicto* if they knowingly or carelessly assume the authority or misrepresent or conceal their authority and thus falsely lead others to rely on them. *Jacobs v. Williams*, 82 Atl. Rep. 202 (Conn. 1912). An officer who signs the corporate name to a contract to bear part of the expense of a suit is personally liable therefor if he had no authority so to do. *Solomon v. Penoyar*, 89 Mich. 11 (1891). When the president of the bank, without authority from the directors, sells \$6,000 of the bank's paper for \$5,500, he is liable to the bank for \$500 — the real loss. *First Nat. Bank v. Lucas*, 21 Neb. 280 (1887). The president and secretary signing a corporate note without authority are liable for breach of implied warranty of authority, but are not liable as makers or indorsers. *M'Donald v. Luckenbach*, 170 Fed. Rep. 434 (1909). See also § 716, *infra*. See also *Underhill v. Gibson*, 2 N. H. 352 (1821); *Weare v. Gove*, 44 N. H. 196 (1862). 78 S. E. Rep. 367.

<sup>3</sup> *Eastern, etc. Co. v. Cunningham*, 103 Me. 455 (1908).

<sup>4</sup> *National Bank, etc. v. Spot Cash Coal Co.*, 98 Ark. 597 (1911).

<sup>5</sup> *Donohue v. Watson*, 72 N. Y. Misc. Rep. 56 (1911).



generally not liable on such contract; but in some instances he has been held liable.<sup>1</sup> The directors are not personally liable for attorney fees for services rendered in a voluntary dissolution of the company.<sup>2</sup> A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant.<sup>3</sup>

Various instances of the liability of directors and stockholders are given in the notes below.<sup>4</sup>

<sup>1</sup> See ch. XLIII, § 724, *infra*.

<sup>2</sup> *Drew v. Longwell*, 81 Hun, 144 (1894). Directors are not personally liable for a lawyer's fees in a suit which he defends for a corporation. *Davis v. Trimble*, 76 Ark. 115 (1905). The oral agreement of the president of a corporation to pay the attorney's fees and expenses of a person who is negotiating for a contract with the corporation is enforceable against the president personally. *Manary v. Runyon*, 43 Ore. 495 (1903).

<sup>3</sup> *Lamming v. Galusha*, 81 Hun, 247 (1894); *aff'd*, 151 N. Y. 648, where it was also claimed that the incorporation had been insufficient.

<sup>4</sup> A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. *Angle v. Chicago, etc. Ry.*, 151 U. S. 1 (1894). The agreement of a corporation on selling its property not to engage in the same business, does not prevent one of its officers and stockholders engaging in that business, and the stockholders are not individually liable or subject to an injunction because of unfair competition practiced by the corporation. *Hall's, etc. Co. v. Herring, etc. Co.*, 146 Fed. Rep. 37 (1906). Modified, 208 U. S. 554. Officers of a trust company who mingle with the funds of the company moneys which they collect under instructions to remit to the owner are personally liable therefor. *Sweet v. Montpelier, etc. Co.*, 73 Kan. 47 (1906). Where money is converted by a corporation, not only is the corporation liable, but the officers and agents participating in the act are

personally liable. *Sweet v. Montpelier, etc. Co.*, 69 Kan. 641 (1904). Directors are personally liable on a corporate note which they induced the holder to purchase by false representations, and the proceeds of which they took. *Daniel v. Glidden*, 38 Wash. 556 (1905). The president and cashier of a bank are not personally liable even though as officers they refuse to cash a check which is drawn on the bank and should have been paid. *Penney v. Bryant*, 70 Neb. 127 (1903). Where the officers of an insurance company represent that it has authority to take a certain policy and a loss occurs, and the company repudiates the policy on the ground of want of power, they may be held liable. *Harris-Emery Co. v. Pitcairn*, 122 Iowa, 595 (1904). A director's liability at common law in a national bank for mismanagement or misfeasance can be recovered only by the bank or for the benefit of all stockholders. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (1905). The directors of a banking corporation are not liable to its creditors for violation or neglect of duty, there being no deceit. *Hart v. Hanson*, 14 N. Dak. 570 (1895). Directors of a national bank are at common law liable for false reports to any party injured thereby. *Yates v. Jones Nat. Bank*, 105 N. W. Rep. 287 (Neb. 1905). The treasurer may be liable in an action for fraud and deceit to a purchaser of stock who bought relying on false statements made by him to the public as to profits. *Keeler v. Seaman*, 47 N. Y. Misc. Rep. 292 (1905). The fact that coupons are payable in the order of their numbers and only from money as it comes in, does not render the bonds or coupons illegal, and the officers are not personally liable therefor. *Vokes v. Eaton*,



Stockholders in a national bank cannot hold the directors liable in damages for altering the bank building by erecting six stories and leasing

119 Ky. 913 (1905). A manager may be liable for money embezzled by the secretary where the manager continued him in office after he was aware of the facts. *Johnson v. Stoughton, etc. Co.*, 118 Wis. 438 (1903). Where the statute provides for raising funds for a mutual insurance company by assessments, the bond of the directors to advance \$100,000 to the company as needed is *ultra vires* and unenforceable. *Goss v. Peters*, 98 Mich. 112 (1893). In *Beach v. Cooper*, 72 Cal. 99 (1887), in a stockholder's suit to hold officers liable for paying \$315,000 for a few months' loan of \$140,000, the court held that the act was not a fraud *per se*, and that it was possible that the directors might explain it. See § 738, *infra*. A consignor of goods to a corporation to sell cannot hold the directors of the corporation personally liable for conversion where the consignor knew that the corporation had disposed of the property and he had acquiesced in such sale. *Birdsell, etc. Co. v. Oglevee*, 187 Ill. 149 (1900). A statutory liability of stockholders in corporations, except manufacturing corporations, does not apply to a manufacturing corporation, even though it has engaged in a non-manufacturing business without authority from its charter. *Senour, etc. Co. v. Church, etc. Co.*, 81 Minn. 294 (1900). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900). Even though the statute requiring banks loaning on real estate to loan not above fifty per

cent. of its value, yet the directors are not personally liable because on foreclosure sale less than fifty per cent. is realized. The value may have depreciated. *Colorado Savings Bank v. Evans*, 12 Colo. App. 334 (1898). Where all the assets of a corporation are transferred for stock of another corporation and such stock is sold by trustees of the former to pay its debts, the fact that one of the trustees subsequently buys a portion of the stock does not render him liable for such debts. *Wing v. Charleroi, etc. Co.*, 112 Fed. Rep. 817 (1902). An officer of a corporation may be personally liable for funds of a trust estate which are received by him for the corporation after he knows that the corporation is insolvent. *Anderson v. Daley*, 38 N. Y. App. Div. 505 (1899). *De facto* officers are not personally liable on a corporate note issued by their authority. *Potwin v. Greenewald*, 123 Ill. App. 34 (1905). A Montana statute rendering directors liable for corporate debts if they fail to file a specified report applies to foreign as well as domestic corporations. *Nelson v. Bank of Fergus County*, 157 Fed. Rep. 161 (1907). As to a suit against the company and also an employee for negligence, see *Burch v. Caden Stone Co.*, 93 Fed. Rep. 181 (1899). A suit by a stockholder against the directors to hold them liable for violating the national bank act must be for the benefit of the corporation. *Zinn v. Baxter*, 65 Ohio St. 341 (1901). Directors are not liable to creditors for mismanagement unless actual fraud is shown. *Wilson v. Stevens*, 129 Ala. 630 (1901). The power of a private corporation to acquire land cannot be questioned by the grantor of land to the corporation, and moreover, even if the rule were otherwise, an agent who bought for the corporation as agent would not be personally liable. *Ray v. Foster*, 53 S. W. Rep. 54 (Tex. 1899). In Louisiana it is held that where a corporation organized to build railroads and carry on a plantation business



five of them.<sup>1</sup> Directors are not liable to the company for an *ultra vires* act which the company has ratified.<sup>2</sup> The New York court of

carries on a store to supply its employees with merchandise, its stockholders are personally liable as to the merchandise business — that being *ultra vires*. *Lehman v. Knapp*, 48 La. Ann. 1148 (1896). In *Powell v. Murray*, 3 N. Y. App. Div. 273 (1893); *aff'd*, 157 N. Y. 717, where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon, under the New York statute, as not being paid-up stock, such contract being *ultra vires*. An officer of a construction company who induces a party to buy stock owned by the company is not personally liable on the contract of the company to allow interest on installments paid on such stock in advance. *Hetfield v. Addicks*, 154 Pa. St. 1 (1893). Directors are personally liable for losses of a corporation on account of unreasonable credit extended to another corporation in which the directors are interested. *Stahn v. Catawba Mills*, 53 S. C. 519 (1898). Where a mining company is practically reorganized by selling out to a new and larger company having the same directors, and the stock is sold to the public, if the prospectus discloses all the facts excepting the amount of property, which one of the directors made as a stockholder in the former company, he is not liable to the new company for such property as a promoter thereof, although it might have been ground for rescinding the contract of purchase. *Re Lady Forrest*, etc., [1901] 1 Ch. 582. In Minnesota by statute directors who participate in an *ultra vires* act are liable for all debts thereafter contracted, even though they go out of office. *Citizens' State Bank v. Story*, etc. Co., 84 Minn. 408 (1901). A suit in a state court against the officers of a national bank on the ground that they had violated the national bank act is removable to the United States court. *Bailey v. Mosher*, 95 Fed. Rep. 223 (1899). In a suit by creditors to

hold directors personally liable for violating the statutes in the conduct of the corporate business, the creditors must clearly set forth the character and existence of the amount they claim. *Boston, etc. R. R. v. Parr*, 104 Fed. Rep. 695 (1900). Where the lease of a street railway has been made, in accordance with the vote of the stockholders and directors, a stockholder cannot hold the directors personally liable for not informing the stockholders of an offer to purchase the property, it not being shown that the offer was from a responsible party or that it would have made any difference in the stockholders' action. *Strunk v. Owen*, 199 Pa. St. 73 (1901). Where the statute renders the officers and stockholders of a foreign corporation liable for doing business in the state without filing a certificate, this does not prevent the company from suing on contracts. The courts will not extend the penalty. *Kindel v. Beck, etc. Co.*, 19 Colo. 310 (1893), stating also that a statute which should restrict the right of a foreign corporation to deliver in the state goods manufactured by the company out of the state would be unconstitutional. Where an insolvent corporation turns over all its property to a new corporation formed for that purpose, and the new corporation turns over a portion of its assets to one of the directors of the old corporation without consideration, a creditor of the old corporation may hold the directors personally liable. *South Bend, etc. Co. v. George, etc. Co.*, 97 Wis. 230 (1897); *s. c.*, 105 Wis. 443 (1900). For various other instances of the liability of directors, see § 243.

<sup>1</sup> *Wingert v. First National Bank*, 223 U. S. 670 (1912).

<sup>2</sup> "When the directors and officers of a corporation engage in *ultra vires* transactions, and thus cause damage to the corporation, they may be jointly and severally liable for such damage; and when sued for such damage, a subordinate officer cannot establish an absolute defense by show-



appeals has said: "The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied."<sup>1</sup> But a general manager who violates a by-law prohibiting him from speculating is personally liable for loss of corporate funds thereby, even though the directors knew thereof.<sup>2</sup> Mere incapacity in management, however, does not render the directors liable.<sup>3</sup> Where a New Jersey corporation illegally practices dentistry in Pennsylvania, and one of its employees does negligent dental work, the directors and officers are personally liable for the damage, it appearing that they knew and assented to the company doing business in Pennsylvania.<sup>4</sup> Directors may be liable where the corporation is but a "dummy," organized for a fraudulent purpose.<sup>5</sup> But one director is not liable for the others.<sup>6</sup> *De facto* officers are not personally liable on a corporate note issued by their authority.<sup>7</sup>

ing that his transactions were assented to or even directed by the directors. Directors and officers of corporations are agents of the corporation for which they act, and for their unauthorized transactions they may be liable to their principal just as the agent of an individual may be liable for the damage caused to his principal by his unauthorized acts. But . . . when the officers of a corporation engage in an *ultra vires* business for the benefit of a corporation, and the corporation has the actual benefit thereof, and when the business is so carried on with the acquiescence of the stockholders that it actually, though illegally, becomes the business of the corporation, it cannot maintain an action against such officers for any damages it has suffered in such business. In other words, a corporation engaged in an *ultra vires* business cannot sue, for damages suffered therein, the agents it employs to carry on the business. The agent of the corporation in such a case would be protected just as the agent of a copartnership would be protected who did business with the express or implied consent of the copartners, which was not authorized by the articles of copartnership." Holmes v. Willard, 125 N. Y. 75, 79, 81 (1890).

<sup>1</sup> Wormser v. Metropolitan Street Ry., 184 N. Y. 83 (1906).

<sup>2</sup> Hoffman v. Farmers' etc. Ass'n, 78 Kan. 561 (1908).

<sup>3</sup> Where a company has been dissolved because there were only two directors by the charter and one had resigned and the stockholders divided evenly and could not elect a successor, one faction cannot hold the other responsible in damages for the result. Weymouth v. Oudin, 56 Wash. 315 (1909). Where all the stockholders and directors of a planing mill corporation turn its property over to a person to operate and give him an option on their stock, the fact that he failed in the management does not render him liable in damages, no fraud being proved. Ring v. Brown, 84 Neb. 589 (1909). Where a copartnership is the general manager and agent of a company and a member of the copartnership is a director and misappropriates the company's property, the company has recourse against his separate estate as well as against the joint estate of the copartnership. *Re MacFadyen*, [1908] 2 K. B. 817.

<sup>4</sup> Mandeville v. Courtright, 142 Fed. Rep. 97 (1905).

<sup>5</sup> See §§ 663, 664, *supra*.

<sup>6</sup> Although the directors of a company are the agents of the company,

<sup>7</sup> Potwin v. Greenwald, 123 Ill. App. 34 (1905).



A receiver may hold liable a director,<sup>1</sup> where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation, and the company becomes insolvent.<sup>1</sup> Where the officers and directors, in conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first-named directors are personally responsible for their action, and a receiver of the corporation may hold them liable.<sup>2</sup> Where the directors allow another corporation in which they are interested to appropriate the good-will of the corporation of which they are directors, a minority stockholder may hold them personally liable.<sup>3</sup> And if the president refuses to deliver up goods which have been converted by the corporation he is personally liable.<sup>4</sup> If an officer or agent of a corporation has been instrumental in causing the corporation to commit trespass or any other tort, then such director or officer is personally liable therefor.<sup>5</sup> A flour milling company may

and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something to make his co-directors his agents in some other sense than this, he is no more liable for their acts than any other stockholder. In this respect directors are like promoters, each being answerable for his own acts, and for the acts of the others so far as he has made them his agents, but no further. *Brown v. Byers*, 16 M. & W. 252 (1847); *Heraud v. Leaf*, 5 C. B. 157 (1847); *Bramah v. Roberts*, 3 Bing. N. Cas. 963 (1837); *Londesborough's Case*, 4 De G., M. & G. 411 (1854); *Walker's Case*, 8 De G., M. & G. 607 (1856). See also *Weir v. Barnett*, L. R. 3 Exch. D. 32 (1877); *Weir v. Bell*, L. R. 3 Exch. 238 (1878); *Cargill v. Bower*, L. R. 10 Ch. D. 502 (1878). As to contribution, see § 749, *infra*. Where directors are paid an annual sum as remuneration, they cannot collect for traveling expense in going to and from meetings, but one director is not liable to the company for amounts paid to other directors for such traveling expenses unless he signed the check. *Young v. Naval, etc. Soc. Ltd.*, [1905] 1 K. B. 687. Where a corporation authorizes the issue and sale of bonds, without speci-

fying any officer to make the sale, the president is not personally liable for such bonds, even though he turned them over to the vice-president to sell and the vice-president kept the proceeds. *Oswego, etc. Co. v. Boyer*, 111 N. Y. App. Div. 140 (1906).

<sup>1</sup> *Pierson v. Cronk*, 13 N. Y. Supp. 845 (1890). Where an insolvent insurance company buys out a solvent company, and certain individuals guarantee that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. *Mason v. Cronk*, 125 N. Y. 496 (1891).

<sup>2</sup> *Bosworth v. Allen*, 168 N. Y. 157 (1901). Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors, are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is no bar to such suit for the balance. A release by the board of directors is no defense. *Gilbert v. Finch*, 72 N. Y. App. Div. 38 (1902); *aff'd*, 173 N. Y. 455.

<sup>3</sup> *Godley v. Crandall etc. Co.*, 153 N. Y. App. Div. 687 (1912).

<sup>4</sup> *McCrea v. McClenahan*, 131 N. Y. App. Div. 247 (1909).

<sup>5</sup> This subject belongs more prop-



hold its president personally responsible for selling its inferior grades of flour as though they were the superior grades, to the injury of the company's reputation and its standing with its customers and its trade marks.<sup>1</sup>

Where a bond on its face recites that it is secured by all the assets of the company, while in fact it is not secured at all, the purchaser thereof may hold the president personally liable, the latter having taken part in the issue of the bonds.<sup>2</sup> Individuals who own several railroads and consolidate them and issue bonds thereon, with a false and fraudulent statement that the bonds cover certain timber lands, are liable personally to the bondholders.<sup>3</sup> Even though certain directors are a building committee and sign certificates for the issue of bonds purporting to repay money which has gone into construction in accordance with the mortgage, and it turns out that the money was misapplied, they are not personally liable, being guilty of only ordinary negligence, but if one of them knew the facts he is personally liable.<sup>4</sup> The president of an insurance company which has not complied with the law authoriz-

erly to treatises on agency and on torts. An agent is liable for aiding the corporation in perpetrating a breach of trust. *Attorney-General v. Leicester*, 7 Beav. 176 (1844). As to the liability of officers for trespass, etc., see *Thompson, Liab. Officers*, p. 489. Even though the president of a company in good faith directs timber to be cut from another man's land he and the company may be held jointly liable for the tort. *Lytle Logging, etc. Co. v. Humptulips, etc. Co.*, 60 Wash. 559 (1910). A director is not liable for the acts of the corporation in cutting timber on land not owned by the corporation where the director took no part in the same. *Davenport v. Newton*, 71 Vt. 11 (1898).

<sup>1</sup> *Sessinghaus Milling Co. v. Hanebrink*, 152 S. W. Rep. 354 (Mo. 1912).

<sup>2</sup> *Stickel v. Atwood*, 25 R. I. 456 (1903).

<sup>3</sup> *O'Beirne v. Bullis*, 158 N. Y. 466 (1899). See also *Bullis v. O'Beirne*, 195 U. S. 606 (1904). A director voting for a mortgage and the president executing it, relying on statements that it covered certain property, are liable to the purchaser of the bonds secured thereby if it turns out that the mortgage did not cover that property, a prospectus having been issued misrepresenting the value of the prop-

erty. *Lynch v. Southern etc. Co.*, 135 Mo. App. 672 (1909). A purchaser of bonds secured by a mortgage which fraudulently represents the amount of land covered by it, may hold personally liable corporate officers who took part in the fraud. Such a suit may be brought by one bondholder in behalf of all the bondholders, and a provision in the mortgage against bondholders bringing a suit does not apply. The mortgagor is not a necessary party defendant. *Slater T. Co. v. Randolph etc. Co.*, 166 Fed. Rep. 171 (1908). Even though a mortgage purports to cover land when in fact it merely covers the coal underlying the land, yet the president who executes the mortgage and the stockholders who authorize it are not liable for deceit to a bondholder, although they knew the acts when they acted; neither can they be held liable in equity to make the representations good on the ground of rescission, inasmuch as they are not parties to the transaction as individuals and did not receive the consideration paid for the bonds. *Slater Trust Co. v. Gardiner*, 183 Fed. Rep. 268 (1910).

<sup>4</sup> *Carrington v. Basshor Co.*, 84 Atl. Rep. 746 (Md. 1912). See also § 814 *infra*.



ing its organization is liable to policy-holders for false representations to them by the insurance agents that the company had so complied.<sup>1</sup> The president of an insurance company may be held personally liable for its funds used by him for political purposes and also moneys expended on improvident agency contracts with members of his family, and the complaint may allege that he either caused the expenditure or negligently allowed it, and a suit by the company itself is at law.<sup>2</sup>

In New York it has been held that a stockholder may have a corporate officer arrested for his frauds on the corporation.<sup>3</sup> The president of a corporation obtaining credit for the corporation by false representations is liable personally therefor, and is liable to arrest.<sup>4</sup> A director is not guilty of grand larceny, even though he donates corporate funds for a political purpose.<sup>5</sup> An indictment for conspiracy to obtain money by false pretenses lies against persons who organize a bank and constitute its board of directors and borrow enough money from it to pay for their small subscriptions to the stock, the purpose being to defraud the public and other stockholders.<sup>6</sup> The president of a savings and loan company, who directs the treasurer to pay out the company's money on worthless checks and then causes the money to be put into a mining scheme for his own benefit, is criminally liable under the statute of New York making a trustee or officer criminally liable for misappropriation of property in his possession.<sup>7</sup> The president of an incorporated bank is not criminally liable for the act of the receiving teller in receiving a deposit when such teller knew that the bank was insolvent. The statute rendering a bank officer liable for knowingly receiving such a deposit applies only to the officer actually receiving the deposit.<sup>8</sup>

<sup>1</sup> *Belding v. Floyd*, 17 Hun, 208 (1879).

<sup>2</sup> *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 815 and 827 (1907). Where, however, the transactions cover thirteen years, the complaint may be ordered made more definite and certain. *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 828 (1907). At the same time the company may maintain a suit in equity to compel him to account for moneys paid out through false and fraudulent bills and vouchers and for unlawful purposes, the details of which the company does not know. *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 822 (1907). So also the vice-president, whose duty it was to approve disbursements and who knowingly or negligently allowed illegal payments, is

personally liable. *Mutual, etc. Co. v. Grannis*, 118 N. Y. App. Div. 830 (1907).

<sup>3</sup> *Crook v. Jewett*, 12 How. Pr. 19 (1854).

<sup>4</sup> *Phillips v. Wortendyke*, 31 Hun, 192 (1883).

<sup>5</sup> *People v. Moss*, 187 N. Y. 410 (1907). Although it is *ultra vires* for an insurance company to contribute to political campaign expenses, it is not a criminal act, and hence an officer who acts as intermediary is not criminally liable. *People v. Moss*, 113 N. Y. App. Div. 329 (1906); *aff'd*, 187 N. Y. 410.

<sup>6</sup> *People v. Smith*, 239 Ill. 91 (1909).

<sup>7</sup> *People v. Britton*, 134 N. Y. App. Div. 275 (1909).

<sup>8</sup> *Ex parte Rickey*, 31 Nev. 82 (1909).



Where persons engaged in a real estate and loan business organize a corporation to take over the business and they hold all the stock and the corporation is merely a formal intermediary, they may be criminally liable for taking in money in the name of the corporation at a time when the corporation is insolvent, thus causing the money to be lost, and it is no defense that they acted in their capacity as officers of the corporation.<sup>1</sup> Under the New York Banking Law a director may be criminally liable for voting to loan money in excess of the amount allowed by statute.<sup>2</sup> It is a criminal offense for the president of a national bank to discount for the bank the paper of an insolvent corporation of which he is an officer, the intent being to defraud the bank.<sup>3</sup> The president is not guilty of larceny merely because a clerk embezzled funds paid in by a customer.<sup>4</sup>

Where money is collected by a corporation from a railroad for a loss incurred by one of the corporation's customers, and the manager of the corporation uses the money to pay a corporate debt, he is personally liable for conversion.<sup>5</sup> Corporate officers who participate in violating the anti-trust act of Congress of July 2, 1890, may be indicted jointly with the corporation, although their acts were separate and done at a different time.<sup>6</sup> Officers of a corporation who obtain money in its name, representing that it would be used in speculations and the profits divided by way of dividends, but use the money to pay pretended dividends and keep the balance for their own use, may be convicted of embezzlement and larceny at common law.<sup>7</sup> A vice-president of a foreign corporation may be punished criminally for causing the corporation to sell goods through a peddler without taking out a license.<sup>8</sup> A

<sup>1</sup> *State v. Milbrath*, 138 Wis. 354 (1909).

<sup>2</sup> *People v. Knapp*, 147 N. Y. App. Div. 436 (1911).

<sup>3</sup> *Flickinger v. United States*, 150 Fed. Rep. 1 (1906). A criminal prosecution of officers of a corporation for using its funds to pay their own debts in violation of the New Hampshire statute was involved in *State v. Newman*, 74 N. H. 10 (1906).

<sup>4</sup> *State v. Carmean*, 126 Iowa, 291 (1905).

<sup>5</sup> *Rauch v. Brunswick*, 155 Mo. App. 367 (1911).

<sup>6</sup> *United States v. MacAndrews, etc. Co.*, 149 Fed. Rep. 823 (1906). A criminal prosecution by a government against persons for illegally receiving rebates from a railroad fails if they were merely stockholders in a

corporation that received the rebate. *United States v. Wood*, 145 Fed. Rep. 405 (1906). A corporate agent and the corporation cannot be guilty of an illegal combination in restraint of trade, unless some other corporate agent or officer knows of it or participates in it, because a corporation can act only by agent. *Union Pacific Coal Co. v. United States*, 173 Fed. Rep. 737 (1909).

<sup>7</sup> *People v. Kellogg*, 105 N. Y. App. Div. 505 (1905).

<sup>8</sup> *Crall v. Commonwealth*, 103 Va. 855 (1905). The court said: "A corporation can act alone through its officers and agents, and where the business itself involves a violation of the law the correct rule is that all who participate in it are liable."



stockholder who is also general manager of a newspaper corporation is not liable criminally for its criminal advertisement of an illegal lottery, unless he had actual knowledge or notice thereof.<sup>1</sup> The vice-president and general counsel of an insurance company cannot be convicted of larceny for using the corporate funds to settle a claim against the corporation and its president, there being no proof that the company was not liable thereon.<sup>2</sup> There are many criminal statutes relative to false reports.<sup>3</sup> In a criminal prosecution against a corporate officer the corporate books are not evidence against him unless it is shown that he had something to do with the books or knowledge of their contents, or some connection with the entries.<sup>4</sup> Criminal liability in connection with the issue or sale of stock is considered elsewhere.<sup>5</sup> An indictment against the president as principal of a bucket shop corporation on account of its acts is not good; neither can he be held liable on the ground that the incorporators were clerks in a lawyer's office and had no real interest in the company.<sup>6</sup> In England there is a statute, under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.<sup>7</sup> Under the English statute it is a penal offense for the directors not to call a stockholders' meeting during the year.<sup>8</sup>

An officer is liable who directs a negro to be excluded from the company's omnibus;<sup>9</sup> or who takes part in an assault;<sup>10</sup> or who carries on a malicious prosecution.<sup>11</sup> Directors are not liable for commencing

<sup>1</sup> *People v. England*, 27 Hun, 139 (1882). See also Green's Brice's *Ultra Vires*, p. 765. Even though the stockholders of a newspaper company may be held liable criminally for its publication of an illegal liquor advertisement, if they knew of the publication, yet it must be shown that they were stockholders at the time. *State v. Bass*, 101 Me. 481 (1906).

<sup>2</sup> *People v. Burnham*, 119 N. Y. App. Div. 302 (1907).

<sup>3</sup> Even though the capital stock of a West Virginia corporation is paid by giving notes and one of its officers in filing a statement with a county clerk in Montana under the Montana statutes in order to do business in that state, sets forth in that statement that "the amount of the capital stock actually paid in is \$100,000," yet he is not liable under the criminal statutes of Montana for making a false report. *State v. Clements*, 37 Mont. 314 (1908).

<sup>4</sup> *People v. Burnham*, 119 N. Y. App. Div. 302 (1907). See § 727, *infra*.

<sup>5</sup> See §§ 40, 48, 152, 357, *supra*. In the case *Wilson v. United States*, 190 Fed. Rep. 427 (1911), the court affirmed the conviction of the promoters of a wireless telegraph company for using the United States mails for fraudulent representations inducing a purchase of stocks.

<sup>6</sup> *State v. Miner*, 233 Mo. 312 (1911).

<sup>7</sup> *Re London, etc. Corp., Ltd.*, [1903] 1 Ch. 728.

<sup>8</sup> *Park v. Lawton*, [1911] 1 K. B. 588.

<sup>9</sup> *Peck v. Cooper*, 112 Ill. 192 (1884); 54 Am. Rep. 231.

<sup>10</sup> *Brokaw v. New Jersey R. R. & T. Co.*, 32 N. J. L. 328 (1867); *Hewett v. Swift*, 85 Mass. 420 (1862); *Moore v. Fitchburg R. R.*, 70 Mass. 465 (1855).

<sup>11</sup> *Hussey v. Norfolk Southern R. R.*, 98 N. C. 34 (1887).



business before the capital stock is subscribed for.<sup>1</sup> And even though the directors certify that one half of the capital stock has been paid in in cash, when in fact it has not been, yet the assignee of the corporation for the benefit of its creditors cannot hold them liable for the part not so paid in.<sup>2</sup> Directors and officers of a national bank are personally liable for the funds of the bank used by them to develop a mining property owned by the bank, even though the bank originally acquired the mining property legally. The statute of limitations may, however, be a bar to such a suit.<sup>3</sup> Where a national bank and two of the directors are secretly interested in the profit made by selling property to a corporation for stock, the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good.<sup>4</sup> Where an insolvent person forms a corporation for the purpose of conveying all his property to it for stock, an incorporator and director who takes part in the fraud is personally liable therefor, but not a director who had merely constructive notice of the fraud.<sup>5</sup>

Where the directors of a corporation transfer all its assets to another corporation for stock of the latter, which they divide among themselves, the creditors of the former may hold the directors liable and may also hold liable the company that received the property for the value thereof.<sup>6</sup>

<sup>1</sup> See § 243, *supra*. Corporate creditors cannot hold the officers liable on the ground that they began business before the statutory percentage of stock had been paid for, there being no allegation that such omission caused the insolvency of the Company. *Land etc. T. Co. v. Connolly*, 233 Pa. St. 1 (1911). Neither can the receiver maintain such a suit. *Kinter v. Connolly*, 233 Pa. St. 5 (1911). Even though a corporation commences business before its capital stock is fully subscribed, and even though the statutes prohibit it, yet this does not make the directors personally liable for the corporate debts. *American, etc. Co. v. Kinnear*, 56 Wash. 210 (1909). Where the directors commence business before ten per cent. of the capital is paid in, as required by statute, the directors are personally liable as agents transacting business without authority from the principal. *Trust Co. v. Floyd*, 47 Ohio St. 525 (1890). Cf. § 180, *supra*. In Illinois by statute the directors are personally liable for

debts incurred before all "stock named in the articles of incorporation shall be subscribed in good faith." *Kent v. Clark*, 181 Ill. 237 (1899). In the case *Bank of De Soto v. Reed*, 50 Tex. Civ. App. 102 (1908), it was held that the directors were liable to corporate creditors for using the corporate funds to pay losses in the business before incorporation.

<sup>2</sup> *Hequemebourg v. Edwards*, 155 Mo. 514 (1900).

<sup>3</sup> *Cooper v. Hill*, 94 Fed. Rep. 582 (1899).

<sup>4</sup> *Zinc, etc. Co. v. First, etc. Bank*, 103 Wis. 125 (1899).

<sup>5</sup> *Benton v. Minneapolis, etc. Co.*, 73 Minn. 498 (1898).

<sup>6</sup> *McIver v. Young Hardware Co.*, 144 N. C. 478 (1907). Where the corporation sells all its property and distributes the assets among its stockholders, who are also officers, they are liable personally for corporate debts. *Tatum v. Lehigh*, 136 Ga. 791 (1911). Where a corporation turns over all its assets to its president to pay its debts, and he pays all but one



Under the New York statute where the board of directors sell all the property to another corporation for stock of the latter to be delivered to

debt and then distributes the balance among the stockholders, he is personally liable on that one debt, the amount turned over by him to the stockholders being sufficient to pay it. *Carter v. Forbes, etc. Co.*, 22 Tex. Civ. App. 549 (1900). Where a mining company and a coal company are united, the mining company buying the stock of the coal company and then taking a transfer of the mining company's property, giving notes therefor, and then the mining company exchanged the notes for the stock of the coal company, and then the notes and stock are canceled, leaving nothing to pay the debts of the mining company, those who took part in the transaction are liable for the mining company's debts to the extent of the property which it had. *Standard, etc. Co. v. Jones & Adams Co.*, 239 Ill. 600 (1909). Where the stockholders take all the corporate assets which are worth more than the debts, they are liable for the debts. *McLean v. Moore*, 145 S. W. Rep. 1074 (Tex. 1912). Often by statute, if the directors upon the dissolution of a corporation distribute the assets among the stockholders without paying the debts, they are personally liable for such debts. *Keen v. Maple, etc. Co.*, 63 N. J. Eq. 321 (1901); rev'g 61 N. J. Eq. 497. Where the directors of a dissolved corporation prefer one corporate creditor over another, they are personally liable to other corporate creditors. The liability may be enforced by a court of equity. *American Ice Co. v. Pocono, etc. Co.*, 165 Fed. Rep. 714 (1908); s. c., 183 Fed. Rep. 197. The directors of an insolvent mutual insurance association, who have money on hand sufficient to pay a fixed benefit liability, and who, instead of doing so, transfer all the assets to another association, are personally liable on such liability. *Harvey v. Wasson*, 74 Kan. 489 (1906). Under the Washington statute the directors are liable to a corporate creditor where they transfer all the property

to another corporation and take pay therefor by stock to be issued to the stockholders of the former. *Carstens & Earles, Inc. v. Hoffus*, 44 Wash. 456 (1906). Where directors in an insolvent corporation in violation of statute transfer a part of its property to two of their number to pay certain creditors, the receiver may recover from two such directors the value of the property so transferred, and if they have already paid some of the debts they will be subrogated to the rights attached to such debts. All of the directors authorizing or participating in the act are liable jointly and severally. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905). An unsecured creditor of a solvent corporation that has transferred all its property to another corporation for stock of the latter, and such stock is then sold to pay a mortgage debt, cannot hold the agents of the corporation carrying out the transaction personally liable for misapplication of funds, the transaction having been authorized and directed by the board of directors of the selling corporation. *Wing v. Charleroi, etc. Co.*, 112 Fed. Rep. 817 (1902). Even though an insolvent person sells all his property to a corporation and the corporation proceeds with the business, yet the directors are not personally liable on the transfer being set aside, where they acted in good faith. *Re Ely*, 82 L. T. Rep. 501 (1900). A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained what seemed to be sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were not sufficient to pay all liabilities, no bad faith being involved. *Lawrence v. Greenup*, 97 Fed.



stockholders of the former, and do not give a creditor of the former a reasonable opportunity to present and enforce his claim, they are personally liable to him on his claim, even though the purchasing corporation assumed the payment of all debts, and even though the directors were ignorant of the claim.<sup>1</sup> The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been disposed of by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.<sup>2</sup> Where the officers of the corporation have aided in transferring its assets to another corporation, a civil action for damages for a conspiracy to defraud may lie.<sup>3</sup>

Under the statutes of New York where a New Jersey corporation, doing business in New York, pays dividends from the capital stock, a director participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders.<sup>4</sup> A director in a bank is personally liable to persons who deposit their money in the bank after he knows

Rep. 906 (1899). See also § 546, *supra*. In Alabama it is held that directors are not personally liable to creditors of the company for authorizing a transfer of the property of the company to another corporation in payment for stock in such latter corporation. A creditor cannot attack a corporate transfer as *ultra vires*, but can only attack it as fraudulently diverting corporate assets. *Force v. Age-Herald Co.*, 136 Ala. 271 (1903). Under the ordinary statute rendering corporate officers liable for dividends or diversion of funds leaving the corporation unable to meet its obligations, corporate officers who bring about a dissolution and distribution of corporate assets among the stockholders without paying debts, are personally liable for such debts. *Wisconsin, etc. Lumber Co. v. Cable*, 140 N. W. Rep. 211 (Iowa, 1913).

<sup>1</sup> *Darey v. Brooklyn, etc. Co.*, 196 N. Y. 99 (1909). Directors cannot be held personally liable by a corporate creditor on the ground that they have paid to other creditors money which should have been paid to him. *Cass v. Realty, etc. Co.*, 148 N. Y. App. Div. 96 (1911); *aff'd*, 202 N. Y. 25. A resident creditor of a dissolved foreign corporation may hold the directors and persons to whom the corporate prop-

erty has been transferred, liable for his debt, where no fund was set aside for the payment of corporate creditors, as required by the law of the state where the company was incorporated. No judgment against the corporation is first necessary, and the corporation is not a necessary party defendant. *Atlantic Dredging Co. v. Beard*, 145 N. Y. App. Div. 342 (1911). A creditor of a corporation which has sold all its assets and distributed the proceeds among its stockholders may in an action to recover his claim from the directors, join also the purchaser, if the latter knew of the fraud or if it did not pay full value. *Teague v. Ridgway Co.*, 145 N. Y. App. Div. 277 (1911). Where upon dissolution of a corporation the directors distribute all the assets without paying a judgment, they are personally liable for what would have been paid on the judgment under the New York statutes. *Tapley v. Keller*, 133 N. Y. App. Div. 54 (1909). 155 *id.* 735.

<sup>2</sup> *Mason v. Henry*, 152 N. Y. 529 (1897).

<sup>3</sup> *Russell v. Post*, 138 U. S. 425 (1891).

<sup>4</sup> *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424 (1903). See also § 550, *supra*.



that it is hopelessly insolvent, where he fails to initiate measures to close the business of the bank.<sup>1</sup> Although the certificate of incorporation fixes the amount of debts which the corporation may incur, yet the directors are not liable for an excess of that amount.<sup>2</sup>

The court may authorize a receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders where such contract is a fair one, even though some of the stockholders dissent.<sup>3</sup> A statute shortening the statute of limitations applicable to the common-law liability of directors is unconstitutional as to existing liabilities, if the shortened period does not give a reasonable time after it takes effect for the commencement of suits on existing causes of action.<sup>4</sup> Laches is a bar to a suit to hold directors personally responsible to the corporation for diverting its property to their own use where the statute of limitations would be a bar.<sup>5</sup> Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution among joint tortfeasors.<sup>6</sup>

"A stockholder of a corporation does not become criminally liable for a combination made by the corporation without conscious participation therein."<sup>7</sup> The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation liable, and one who pays the tax

<sup>1</sup> It is his duty to call a meeting of the directors, or report the condition of things to the state authorities, or instruct the cashier to stop taking deposits, or to warn individual depositors, or, if necessary, make public announcement of the condition of things. *Cassidy v. Uhlmann*, 170 N. Y. 505 (1902).

<sup>2</sup> *Frost Mfg. Co. v. Foster*, 76 Iowa, 535 (1889). *Cf.* § 760. Where the directors incur debts in excess of the amount allowed by the charter, debts due them are postponed until the other debts are paid, and the directors are legally guilty of fraud as to creditors who did not know of the excessive indebtedness, and hence are personally liable to such creditors. *Guenther v. Baskett, etc. Co.*, 52 S. W. Rep. 931 (Ky. 1899). A statute may

make directors liable for corporate debts in excess of the amount mentioned in the charter. *Randolph v. Ballard, etc. Bank*, 142 Ky. 145 (1911). Directors issuing debentures in excess of the amount allowed by statute are personally liable thereon. *Weeks v. Propert*, L. R. 8 C. P. 427 (1873).

<sup>3</sup> *People v. Anglo-American, etc. Assoc.*, 66 N. Y. App. Div. 9 (1901); s. c., 169 N. Y. 606.

<sup>4</sup> *Gilbert v. Ackerman*, 159 N. Y. 118 (1899).

<sup>5</sup> *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1913).

<sup>6</sup> *Gilbert v. Finch*, 173 N. Y. 455 (1903). See also § 749, *infra*.

<sup>7</sup> *Union Pacific Coal Co. v. United States*, 173 Fed. Rep. 737, 744 (1909).



may have contribution from the others.<sup>1</sup> Majority stockholders are not liable for the act of the directors in discharging an employee in breach of his contract, even though they acquired some of their stock in connection with that contract.<sup>2</sup> A stockholder in telegraphing to another stockholder, in regard to a contested corporate election, is not liable for libel, even though he reflects on the competency of the former manager. Both parties being interested in the communication, it is privileged, where it is in good faith.<sup>3</sup> A corporation owning a majority of the stock of another corporation is not liable for infringement of a patent by the latter even though it elects its own officers as directors of the latter.<sup>4</sup> Stockholders are not personally liable for *ultra vires* acts.<sup>5</sup> A resident agent of a foreign corporation who does business in its name without its having qualified under the statute is personally liable on contracts so made.<sup>6</sup>

<sup>1</sup> Richter v. Henningsan, 110 Cal. 530 (1895).

<sup>2</sup> Badere v. Goodrich, 63 Wash. 650 (1911).

<sup>3</sup> Ashcroft v. Hammond, 197 N. Y. 488 (1910). See also § 645, *supra*.

<sup>4</sup> Westinghouse, etc. Co. v. Allis-Chalmers, 168 Fed. Rep. 91 (1909).

<sup>5</sup> Tennessee, etc. Co. v. Massey, 56 S. W. Rep. 35 Tenn. (1899). A stockholder is not personally liable for a tort of the corporation in diverting water. Poley v. Lacert, 35 Oreg. 166 (1899). Where a guaranty by a loan

and trust company is *ultra vires*, the statutory liability of stockholders cannot be enforced to pay such guaranty, even though the courts of the state where the corporation existed have held that *ultra vires* is no defense where the benefit of the guaranty has been received. Ward v. Joslin, 105 Fed. Rep. 224 (1900); *aff'd*, 186 U. S. 142 (1902). See also § 243, *supra*, as to the liability of stockholders.

<sup>6</sup> Raff v. Isman, 235 Pa. St. 347 (1912).



## CHAPTER XLI.

### INTRA VIRES ACTS AND CONTRACTS—IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE WITHIN THE CHARTER POWERS OF THE CORPORATION'S DIRECTORS, OR STOCK- HOLDERS.

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| <p>§ 683. <i>Intra vires</i> acts as distinguished from <i>ultra vires</i> acts.</p> <p>684. The discretion of the directors or the majority of the stockholders as to acts <i>intra vires</i> cannot be questioned by single stockholders unless fraud is involved.</p> <p>685-689. Borrowing money, issuing bills, notes, and acceptances, coupon bonds, debentures, and mortgages.</p> <p>690. Loans generally cannot be made by corporations — Statutes — Mortgages — Usury.</p> <p>691. Preferences and assignments by insolvent corporations — Assignments by corporations for the benefit of creditors — Preferences in such assignments. — Preferences by way of mortgages, etc.</p> | <p>§ 692. Preferences and assignments by insolvent corporations to directors, officers, or stockholders — Loans by directors to the corporation — Mortgages by corporations to directors.</p> <p>693. Preferences in favor of corporate debts upon which the directors are liable as indorsers or otherwise.</p> <p>694. Land may be purchased by a domestic corporation.</p> <p>695. Land may be purchased, held, and sold by a foreign as distinguished from an alien corporation, if there is no statute of the state to the contrary.</p> <p>696-700. Foreign corporations — Their right to do business in the various states — Restrictions thereon.</p> |
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§ 683. *Intra vires* acts as distinguished from *ultra vires* acts. — An *ultra vires* act, as already explained, is an act beyond the express and implied powers of the corporation. An *intra vires* act, on the contrary, is one which is within the express or implied powers either of the board of directors or of the majority of the stockholders in meeting assembled. *Intra vires* acts are frequently spoken of as matters concerning the "internal management" of the corporation. Much confusion has arisen concerning these acts, owing to a failure to recognize clearly the fact that an act is *intra vires* of a corporation if it can be legally carried out *either* by the directors or by the majority of the stockholders.<sup>1</sup> Thus, a stockholder frequently brings suit to enjoin or set aside an act which the majority of the stockholders have power to do, but which

<sup>1</sup> An act which may be done either by the board of directors or by vote of the stockholders is *intra vires*. Bradbury v. Waukegan & Washington Min. Co., 113 Ill. App. 600 (1904).



the directors have done without power. It is clear that a dissenting stockholder has no right to carry such a matter into the courts unless the majority are also opposed to the act, since, if the majority approve of the directors' acts, this amounts to a ratification of the same.

In short, there are three classes of corporate acts herein. First, the stockholder may bring suit to remedy an act which is *ultra vires* or beyond the powers of both the majority of the stockholders and of the directors.<sup>1</sup> Second, as to acts within the power of the majority of the stockholders, but beyond the power of the directors, a stockholder may sue to enjoin or set them aside when the directors have performed them, and the majority of the stockholders refuse to confirm their action.<sup>2</sup> As to such acts the stockholder cannot sue if the majority confirm the directors in their performance. Third, as to acts within the powers of the directors and performed by them, or within the powers of the majority of the stockholders and performed by the majority, the stockholders cannot complain that they are *ultra vires*. The second and third classes of acts are *intra vires* of the corporation. They are matters of internal arrangement or management, and cannot be controlled or objected to by a minority stockholder, except as stated above.<sup>3</sup> The question of what *intra vires* acts are to be performed by the directors, and what ones can be exercised only by the majority of the stockholders in meeting assembled, is considered elsewhere.<sup>4</sup>

§ 684. *The discretion of the directors or a majority of the stockholders as to acts intra vires cannot be questioned by single stockholders unless fraud is involved.*<sup>5</sup> — This proposition of law is clearly,

<sup>1</sup> Chapter XL, *supra*, treats of this subject. See also § 740, *infra*.

<sup>2</sup> *Exeter, etc. Ry. v. Buller*, 11 Jur., Part I, 527, 532 (1847), holding also that where such an action has been instituted it will not be defeated by the fact that subsequently the directors obtain control of a majority of the votes. But there must be clear proof that the majority refuse to confirm. Thus, in *Bagshaw v. Eastern Union Ry.*, 7 Hare, 114 (1849); *aff'd*, 19 L. J. (Ch.) 410, the court says that *Foss v. Harbottle*, 2 Hare, 461 (1843), decides "that if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give

validity to the act of which the bill complains." See also *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13 (1875), and § 662, *supra*. A shareholder cannot enjoin an agreement authorized by the directors that their pay be increased, inasmuch as such agreement will be legal if ratified by a majority in interest of the stockholders. *Normandy v. Ind. etc. Co. Ltd.*, 97 L. T. Rep. 872 (1907).

<sup>3</sup> See note 5, below.

<sup>4</sup> See ch. XLIII, *infra*.

<sup>5</sup> Quoted and approved in *McMullen v. Ritchie*, 64 Fed. Rep. 253 (1894). "A stockholder cannot enjoin the execution of a contract *intra vires* unless fraud is shown." *Burden v. Burden*, 159 N. Y. 287, 307 (1899). "Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropri-



firmly, and very properly established beyond any question.<sup>1</sup> Were the rule otherwise there would be no safety or possibility of carrying on

tion of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." *Ellerman v. Chicago Junction, etc. Co.*, 49 N. J. Eq. 217 (1891). Thus, in *Bloxam v. Metropolitan Ry.*, L. R. 3 Ch. App. 337 (1868), the court said: "The matters of internal arrangement which are beyond the province of the court were properly admitted to be such as are within the scope of the company's powers." And in *Camblos v. Philadelphia, etc. R. R.*, 4 Brewst. 563, 591 (1873); s. c., 4 Fed. Cas. 1089, the court said: "So long as those who manage the corporation keep within the limits of its charter, and commit or propose to commit no breach of their trust, he has no right to complain." In *Becher v. Wells, etc. Co.*, 1 Fed. Rep. 276 (1880), it was said: "A court of equity will not interfere with the internal policy of a corporation unless it is manifest that the proposed act is *ultra vires*." In *Bach v. Pacific Mail S. S. Co.*, 12 Abb. Pr. (N. S.) 373 (1872), the court said: "No case can be found where the general management of corporate property has been subject to the restrictions of judicial power, unless, indeed, in the case of a clear violation of express law, or a wide departure from chartered powers." In this case the stockholder objected to the securities in which the corporate funds were being invested. In *Walker v. Mad River, etc. R. R.*, 8 Ohio, 38 (1837), it was said by the court: "When acts requiring judgment, science, and professional skill are confided to the discretion of the officers of a corporation, the exercise of that

discretion will not be lightly disturbed." See also *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71 (1880). In *Ramsey v. Erie Ry.*, 7 Abb. Pr. (N. S.) 156 (1869); s. c., 38 How. Pr. 193, it is said: "When directors are only unwise, or merely extravagant or improvident, or slightly negligent, or merely misjudge in the performance of their duties, the remedy of stockholders is to elect other persons directors in their places." In *Bailey v. Birkenhead, etc. Ry.*, 12 Beav. 433 (1850), where a stockholder sought to restrain a call as being unnecessary, the court refused to entertain the suit, and said that it was not for the court "to take upon itself to determine a question which might well and ought to be determined by the shareholders themselves at general meetings." See also *Edwards v. Shrewsbury, etc. Ry.*, 2 De G. & Sm. 537 (1849); also § 750, *infra*. A minority stockholder cannot have a receiver appointed on the ground that the corporation, the property of which consists of land, is about to sell a large tract of land at a low price, such price being satisfactory to the majority and no fraud being alleged. Not even the statute in Louisiana authorizing a receiver for gross mismanagement is sufficient. *North American, etc. Co. v. Watkins*, 109 Fed. Rep. 101 (1901). Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown. *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901); *Matter of Pierson*, 44 N. Y. App. Div. 215 (1899). A court of equity will not enjoin the directors from expending money unless it is *ultra vires* or fraudulent. *Taylor & Co. v. Southern Pac. Co.*, 122 Fed. Rep. 147 (1903). A mining corpo-

<sup>1</sup> Quoted and approved in *Vogeler v. Punch*, 205 Mo. 558 (1907); *Theis v. Spokane, etc. Co.*, 49 Wash. 477

(1908), and *Smith v. Stone*, 128 Pac. Rep. 612, 619 (Wyo. 1912).



business through corporations. There would be suits instituted by dissatisfied stockholders on slight provocation, and sometimes for the very purpose of embarrassing the transaction of business. A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done.<sup>1</sup> Thus where a company has the charter power to retire its preferred stock this power may be exercised by the board of directors without a vote of the stockholders.<sup>2</sup>

ration may lease its property for rental payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. *Hennessy v. Muhleman*, 40 N. Y. App. Div. 175 (1899). The minority are subject to the will of the majority acting within the powers of the corporation. *Colby v. Eq. Trust Co.*, 124 N. Y. App. Div. 262 (1908); *aff'd*, 192 N. Y. 535.

Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on the corporation. *Berger v. United States Steel Corp.*, 63 N. J. Eq. 809 (1902). See also *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 807 (1903). Where by its charter a corporation has a right to purchase stock in other corporations, the corporation may subscribe for stock in another corporation to be formed to carry on a similar business, and the court will not, at the instance of a stockholder, review the discretion of the directors in making such investment. *Rubino v. Pressed, etc. Co.*, 53 Atl. Rep. 1050 (N. J. 1903). In England it is held that a majority of the shareholders in meeting assembled may control the discretion of the directors, except as restrained by the charter, and hence the court refused to stay a suit instituted by one of the directors in the name of the company where it appeared that a majority of

the shareholders favored such suit. *Marshall's, etc. Co. v. Manning, etc. Co.*, 100 L. T. Rep. 65 (1908). Where, however, an act is in violation of the charter it is not legal. *Salmon v. Quin and Axtens, Ltd.*, 100 L. T. Rep. 161 (1908), *aff'd*, 100 L. T. Rep. 820, the court intimating that the by-laws originally adopted, in accordance with the English statute, really constitute a contract between the shareholders and the company and also between each individual shareholder and every other shareholder. The court approved, however, the decision in *Automatic, etc. Co. v. Cunninghame*, [1906] 2 Ch. 34, holding that "even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be intrusted with the control of the business, and if so intrusted they can be dispossessed from that control only by the statutory majority, which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals."

<sup>1</sup> Quoted and approved in *Theis v. Spokane, etc. Co.*, 49 Wash. 477 (1908).

<sup>2</sup> *Mannington v. Hocking Valley Ry.*, 183 Fed. Rep. 133 (1910). See also §§ 708-712, *infra*.



The same rule prevails as to the majority of the stockholders in meeting assembled. An act *intra vires* and without fraud is an act of internal management, and a minority of the stockholders are powerless to prevent, control, change, or question that act.<sup>1</sup> A statute, however, that the number of directors may be increased by a vote of a majority in interest of the stock does not render illegal a provision in the certificate of incorporation that the directors shall not be increased except upon the unanimous vote, the statute allowing the insertion of special provisions in the certificate of incorporation. The court held that the provision was a limitation instead of an increase of power.<sup>2</sup> A majority of the stockholders may elect themselves directors and control the corporation.<sup>3</sup>

The stockholders have no remedy for the mere inefficiency of a director, except to turn him out at the next election of the corporation. Having once been elected, a director is entitled to retain his position, even though he is grossly inefficient. He cannot be removed from his position,<sup>4</sup> unless the by-laws so provide.<sup>5</sup> But where there are violent internal dissensions in a corporation, and two sets of officers are attempting to act, and the corporate property is endangered, a court of equity will interfere to the extent of preserving the corporate property by a temporary receiver.<sup>6</sup> A court of equity cannot, however, restrain the corporation from proceeding with business and using its funds for that purpose, even though a minority of the stockholders show that sound business discretion and judgment would dictate a different policy.<sup>7</sup> The question of whether a suit by a corporation shall be brought or not is entirely within the discretion of the directors in the absence of fraud.<sup>8</sup> Thus, even

<sup>1</sup> Quoted and approved in *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). See also *Smiley v. New River Co.*, 77 S. E. Rep. 976 (W. Va. 1913).

<sup>2</sup> *Ripin v. Atlantic Mercantile Co.*, 205 N. Y. 442 (1912).

<sup>3</sup> *White v. Snell*, 35 Utah, 434 (1909). See also §§ 708-712, *infra*.

<sup>4</sup> See § 711, *infra*.

<sup>5</sup> See § 711, *infra*.

<sup>6</sup> *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303 (1873); *Featherstone v. Cooke*, L. R. 16 Eq. 298, 303 (1873), the court saying: "The court will not interfere with the internal affairs of joint-stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested.

In such a case the court will interfere, but only for a limited time, and to as small an extent as possible." See also *Lawrence v. Greenwich F. Ins. Co.*, 1 Paige, 587 (1829); and § 746, *infra*.

<sup>7</sup> Quoted and approved in *Theis v. Spokane, etc. Co.*, 49 Wash. 477 (1908); *Fountain Ferry, etc. Co. v. Jewell*, 8 B. Mon. (Ky.) 140 (1848), the court saying: "The question of expediency, of practicability, of extravagance, or of prudent economy, must be left to be decided by the managers and the corporators." A stockholder may object to corporate acts and contracts which are fraudulent or *ultra vires* or *mala in se*. But all other acts he can correct only by the election of new directors. *Leslie v. Lorrillard*, 110 N. Y. 519 (1888).

<sup>8</sup> See § 750, *infra*.



though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue.<sup>1</sup>

§§ 685-689. *Borrowing money, issuing bills, notes, and acceptances, coupon bonds, debentures, and mortgages.* — These subjects are fully considered elsewhere.<sup>2</sup>

§ 690. *Loans by a corporation, and statutes forbidding loans or forbidding the taking of notes or mortgages — Usury.* — A corporation cannot make loans of money unless its regular business ordinarily involves loaning. In most cases the business of a corporation is to invest and use its capital, and not to loan it out. Accordingly, it is well settled that only where the business of the corporation is such as usually involves loaning does the corporation have the right to loan its funds.<sup>3</sup> If not prohibited by statute, a corporation may receive and sell notes or acceptances, if this is naturally connected with its business.<sup>4</sup>

<sup>1</sup> *Anderson v. Midland Ry.*, [1902] 1 Ch. 369 (1901).

<sup>2</sup> See chs. XLVI and XLVII, *infra*.

<sup>3</sup> 1 Daniel, Neg. Inst., § 384. It is legal, however, for a loan and trust company to loan money and take a mortgage as security. *Farmers' L. & T. Co. v. Perry*, 3 Sandf. Ch. 339 (1846); *Farmers' L. & T. Co. v. Clowes*, 3 N. Y. 470 (1850). A plank-road company may loan its funds to a contractor who is constructing the road. *Dictum* in *Madison, etc. Co. v. Watertown, etc. Co.*, 5 Wis. 173 (1856); s. c., 7 Wis. 59. Ordinarily a lumber company has no power to loan money and take a mortgage as security. *Bank of Berwick v. Vinson, etc. Co.*, 124 La. 1000 (1909). A benevolent association may loan its funds. *Western Boatmen's Benev. Assoc. v. Kribben*, 48 Mo. 37 (1871). A national bank may purchase notes as well as discount them. *National Pemberton Bank v. Porter*, 125 Mass. 333 (1878); *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339 (1878). The discounting of a note by a cement corporation contrary to law, done through the president, is presumed to have been his act and not that of the corporation. *Lawrenceville Cement Co. v. Parker*, 10 N. Y. Supp. 831 (1890). The fact that a manufacturing com-

pany extended its business so as to include iron pipe as well as brass, and loaned money, which loans, however, the president was willing to take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. *McNab v. McNab, etc. Co.*, 62 Hun, 18 (1891); *aff'd*, 133 N. Y. 687. A deposit by a bank in a bank renders the latter liable therefor, though the deposit is made to enable the president of the latter to use it. *Eastern Townships Bank v. Vermont Nat. Bank*, 22 Fed. Rep. 186 (1884). A bank may loan money to its cashier with the consent of the board of directors. *Barth v. Koetting*, 99 Wis. 242 (1898). A trading corporation has power to purchase and indorse bills and notes. *Jamieson, etc. v. Heim*, 43 Wash. 153 (1906).

<sup>4</sup> *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601 (1861); *Western Cottage Organ Co. v. Reddish*, 51 Iowa, 55 (1879); *Pratt v. Short*, 79 N. Y. 437 (1880); *Clark v. Titcomb*, 42 Barb. 122 (1864); *Buckley v. Briggs*, 30 Mo. 452 (1860), where it was held that a corporation, though prohibited from dealing in commercial paper, could receive and sell notes given for the sale of its



But unless specially authorized they cannot make a business of discounting,<sup>1</sup> nor engage in a banking business.<sup>2</sup> A manufacturing corporation has no power to loan its money.<sup>3</sup>

A mercantile or manufacturing company may, however, loan its surplus funds temporarily when not needed in the business.<sup>4</sup> The American Sugar Refining Company, a New Jersey corporation, has no power to loan its funds to a person owning a majority of the stock of a competing refining company, taking that stock as collateral security.<sup>5</sup> Then too the laws relative to a foreign corporation doing business in the state may apply.<sup>6</sup> A person who borrows money from a corporation cannot defeat an action for the money by alleging that the corporation had no authority to make the loan. He must pay back the money borrowed.<sup>7</sup>

lands; *McIntire v. Preston*, 10 Ill. 48 (1848). And a note received by a corporation will be presumed to have been taken in the course of business. *Lucas v. Pitney*, 27 N. J. L. 221 (1858); *Hardy v. Merriweather*, 14 Ind. 203 (1860); *Frye v. Tucker*, 24 Ill. 180 (1860); *Potter v. Bank of Ithaca*, 5 Hill, 490, 7 Hill, 530 (1844); *Suydam v. Morris Canal, etc. Co.*, 6 Hill, 217 (1843); *Talman v. Rochester City Bank*, 18 Barb. 123 (1854); *Gee v. Alabama, etc. Co.*, 13 Ala. (N. S.) 579 (1848); *Bates v. Bank of State*, 2 Ala. (N. S.) 451 (1841); *Smith v. Mississippi, etc. R. R.*, 14 Miss. 179 (1846); *Portland Bank v. Storer*, 7 Mass. 433 (1811); *Northampton Bank v. Allen*, 10 Mass. 284 (1813); *Fleckner v. Bank of U. S.*, 8 Wheat. 338 (1823); *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326 (1827); *Payne v. Baldwin*, 11 Miss. 661 (1844); *rev'd, Baldwin v. Payne*, 6 How. 332 (1848); *Akin v. Blanchard*, 32 Barb. 527 (1860). An insurance company cannot purchase a note for purposes of a set-off. Set-off defeated. *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59 (1855).

<sup>1</sup> *New York F. Ins. Co. v. Sturges*, 2 Cow. 664 (1824). In *Mitchell v. Rome R. R.*, 17 Ga. 574 (1855), it was held that where power is given to "make contracts," a note taken by a corporation is *prima facie* evidence of an authorized contract.

<sup>2</sup> *State v. Granville, etc. Soc.*, 11 Ohio, 1 (1841); *State v. Washington Social Lib. Co.*, 11 Ohio, 96 (1841);

*Re Ohio Life, etc. Co.*, 9 Ohio, 291 (1839); *Blair v. Perpetual Ins. Co.*, 10 Mo. 559 (1847); *Sumner v. Marcy*, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384. See also *Central R. R. v. Collins*, 40 Ga. 582 (1869), and *Duncan v. Maryland Sav. Inst.*, 10 Gill. & J. (Md.) 299 (1838).

<sup>3</sup> *Leigh v. American, etc. Co.*, 205 Ill. 147 (1903). Even though the corporation makes loans *ultra vires*, yet an officer who takes part therein cannot complain. *Bixler v. Summerfield*, 210 Ill. 66 (1904).

<sup>4</sup> *Garrison, etc. Co. v. Stanley*, 133 Iowa, 57 (1907). A corporation may loan its surplus funds unless it is prohibited from so doing. *Frese v. Mutual Life, etc. Co.*, 11 Cal. App. 387 (1909). Surplus funds may temporarily be invested in commercial paper. *Western Tel. Co. v. Foley*, 150 Ill. App. 343 (1909). See 61 S. Rep. 850.

<sup>5</sup> *Earle v. American Sugar, etc. Co.*, 74 N. J. Eq. 751 (1908).

<sup>6</sup> A Delaware holding company which makes loans in Pennsylvania to one of its subsidiary companies cannot collect those loans in Pennsylvania if it has not complied with the Pennsylvania statutes relative to foreign corporations doing business in the state. *Re Montello Brick Works*, 163 Fed. Rep. 621 (1908). A foreign coal company may recover a loan in the state of New York, even though it has not complied with the statute. *Commercial, etc. Co. v. Polhemus*, 128 N. Y. App. Div. 247 (1908).

<sup>7</sup> Quoted and approved in *Johnson*



Although a statute or charter forbids a corporation from loaning more than a certain amount of money, and it actually has loaned more than that amount, yet the borrower cannot avoid payment of any part of the loan.<sup>1</sup> Although a statute requires a bank to loan on bond and mortgage, yet it may recover loans made on drafts or notes.<sup>2</sup> Where

*v. Mason Lodge, etc.* 106 Ky. 838, 846 (1899); *Gorrell v. Home Life Ins. Co.*, 63 Fed. Rep. 371 (1894); *Head v. Cleburne, etc. Assoc.*, 25 S. W. Rep. 810 (Tex. 1893); *Steam Nav. Co. v. Weed*, 17 Barb. 378, 382, 384 (1853); *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620 (1863); *Mott v. U. S. Trust Co.*, 19 Barb. 568 (1855); *Poock v. Lafayette Bldg. Assoc.*, 71 Ind. 357 (1880), the court saying: "The law may have its reproaches, but this is not one of them." A person borrowing money from a corporation cannot defend against the loan on the ground that the corporation had no power to make it. *Noah v. German, etc. Assn.*, 31 Ind. App. 504 (1903). A person making a note to a corporation cannot defeat it by the defense that the company had no power to loan money. *Bond v. Terrell, etc. Co.*, 82 Tex. 309 (1891). In Alabama the borrower of the money from the corporation may escape payment. *Alabama Grand Lodge v. Waddill*, 36 Ala. 313 (1860); *Chambers v. Falkner*, 65 Ala. 448 (1880), where Masonic lodges had loaned money. See also dictum in *Beach v. Fulton Bank*, 3 Wend. 573 (1829), where an insurance company made a loan; also the decision in *Life & F. Ins. Co. v. Mechanic F. Ins. Co.*, 7 Wend. 31 (1831), denying the right of an insurance company to recover an unsecured loan where its charter authorized loans on bond and mortgage. See also *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560 (1825), where, however, the loan was expressly prohibited. In *Waddill v. Alabama, etc. R. R.*, 35 Ala. 323 (1859), an unauthorized loan by a railroad was enforced on the ground that the railroad president made the loan without authority from the directors.

<sup>1</sup> *Gold Min. Co. v. National Bank*, 96 U. S. 640 (1877). See also *Silver Lake Bank v. North*, 4 Johns. Ch. 370

(1820); *National Bank v. Matthews*, 98 U. S. 621 (1878); *Bly v. Second Nat. Bank*, 79 Pa. St. 453 (1875); *Allen v. First Nat. Bank*, 23 Ohio St. 97 (1872); *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424 (1869); s. c., 23 Fed. Cas. 68, holding that though the loan may be recovered the franchise of the bank may be forfeited. To same effect, *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416 (1869); s. c., 21 Fed. Cas. 1331; and *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531 (1872); *Elder v. First Nat. Bank*, 12 Kan. 238 (1873), holding that a borrower cannot restrain a national bank from negotiating such securities nor compel their return; *O'Hare v. Second Nat. Bank*, 77 Pa. St. 96 (1874), holding that an accidental excess does not make the loan void. Although the statute forbids loans to directors, yet a loan so made is collectible, and securities pledged by the director are subject to the loan, though they were fraudulently obtained by him from others. *Bowditch v. New England, etc. Ins. Co.*, 141 Mass. 292 (1886). Where the president causes the corporation to loan him money, in direct violation of the statute, he may be sued for the conversion thereof, although his collateral security has been sold and the whole transaction ratified by the directors. *Nellis Co. v. Nellis*, 62 Hun, 63 (1891). A statute giving a bank a lien on its stock for debts due to the bank from the stockholder is not nullified by another statutory provision prohibiting the bank from loaning money on its stock. *Batley v. Eureka Bank*, 62 Kan. 384 (1901).

<sup>2</sup> *Allen v. Freedman's Sav. etc. Co.*, 14 Fla. 418 (1874); *Mott v. U. S. Trust Co.*, 19 Barb. 568 (1855); *Little v. O'Brien*, 9 Mass. 423 (1812); *Mutual Life Ins. Co. v. Wilcox*, 8 Biss. 203 (1878); s. c., 17 Fed. Cas. 1081;



directors loan money in violation of the statute, they are liable personally therefor.<sup>1</sup> Under the New York banking law a director may be criminally liable in voting to loan money in excess of the amount allowed by statute.<sup>2</sup>

A statute which prohibits corporations from discounting notes or bills unless expressly authorized so to do prevents the corporation from collecting a note taken in violation thereof;<sup>3</sup> but this does not

*Davis S. M. Co. v. Best*, 30 Hun, 638 (1883). A loan for two years, instead of one as allowed by statute, is nevertheless enforceable. *Germantown, etc. Ins. Co. v. Dhein*, 43 Wis. 420 (1877). A loan is collectible though for a longer time than allowed, and without the required security, and in excess of the amount allowed by statute. *Bond v. Central Bank*, 2 Ga. 92 (1847). The maker of a promissory note cannot set up a defense that the indorsee of the note had no power to buy it. *Mutual Trust Co. v. Stern*, 83 Atl. Rep. 614 (Pa. 1912).

<sup>1</sup> *Thompson v. Greeley*, 107 Mo. 577 (1891); *Dodd v. Wilkinson*, 42 N. J. Eq. 647 (1887); *Williams v. McDonald*, 42 N. J. Eq. 392 (1886). The treasurer and manager, turning in to the corporation a mortgage not worth double the debt owed by him to the corporation, is liable for any loss. *Williams v. Riley*, 34 N. J. Eq. 398 (1881). The case of *Williams v. McKay*, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers, etc., had made instruments contrary to the by-laws, charter, and statutes. See also § 682.

<sup>2</sup> *People v. Knapp*, 147 N. Y. App. Div. 436 (1911).

<sup>3</sup> *New York, etc. Co. v. Helmer*, 77 N. Y. 64 (1879), applying the New York act against unauthorized banking; *Tracy v. Talmage*, 14 N. Y. 162 (1856); *Talmage v. Pell*, 7 N. Y. 328 (1852); *Weed v. Snow*, 3 MacLean, 265 (1843); s. c., 29 Fed. Cas. 572; *Leavitt v. Palmer*, 3 N. Y. 19 (1849) (a certificate of deposit), and *Hayden v. Davis*, 3 McLean, 276 (1843); s. c., 11 Fed. Cas. 898 (an acceptance);

*Swift v. Beers*, 3 Denio, 70 (1846); *Tylee v. Yates*, 3 Barb. 222 (1848); aff'd; 17 Barb. 404, holding also that an assignment of securities for their payment is also void, and transfers no title to the assignees; *White v. Franklin Bank*, 39 Mass. 181 (1839), holding that, while a time deposit is within the prohibition, the money may be recovered in an action brought before the time has expired. See also *Slark v. Highgate Archway Co.*, 5 Taunt. 792 (1814); *Wigan v. Fowler*, 1 Starkie, 459 (1816); *Broughton v. Manchester, etc. Water-works*, 3 B. & Ald. 1 (1819); *Dockery v. Miller*, 9 Humph. (Tenn.) 731 (1849); *Ohio Life, etc. Co. v. Merchants', Ins. etc. Co.*, 11 Humph. (Tenn.) 1 (1850); *Root v. Wallace*, 4 McLean, 8 (1845); s. c.; 20 Fed. Cas. 1167, holding that an indorsee may recover from the indorser of a note void for this illegality the consideration paid for it; *State v. Urbana, etc. Co.*, 14 Ohio, 6 (1846), holding that receiving a deposit of money is not a violation of a charter restriction upon the exercise of banking powers; *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560 (1825), where a corporation was not allowed to recover upon a note because its charter prohibited it from doing a banking business; *Farmers' L. & T. Co. v. Perry*, 3 Sandf. Ch. 339 (1846), and *Green v. Seymour*, 3 Sandf. Ch. 285 (1846), where the same principle was applied to mortgages issued in violation of statutory prohibition; *Safford v. Wyckoff*, 4 Hill, 442 (1842), holding also that if the form and appearance of the notes indicate that they were intended to be circulated as money, one who takes them, being thereby put upon his inquiry, is not a *bona fide* holder and cannot recover upon them. To same



prevent the corporation from collecting the amount due. It may disregard the note and sue on the loan itself.<sup>1</sup>

effect, *Attorney-General v. Life, etc. Ins. Co.*, 9 Paige, 470 (1842); *Mumford v. American, etc. Co.*, 4 N. Y. 463 (1851), holding that a certificate of deposit is not included in such a prohibition; *Leavitt v. Yates*, 4 Edw. Ch. 134 (1843), holding also that a trust deed given to secure such notes was also void; *Hazleton Coal Co. v. Megargel*, 4 Pa. St. 324 (1846), holding that the statute cannot be avoided by issuing a document which is in effect, though not in form, a note; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Utica Ins. Co. v. Scott*, 19 Johns. 1 (1821); *Montgomery Branch Bank v. Crocheron*, 5 Ala. (N. S.) 250 (1843), holding that the bills of a corporation which is prohibited from issuing them cannot be rendered legal by being issued by a bank under a contract with the corporation; *Sackett's Harbor Bank v. Codd*, 18 N. Y. 240 (1858), holding that a statute prohibiting the circulation of foreign bank-notes does not prevent their sale and delivery for any other purpose. Payment of a debt by a draft which is prohibited by statute is not payment, the draft not having been paid. *Davis v. River Rasin Bank*, 4 McLean, 387 (1848); s. c., 7 Fed. Cas. 111. A charter provision that no director or officer should borrow from the bank does not apply to loans to a firm of which the director is a member. *Fisher v. Murdock*, 13 Hun, 485 (1878). A deposit made with a corporation which is prohibited by statute from doing a banking business is presumed to have been a loan, and in any case is recoverable back in an action for money had and received. *Chapman v. Comstock*, 58 Hun, 325 (1890); aff'd, 134 N. Y. 509.

<sup>1</sup> *Oneida Bank v. Ontario Bank*, 21 N. Y. 490 (1860); *Pratt v. Short*, 79 N. Y. 437 (1880), reviewing New York cases; *Davis S. M. Co. v. Best*, 30 Hun, 638 (1883); *Mills v. Western Bank*, 64 Mass. 22 (1852); *Webb v. Herne Bay Com'rs*, L. R. 5 Q. B. 642 (1870). Compare *Faneuil Hall Bank*

*v. Bank of Brighton*, 82 Mass. 534 (1860), and *Western Bank v. Mills*, 61 Mass. 539 (1851); *Utica Ins. Co. v. Kip*, 8 Cow. 20 (1827); *Utica Ins. Co. v. Cadwell*, 3 Wend. 296 (1829), and *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652 (1830); *Planters' Bank v. Union Bank*, 16 Wall. 483 (1872), holding that, when an illegal contract has been fully executed, the money constituting the price for it may be looked upon as a legal consideration for an express or implied promise. To same effect, *Cook v. Sherman*, 20 Fed. Rep. 167 (1882); *Workingmen's Banking Co. v. Rautenberg*, 103 Ill. 460 (1882), holding that a note given by a director for a loan in excess of the amount limited by charter is void so far as to release a guarantor upon it; *Farmington Sav. Bank v. Fall*, 71 Me. 49 (1880), holding that a prohibition against lending money on the security of names only is merely directory, and a note so secured may be collected. To same effect, *National Pemberton Bank v. Porter*, 125 Mass. 333 (1878); *U. S. Trust Co. v. Brady*, 20 Barb. 119 (1855); *Vanatta v. State Bank*, 9 Ohio St. 27 (1858). *Union, etc. Ins. Co. v. Keyser*, 32 N. H. 313 (1855), where a note given for insurance upon property in one class, when by law it was insurance only in another class, was held valid; *McFarlan v. Triton Ins. Co.*, 4 Denio, 392 (1847), where a bond owned by an insurance company was held to have been taken as an investment in default of proof of consideration; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471 (1875), holding that an accommodation drawer of a bill, who did not at the time know it was discounted by a bank in violation of law, may defend by showing that the bank was not properly organized; *Brown v. Killian*, 11 Ind. 449 (1858), holding that notes in similitude of bank-notes are void, even the issuers not being liable upon them, but any consideration paid for them may be recovered back; *White v. Franklin Bank*, 39 Mass. 181 (1839), holding that money deposited



But where the statute prohibits not only the enforcement of the note, but also the enforcement of any contract, express or implied, growing out of the transaction, then the corporation loses the money loaned.<sup>1</sup> Any corporation, unless expressly prohibited, has power to take a mortgage as security for a debt contracted in the course of its business.<sup>2</sup>

Although a corporation is prohibited by its charter from taking a real-estate mortgage as security for a debt, nevertheless the mortgage, after it has been taken, may be enforced by the corporation. The penalty is that the state may forfeit the corporate charter for misuser.<sup>3</sup>

in a savings bank in violation of a statute may be recovered; *Lester v. Howard Bank*, 33 Md. 558 (1870), where a director who borrowed money from a bank in violation of its charter was held liable for the money; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249 (1839), where the original debt was validly incurred, but a subsequent note by the corporation was illegal; *Pratt v. Eaton*, 79 N. Y. 449 (1880), where notes secured by a mortgage were held void, but the mortgage valid; *People v. Brewster*, 4 Wend. 498 (1830), holding that prohibiting the carrying on of a banking business does not prevent lending money upon notes, if it is not done as a business; *Otis v. Harrison*, 36 Barb. 210 (1862); *Barton v. Port Jackson, etc. Co.*, 17 Barb. 397 (1854).

<sup>1</sup> *New Hope, etc. Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648 (1841).

<sup>2</sup> *State v. Rice*, 65 Ala. 83 (1880); *National Bank v. Insurance Co.*, 41 Ohio St. 1 (1884); *Baird v. Bank of Washington*, 11 Serg. & R. (Pa.) 411 (1824), holding that a power to take mortgages in the course of business confers the power to commute debts really due for land; *Bank of Michigan v. Niles*, 1 Doug. (Mich.) 401 (1844), holding that power to hold lands and take mortgages for business purposes does not confer the right to deal in lands; *National Trust Co. v. Murphy*, 30 N. J. Eq. 408 (1879), holding that a corporation not authorized to take land as original investment may take a mortgage on land in a foreign state as additional security; *Clark v. Farrington*, 11 Wis. 306

(1860). Sections 5135 and 5137 of the United States Revised Statutes do not prevent a national bank from enforcing the collection of a note secured by a mortgage of land by a foreclosure of the mortgage. *National Bank v. Matthews*, 98 U. S. 621 (1878); *Palmer v. Lawrence*, 3 Sandf. Super. 161 (1849); *Lathrop v. Seiotto*, Comm. Bank, 8 Dana (Ky.), 114 (1839); *Mapes v. Scott*, 94 Ill. 379 (1880), holding that national banks may take conveyances of land in payment of preëxisting debts. A national bank may enforce a mortgage securing future indebtedness. *National Bank v. Whitney*, 103 U. S. 99 (1880); *Simons v. First Nat. Bank*, 93 N. Y. 269 (1883). The case of *U. S. Mortgage Co. v. Gross*, 93 Ill. 483 (1879), to the effect that foreign corporations for loaning on mortgages could not take mortgages in Illinois, inasmuch as no domestic corporation could be organized for that purpose, was overruled by *Stevens v. Pratt*, 101 Ill. 206 (1882), and *Commercial, etc. Co. v. Scammon*, 102 Ill. 46 (1882). A foreign corporation may foreclose a mortgage. *American, etc. Ins. Co. v. Owen*, 81 Mass. 491 (1860).

<sup>3</sup> *National Bank v. Whitney*, 103 U. S. 99 (1880), reversing *Crocker v. Whitney*, 71 N. Y. 161 (1877), holding that, where a national bank takes a mortgage to secure future advances, it can be objected to only by the government; *National Bank v. Matthews*, 98 U. S. 621 (1878), reversing *Matthews v. Skinker*, 62 Mo. 329 (1876), holding that a bank holding a deed of trust upon real estate as



The laws concerning usury are enforced against corporations as fully as against individuals,<sup>1</sup> and where their charters forbid them from exacting more than a specified rate of interest they are bound by the restriction.<sup>2</sup> National banks are limited to the same rate of interest as the

security for a note, contrary to the act, may sell the land in order to collect the note; followed in *Winton v. Little*, 94 Pa. St. 64 (1880); *Thorn-ton v. National Exch. Bank*, 71 Mo. 221 (1879), holding that the only penalty for violation of that act is forfeiture of charter, to be invoked only by the United States. A mortgagor of land to a national bank cannot defend against it on the ground that the bank had no power to take the mortgage. *Camp v. Land*, 122 Cal. 167 (1898). To same effect, *Graham v. National Bank*, 32 N. J. Eq. 804 (1880); *Oldham v. Bank*, 85 N. C. 240 (1881), and *Grand Gulf Bank v. Archer*, 16 Miss. 151 (1847). For a contrary decision, see *Green v. Seymour*, 3 Sandf. Ch. 285 (1846); *Bard v. Chamberlain*, 3 Sandf. Ch. 31 (1845).

<sup>1</sup> *McLean v. Lafayette Bank*, 3 McLean, 587 (1846); s. c., 16 Fed. Cas. 264; *New York F. Ins. Co. v. Sturges*, 2 Cow. 664 (1824); *Grand Gulf Bank v. Archer*, 16 Miss. 151 (1847); *Perkins v. Watson*, 2 Baxt. (Tenn.) 173 (1872), holding that a bank may discount on the same terms as an individual, and should suffer the same forfeit for usury; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308 (1874), holding that general usury laws apply to corporations. Charter privileges to a building association to take larger interest than is allowed to others under the usury laws are unconstitutional in Kentucky. *Gordon v. Winchester, etc. Assoc.*, 12 Bush (Ky.), 110 (1876). A note of a third party given by a debtor to a bank in good faith for an existing debt is not usurious; *Dunkle v. Renick*, 6 Ohio St. 527 (1856); *Morse, Banking* (3d ed.), § 72, etc. A corporation limited to "legal interest" may take legal interest as allowed by the laws of the state where the money is loaned. It is not confined to the rate prescribed by the laws of the state

in which it is incorporated. *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313 (1891). In some states the excess of interest is forfeited; in other states the whole interest is forfeited; and in still other states the whole debt is forfeited. See *Stimson, Am. Stat. Law*, § 4832. As to usury as a defense to a suit against a corporation, see § 766*b*, *infra*.

<sup>2</sup> *Bank of U. S. v. Owens*, 2 Pet. 527 (1829), where notes given for more than the rate fixed by the charter of a bank were declared void; *Planters' Bank v. Sharp*, 12 Miss. 75 (1844). But here it was held that taking a greater amount of interest than that allowed by the charter rendered the corporation liable under the general usury laws, and that the contract was not void. On this point see *Rock River Bank v. Sherwood*, 10 Wis. 174 (1860); *Commercial Bank v. Nolan*, 8 Miss. 508 (1843); *Grand Gulf Bank v. Archer*, 16 Miss. 151 (1847); *Bank of Chillicothe v. Swayne*, 8 Ohio, 257 (1838), where a contract for more than the specified rate was held void. To same effect, *Creed v. Commercial Bank*, 11 Ohio, 489 (1842); *Spalding v. Bank of Muskingum*, 12 Ohio, 544 (1841), holding also that taking a commission is only a method of avoiding the statute, and *Miami Exporting Co. v. Clark*, 13 Ohio, 1 (1844), where the same ruling was made in regard to charging for exchange; *Morse, Banking* (3d ed.), § 52. A national bank cannot take usurious interest under the cover of a "commission," the latter to be paid in case the borrower does not keep a balance in the bank of a specified amount. Although a corporation is forbidden by statute to set up usury, yet a national bank cannot collect usurious interest from a railroad corporation borrowing money of the bank. *Union Nat. Bank v. Louisville, etc. Ry.*, 145 Ill. 208 (1893).



banks of the state wherein they are located are allowed to take, and to seven per cent. if there is no restriction in that state.<sup>1</sup> For any infraction of this statute the bank forfeits the interest, or, if already paid, is liable for twice such interest, but is not subject to the state statutes relative to usury.<sup>2</sup>

§ 691. *Preferences and assignments by insolvent corporations — Assignments by corporations for the benefit of creditors — Preferences in such assignments — Preferences by way of mortgages, etc.* — Corporations, unless restricted by their charters, or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may.

In making the assignment the corporation may make preferences to one or more creditors over others, or to one class of creditors over other classes.<sup>3</sup>

<sup>1</sup> U. S. Rev. Stats., § 5197.

<sup>2</sup> U. S. Rev. Stats., § 5198; *Barnet v. National Bank*, 98 U. S. 555 (1878).

<sup>3</sup> *Federal Courts*: That an assignment for the benefit of creditors may be made, see *Graham v. Railroad Co.*, 102 U. S. 148 (1880). Compare on this subject the *dictum* in *Consolidated, etc. Co. v. Kansas City, etc. Co.*, 45 Fed. Rep. 7 (1891). That preferences may be given, see *Smith, etc. Co. v. McGroarty*, 136 U. S. 237 (1890); *Allis v. Jones*, 45 Fed. Rep. 148 (1891); *Atlanta, etc. R. R. v. Western Ry.*, 50 Fed. Rep. 790 (1892); *Consolidated, etc. Co. v. Kansas City, etc. Co.*, 45 Fed. Rep. 7 (1891). *Gould v. Little Rock, etc. Ry.*, 52 Fed. Rep. 680 (1892). A mortgage given by the corporation to indorsers of its notes at the time of the indorsements is legal. *Re Farmers' Supply Co.*, 170 Fed. Rep. 502 (1909). Where the directors of a dissolved corporation prefer one corporate creditor over another, they are personally liable to other corporate creditors. The liability may be enforced by a court of equity. *American Ice Co. v. Pocono, etc. Co.*, 165 Fed. Rep. 714 (1908); s. c., 183 Fed. Rep. 197. An agreement of a corporation to give a mortgage is legal, even though at the time of the actual execution of the mortgage the corporation was insolvent. *Gay v. Hudson River, etc. Co.*, 190 Fed. Rep. 773 (1911); s. c., 190 Fed. Rep. 812 and 191 Fed. Rep. 828.

A mortgage of an insolvent corporation given to a favored creditor without a new consideration is void if attacked within four months under the bankruptcy act. *Morgan v. First Nat. Bank*, 145 Fed. Rep. 466 (1906). Where by resolution of the stockholders all the property of an embarrassed corporation is transferred to trustees to sell and pay the debts and reconvey the remainder to the corporation, and the trustees proceed to do so, the transaction is legal, even though the stockholders' meeting is not held at its principal office, and proxies were irregular and unauthorized, and the directors took no action, and the conveyances were irregular. *Kessler & Co. v. Ensley Co.*, 141 Fed. Rep. 130 (1905); *aff'd*, 148 Fed. Rep. 1019. A solvent corporation may give preferences, and even if its assets are not equal to its liabilities, yet if the officers have reason to think that the corporation will continue, a preference may be legal. *Wyman v. Bowman*, 127 Fed. Rep. 257 (1904). Even though a creditor of a corporation arranges with it so that in case of its insolvency he shall obtain a preference, and even though such arrangement is void, yet his claim will not be postponed to other claims, but all claims will share ratably as though the agreement had never been made. *United States Rubber Co. v. American, etc. Co.*, 181 U. S. 434 (1901), *rev'g* 96 Fed. Rep. 891. An insolvent cor-



There have been a few decisions to the contrary. There has also been considerable discussion in legal periodicals, decisions, and else-

poration may execute a mortgage to secure an existing debt and further advances. *Coler v. Allen*, 114 Fed. Rep. 609 (1902). When a foreclosure sale is subject to chattel mortgages and the sale is confirmed, the purchaser cannot attack such chattel mortgages on the ground that the mortgagor was insolvent at the time. *Richards v. Halliday*, 112 Fed. Rep. 86 (1901), holding also that an insolvent New Jersey corporation may give a chattel mortgage.

Where a corporation makes an assignment for the benefit of its creditors it commits an act of bankruptcy. *Clark v. American, etc. Co.*, 101 Fed. Rep. 962 (1900). Even though the bankruptcy court may have jurisdiction over an insolvent corporation that is being wound up in a state court, yet the bankruptcy court may refuse to take jurisdiction if it is clearly shown that the creditors will be benefited most by the state proceeding. *In re Harper & Bros.*, 100 Fed. Rep. 266 (1900). The bankruptcy act does not apply to a water-works company, a quasi-public corporation. *In re New York, etc. Co.*, 98 Fed. Rep. 711 (1900). Even though a Connecticut corporation which owns a railroad in Kentucky is being wound up, in accordance with the statutes of Connecticut, and even though the company has assigned to the statutory receiver in Connecticut all its property, yet such an assignment is not an assignment for the benefit of creditors, and hence a creditor of the railroad may attach in Kentucky assets in that state. *Huntington v. Chesapeake, etc. Ry.*, 98 Fed. Rep. 459 (1899). As to what constitutes an act of bankruptcy on the part of a corporation, see *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489 (1899). A board of directors has power to make an assignment for the benefit of creditors. *In re Bates Machine Co.*, 91 Fed. Rep. 625 (1899). Preferences are legal. *National Bank of Commerce v. Allen*, 90 Fed. Rep. 545 (1898). An insolvent corporation

may give a chattel mortgage to secure a part of its debts. Such a mortgage is legal, notwithstanding a statute against assignments with preferences. *Brown v. Grand Rapids, etc. Co.*, 58 Fed. Rep. 286 (1893), a case arising in Michigan. A creditor who becomes such after a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful preference. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). A statutory prohibition against preferences by an insolvent corporation does not prevent the giving of collateral for a debt when contracted. *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234 (1890). A corporate creditor may take a mortgage on the corporate property, although he knows that the corporation is insolvent. *Doe v. Northwestern, etc. Co.*, 78 Fed. Rep. 62 (1896). Judgment notes for past and future advances are illegal where the board of directors is at once turned over to the dummies of the holders of the judgment notes, and the company continues to do business as though said judgment notes had not been given, the intent being to insure a preference not only at once, but in the future. Such preferences as to the future must be evidenced by a mortgage or some other instrument upon the public records. *American, etc. Co. v. Fargo*, 77 Fed. Rep. 671 (1896).

A statute prohibiting preferences by any insolvent debtor during ninety days prior to an assignment does not apply to a mortgage given to take the place of a prior mortgage, and of obtaining a larger loan, the creditor having no reasonable cause to suppose the debtor was insolvent. *Moore v. American L. & T. Co.*, 80 Fed. Rep. 49 (1896). A remittance to a correspondent by a national bank is legal, although the bank is insolvent at the time. *Hayden v. Chemical Nat. Bank*, 80 Fed. Rep. 587 (1897). Where the controlling directors of two corporations are the same persons, and one company becomes liable



where to the effect that at common law an insolvent corporation could not prefer one creditor as against another. The almost unanimous con-

on paper for the accommodation of the other, and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. *Hutchinson v. Sutton Mfg. Co.*, 57 Fed. Rep. 998 (1893), a case arising in Indiana. An attaching creditor cannot attack a corporate conveyance which operates as a preference, the corporation itself being insolvent, inasmuch as the reason against preferences by an insolvent corporation applies as much to attaching creditors as to parties taking by conveyance. *Walker v. Miller*, 59 Fed. Rep. 869 (1894). A statutory assignment by a Minnesota corporation to another Minnesota corporation does not prevent a subsequent attachment in Massachusetts by a citizen of New York who is a creditor of the insolvent Minnesota corporation to reach assets of the latter in Massachusetts, even though the New York creditor had notice of the assignment, but had not proven his claim nor filed a release therein. *Security T. Co. v. Dodd, Mead & Co.*, 173 U. S. 624 (1899). In this case the court stated that common-law assignments were different and would be respected, except so far as they conflicted with the rights of local creditors or with the laws and policy of a state.

Section 5242 of the Revised Statutes of the United States prohibits a national bank from transferring any notes, bonds, bills of exchange, or other evidences of debt or mortgages or judgments or deposits either after an act of insolvency or in contemplation thereof with a view to a preference. The following decisions are on this statute: *National Security Bank v. Butler*, 129 U. S. 223 (1889), aff'g 22 Fed. Rep. 697, where a bank holding a certificate of deposit of an insolvent bank took assets of the latter on the day of its failure and gave a certificate of deposit therefor, and then sought to offset the one against

the other. The court held that it was immaterial that the creditor of the insolvent bank was not aware of the insolvency. *Roberts v. Hill*, 24 Fed. Rep. 571 (1885), overruling 23 Fed. Rep. 311, where a bank transferred to one of its depositors a note which the bank held, the transfer being made when the bank was insolvent. Although the bank kept open for about three months thereafter, and even though the note was given to the depositor as collateral security, and was the only way of preventing him from drawing out his money, the court held that the act was in contemplation of insolvency, inasmuch as the officers could reasonably see that the bank would presently be unable to meet its obligation, and would be obliged to suspend operations. *Case v. Citizens' Bank*, 2 Woods, 23 (1873); s. c., 5 Fed. Cas. 251, in which an insolvent bank transferred various bills and notes to another bank, to which the former bank had, while solvent, transferred bills of exchange which were not thereafter honored. The court held the act to be illegal. *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234 (1890), wherein it was held that an insolvent bank might transfer assets to secure a loan made contemporaneously with such transfer. *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301 (1875); s. c., 13 Fed. Cas. 100, where the phrase "act of insolvency" was held to mean any act which would be an act of insolvency by an individual banker. See also *National Bank v. Colby*, 21 Wall. 609 (1874). In *Casey v. Société de Crédit Mobilier*, 2 Woods, 77 (1874); s. c., 5 Fed. Cas. 262, it was held that the preference intended by the act is such as is given to secure or pay a preëxisting debt, and does not prevent the borrowing of money upon security. This case was reversed in 96 U. S. 467. *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14 (1867), holding that the act relates to legal as well as voluntary transfers of property by banks. See also Na-



clusion, however, is that preferences may be given by an insolvent corporation the same as by an insolvent individual. And yet it must be

tional, etc. *Bank v. Mechanics*, etc. Bank, 89 N. Y. 467 (1882); *Robinson v. Newberne Nat. Bank*, 81 N. Y. 385 (1880), holding that the act applies only to such banks as are insolvent or are about to become so. A state statute giving savings banks a preference in payment from the assets of an insolvent bank does not apply to national banks which become insolvent. *Davis v. Elmira Sav. Bank*, 161 U. S. 275 (1896), rev'g *Elmira Sav. Bank v. Davis*, 142 N. Y. 590, and 73 Hun, 357. Remittances by an insolvent national bank to its correspondent bank are legal where the former bank has not actually stopped business and the transactions were in good faith. *Hayden v. Chemical Nat. Bank*, 84 Fed. Rep. 874 (1898).

*Alabama*: That an assignment may be made, see *Chamberlain v. Bromberg*, 83 Ala. 576 (1888); *Pope v. Brandon*, 3 Ala. (O. S.) 401 (1830), holding also that it was not necessary that the creditors should sign the assignment; nor was the deed void because the trustee was the president of the assigning bank, who in that capacity executed the deed as grantor; *Allen v. Montgomery R. R.*, 11 Ala. 437, 451 (1847). The president cannot make an assignment by the company for the benefit of creditors. A ratification by the directors is not good as against an attachment in the meantime. *Norton v. Alabama Nat. Bank*, 102 Ala. 420 (1894). A bill to compel an assignee for the benefit of creditors of an insolvent corporation to account, and to hold stockholders liable on stock issued for property, and to reach corporate assets in the hands of third parties, is multifarious. The theory that the capital stock is a trust fund is unfounded. *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205 (1895).

A preference, however, is not allowed in this state. Yet even though under the decisions of Alabama an insolvent corporation cannot give a preference, nevertheless so long as the corporation is a going concern it

may pay a party who is not aware of the insolvency. *Mary Lee, etc. Ry. v. Knox*, 110 Ala. 632 (1895). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. *Age-Herald Co. v. Potter*, 109 Ala. 675 (1895). A mortgage deed of trust to secure bonds executed by an insolvent corporation is presumed to be a conveyance of corporate property to delay and defraud creditors; but a bill attacking such a mortgage must allege that parties receiving bonds to secure their debts did not advance money at the time of receiving bonds, but were antecedent creditors. *Coal City, etc. v. Hazard Powder Co.*, 108 Ala. 218 (1896). Even though a corporation has allowed judgment to be taken against it, yet a general creditor cannot have a receiver appointed on the ground that such judgment constitutes an illegal preference. *Builders', etc. Co. v. Lucas*, 119 Ala. 202 (1898).

*Arkansas*: An insolvent Missouri corporation may prefer a creditor, but the preference is not good as to property in Arkansas, the Arkansas statutes prohibiting such preference. *Smead v. Chandler*, 71 Ark. 505 (1903). Preferences were formerly upheld in this state. *Ringo v. Bisco*, 13 Ark. 563 (1853); *Ex parte Conway*, 4 Ark. 302, 352 (1842). The statutes of Arkansas prohibit preferences among creditors of insolvent corporations. *Sand & H. Digest*, §§ 1425, 1427.

*California*: At common law a preference is legal. *Merced Bank v. Ivett*, 127 Cal. 134 (1899).

*Canada*: The directors may make an assignment of the corporate assets for the benefit of creditors. *Whiting v. Hovey*, 13 Ont. App. Cas. 7 (1786).

*Colorado*: In Colorado assignments



conceded that great abuses have arisen therefrom. The directors and stockholders of a corporation are numerous, and each generally

by corporations for the benefit of creditors are regulated by statute. See *L. 1897, ch. 26*. An insolvent corporation may give preferences. *Curtis, etc. Co. v. Smelter Nat. Bank*, 43 Colo. 391 (1908). *Beaman v. Stewart*, 19 Colo. App. 226 (1903). An insolvent corporation may give a preference and convey to one creditor all its property. *John, etc. Co. v. Sweetzer*, 10 Colo. App. 421 (1897). 131 Pac. Rep. 269.

*Connecticut*: Preferences are upheld. *Savings Bank v. Bates*, 8 Conn. 505 (1831); *Smith v. Skeary*, 47 Conn. 47 (1879). The following case bears upon this principle of law, but does not conflict with it: *Catlin v. Eagle Bank*, 6 Conn. 233 (1826). A deed in trust by a corporation of all its property, made with consent of nearly all its creditors, to trustees to continue the business, is void as to non-consenting creditors. *Waterman v. Sprague Mfg. Co.*, 55 Conn. 554 (1888); *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282 (1881). Under the Connecticut statutes an insolvent corporation is placed in a receiver's hands for the benefit of all creditors, and a person holding security must stand on his security or else come in only for the excess of his claim above the value of the security. *Re Waddell-Entz Co.*, 67 Conn. 324 (1896). Where a mortgagee at the request of the mortgagor corporation withholds the mortgage from the record to deceive the public until the mortgagor becomes insolvent, the mortgage may be set aside for fraud. *Curtis v. Lewis*, 74 Conn. 367 (1902).

*Delaware*: The Delaware statute prohibiting a preferential assignment by an insolvent corporation was construed in *Brown v. Wilmington, etc. Co.*, 74 Atl. Rep. 1105 (Del. 1910).

*Georgia*: An assignment for the benefit of creditors is legal. *McCallie v. Walton*, 37 Ga. 611 (1868). And preferences may be given. The following case bears upon this principle of law, but does not conflict with it: *Hightower v. Mustian*, 8 Ga. 506 (1850).

*Illinois*: Assignments by insolvent corporations with preferences are legal. *Blair v. Illinois Steel Co.*, 159 Ill. 350 (1896), quoting and approving the text above; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624 (1895); *Chicago, etc. Co. v. Smith*, 158 Ill. 417 (1895). The preference may be by way of mortgage. *Reed v. Bradley*, 17 Ill. 321 (1856). A preference by an insolvent corporation is legal. *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897). It is legal in Illinois for an insolvent corporation to give judgment notes, even though judgment is immediately entered thereon and all its assets sold out, the creditor not being a director or stockholder. *Peterson v. Brabrook, etc. Co.*, 150 Ill. 290 (1894). Although a New York insolvent corporation is prohibited by statute from preferring a creditor, yet where it turns over in Ohio property to a creditor, the Illinois courts will sustain the preference in accordance with Illinois decisions. *Warren v. First Nat. Bank*, 149 Ill. 9 (1893). A corporation that is unable to pay its debts as they become due in the usual course of business is insolvent. *Atwater v. American, etc. Bank*, 152 Ill. 605 (1894).

*Indiana*: The assignment may be made by a meeting of the board of directors, as in any other corporate business. *De Camp v. Alward*, 52 Ind. 468 (1876). Preferences are legal. *First Nat. Bank v. Dovetail, etc. Co.*, 143 Ind. 550 (1895); *Smith v. Wells, etc. Co.*, 148 Ind. 333 (1897). A mortgage given by an insolvent Ohio corporation, to certain of its creditors residing in Ohio is valid in Indiana, such mortgage being upon real estate in Indiana, even though the Ohio courts have declared such a mortgage to be invalid. *Nathan v. Lee*, 152 Ind. 232 (1899). A mortgage securing bonds is not fraudulent by reason of the fact that it was agreed that it should not be recorded in order that the credit of the company might not be impaired. *Am. Trust & S. Bank, etc. v. McGettigan*, 152 Ind. 582 (1899).



wishes some particular creditor to be preferred. Moreover, an insolvent corporation never hopes to resume business again, and is more

*Iowa:* Preferences are legal. *Rolins v. Shaver, etc. Co.*, 80 Iowa, 380 (1890). The following case bears upon this principle of law, but does not conflict with it: *Buell v. Buckingham*, 16 Iowa, 284 (1864). A director and stockholder who acquiesces in the giving of a mortgage to a certain creditor cannot afterwards complain of the same. *Gillette v. Meredith*, 103 Iowa, 155 (1897). An insolvent corporation may prefer one of its creditors. *First Nat. Bank v. Garretson*, 107 Iowa, 196 (1899). An insolvent individual who owes a bank may convey land to the bank for the benefit of its depositors, and the doctrine that individual assets must be applied to individual debts before being applied to partnership debts does not apply, even though he owns one half of the stock of the bank. *Steinke v. Yetzer*, 108 Iowa, 512 (1899). The validity of a mortgage given by an insolvent Ohio corporation upon land owned by it in Iowa is determined by the laws of Iowa. Such a mortgage given two months before a general assignment by the corporation is valid, even though the corporation was insolvent during the whole time, the mortgagee not knowing thereof. *Manton v. Seiberling*, 107 Iowa, 534 (1899).

*Kansas:* An insolvent corporation may give preferences. *Grand, etc. Co. v. Rude, etc. Co.*, 60 Kan. 145 (1899).

*Kentucky:* Payment by a corporation to a bank not with intent to prefer, but in good faith to save the business, is not illegal. *Fairbanks, etc. Co. v. Madisonville Sav. Bank*, 141 Ky. 374 (1910). A receiver may set aside preferences in violation of the Kentucky statute. *Industrial, etc. v. Taylor*, 118 Ky. 851 (1904). A creditor of an insolvent corporation may, by attachment, obtain a preference over other creditors, and if an insolvent corporation makes a fraudulent assignment for the benefit of creditors, any creditor may levy such an attachment. A secret unrecorded mortgage, held until the company becomes

insolvent, is fraudulent as to other creditors. *Louisville, etc. Co. v. Etheridge, etc. Co.*, 43 S. W. Rep. 169 (Ky. 1897).

*Louisiana:* The Louisiana statute allowing insolvent individuals to apply to the court and obtain an extension of time on their debts does not apply to corporations. *Isabella Lumber Co. v. Creditors*, 48 La. Ann. 269 (1896).

*Maine:* An insolvent corporation in Maine may be declared an insolvent debtor under the statute, but cannot obtain a discharge in insolvency. A creditor may obtain a judgment at law and levy on property which the insolvent illegally transferred away. *Miller v. Waldoborough Packing Co.*, 88 Me. 605 (1896). Although an Illinois corporation has passed through insolvency proceedings in Maine, yet a non-resident creditor who was not a party to such proceedings may thereafter sue such corporation in Maine. *Hammond, etc. Co. v. Best*, 91 Me. 431 (1898).

*Maryland:* Assignments are legal. *State v. Bank of Maryland*, 6 Gill & J. 205, 219 (1834). A vendor of goods to an insolvent corporation may rescind and replevy the goods if the corporate officers at the time had no reasonable expectation of making payment when the bill becomes due. *Edelhoff v. Horner, etc. Co.*, 86 Md. 595 (1898). An assignment for the benefit of creditors, executed by the president and secretary without authority from the board of directors, may be valid if not promptly repudiated by the board of directors. *Miller v. Matthews*, 87 Md. 464 (1898).

*Massachusetts:* Where a corporation makes an assignment for the benefit of creditors, the assignee is entitled to all its books, including minute books. *Lothrop, etc. Co. v. Williams*, 191 Mass. 361 (1906). Assignments are legal. *Sargent v. Webster*, 54 Mass. 497 (1847), holding also that the assignment may be to a stockholder to pay a debt of the corporation to him, and the remainder to go to the corporate treasurer for the



ruthless and unconscionable in its preferences, because no moral obligation to do equity rests on any one director or stockholder. In all this

benefit of other creditors. As to the Massachusetts statute providing for insolvency proceedings against a corporation which makes an assignment for the benefit of creditors, see *Steel, etc. Co. v. Manchester Sav. Bank*, 163 Mass. 252 (1895). As to the evidence necessary to prove that an insolvent corporation had preferred a creditor in paying a debt in violation of the statute in Massachusetts, see *Clarke v. Second Nat. Bank*, 177 Mass. 257 (1901).

*Michigan*: Before a corporate creditor can complain of the method in which the corporation has disposed of its property he must obtain a judgment. *McKee v. City Garbage Co.*, 140 Mich. 497 (1905). An insolvent corporation may make an assignment for the benefit of creditors, and the board of directors may make it without the assent of the stockholders. *Boynton v. Roe*, 114 Mich. 401 (1897). The Michigan statute against preferences in assignments does not prevent the giving of a mortgage to a trustee to secure certain debts due from the insolvent corporation mortgagor. *Austin v. First Nat. Bank*, 100 Mich. 613 (1894). At common law in Michigan an insolvent corporation might assign. *Bank of Montreal v. Potts, etc. Co.*, 90 Mich. 345 (1892); *Kendall v. Bishop*, 76 Mich. 634 (1889). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re George, etc. Co.*, 86 Mich. 149 (1891); *Covert v. Rogers*, 38 Mich. 363 (1878), holding that the assignee may be one of the stockholders. In this case he was a former treasurer, who had resigned. Stockholders cannot prevent directors making an assignment for the benefit of corporate creditors, though their term of office expires in four days, the corporation being insolvent. A mortgage by an insolvent corporation given in pursuance of a prior agreement is legal where the mortgagee did not know the corporation was insolvent.

*Franklin, etc. Co. v. Amazon, etc. Co.*, 128 Mich. 198 (1901).

*Minnesota*: While a judgment creditor of a corporation may maintain a bill to redeem land which was deeded by it, but which was in fact a mortgage, the proof must be clear that the deed was intended as a mortgage. *Minneapolis, etc. Co. v. Jones*, 95 Minn. 127 (1905). The board of directors of an insolvent corporation may order an assignment for the benefit of creditors. *Tripp v. Northwestern Nat. Bank*, 41 Minn. 400 (1889), 45 Minn. 383 (1891). In Minnesota, by statute, an insolvent corporation cannot give preferences. *Yanish v. Pioneer Fuel Co.*, 64 Minn. 175 (1896).

*Mississippi*: Preferences are legal. *Sells v. Rosedale, etc. Co.*, 72 Miss. 590 (1895); *Arthur v. Commercial, etc. Bank*, 17 Miss. 394 (1848); *Palmer v. George W. Hutchison Grocery Co.*, 11 S. Rep. 789 (Miss. 1892). The following case bears upon this principle of law, but does not conflict with it: *Robins v. Embry*, 1 Sm. & M. Ch. (Miss.) 207, 258 (1843). An assignment by a railroad assigns its income only. *Arthur v. Commercial, etc. Bank*, 17 Miss. 394, 430 (1848). See also *State v. Commercial Bank*, 21 Miss. 569 (1850). An insolvent corporation may give preferences. *Fargason v. Oxford, etc. Co.*, 78 Miss. 65 (1900).

*Missouri*: Assignments are legal. *Hutchinson v. Green*, 91 Mo. 367 (1886); *Shockley v. Fisher*, 75 Mo. 498 (1882), construing a statute authorizing an assignment "by a debtor to any person in trust for his creditors" to include corporations, and holding that the right exists at common law, citing 2 Kent, Com. 398, and note. Preferences may be given. *Meyer v. American, etc. Co.*, 130 Mo. 188 (1895); *Slavens v. Cook Drug Co.*, 128 Mo. 341 (1895). A creditor of an insolvent corporation may obtain a preference by an attachment, and it is legal, even though a director of the corporation advised him to attach.



an insolvent corporation differs from an insolvent individual. As a result, the abuses from allowing an insolvent corporation to make pref-

La Grange, etc. Co. v. National Bank, 122 Mo. 154 (1894), the court refusing to follow the Tennessee rule. An embarrassed corporation may take title to land in a director's name and have him give a mortgage thereon to raise money for the corporation. Donham v. Hahn, 127 Mo. 439 (1895). An insolvent corporation may turn over to a bank book-accounts, merchandise, and fixtures as security for a debt, even though the corporation thereafter, on the same day, assigns for the benefit of creditors. Alberger v. National Bank, 123 Mo. 313 (1894), calling attention also to the fact that contrary decisions in Ohio and Texas were based on statutes. A creditor who has not yet reduced his claim to a judgment cannot file a bill to set aside an alleged illegal transfer of property. Atlas Nat. Bank v. Moran, etc. Co., 138 Mo. 59 (1897). An assignment for the benefit of creditors, authorized by the directors acting separately and not as a board, is invalid. Calumet Paper Co. v. Haskell, etc. Co., 144 Mo. 331 (1897). A trustee for the benefit of the creditors of an insolvent corporation is bound by a judgment against it. Central T. Co. v. D'Arcy, 238 Mo. 676 (1911).

*Montana:* An insolvent corporation may give a preference by a mortgage. Teitig v. Boesman, 12 Mont. 404 (1892). Preferences are legal. Ames, etc. Co. v. Heslet, 19 Mont. 188 (1897). After foreclosure of a mortgage other creditors cannot attack a mortgage on the ground that the mortgagee had not complied with the state statutes. Miller v. Gates, 22 Mont. 305 (1899).

*Nebraska:* Even though a preference is set aside a creditor receiving the preference is entitled to share *pro rata* with the other creditors. National, etc. Co. v. Columbia Nat. Bank, 68 Neb. 47 (1903). An insolvent corporation may, in the absence of actual fraud, prefer one or more of the creditors, to the exclusion of others. Wallachs v. Robinson, etc. Co., 50 Neb. 469 (1897); Shaw v. Rob-

inson, etc. Co., 50 Neb. 403 (1897). A mortgage given by way of preference by an insolvent corporation is valid unless it is given to a director or officer. M. A. Seeds, etc. Co. v. Heyn, etc. Co., 57 Neb. 214 (1898).

*New Hampshire:* Assignments may be made. Flint v. Clinton Co., 12 N. H. 430, 435 (1841). As to preferences, the following case bears upon this principle of law: Richards v. New Hampshire Ins. Co., 43 N. H. 263 (1861). As to proceedings against a corporation under the insolvent debtor's act, see Kennett v. Woodworth-M. Co., 68 N. H. 432 (1896).

*New Jersey:* Section 64 of the Laws of 1896 forbids any assignment whatsoever of any of the assets of an insolvent corporation. Where the directors of an insolvent corporation who have paid dividends illegally, assign all its assets to an assignee for the benefit of its creditors, the assignee being one of their number, the court may appoint a receiver and remove the assignee, under the New Jersey statute. Gilroy v. Somerville, etc. Mills, 67 N. J. Eq. 479 (1904). A trust company holding a deposit of an insolvent corporation cannot offset against it its notes to the trust company not yet due. McManus-Kelly Co. v. Pope Mfg. Co., 70 Atl. Rep. 297 (N. J. 1908). A *bona fide* mortgagee is protected, even though the corporation was insolvent when the mortgage was made, and a mortgage by an insolvent corporation is prohibited by statute. A mortgage to raise money to keep the concern going is not in contemplation of insolvency. Regina, etc. Co. v. F. G. Otto & Sons, 65 N. J. Eq. 582 (1903). As to the invalidity of a mortgage by an insolvent corporation to one of its creditors for a past due debt, see Miller v. Gourley, 65 N. J. Eq. 237 (1903). A judgment creditor may by execution obtain priority in New Jersey up to the time of the appointment of a receiver. Squire v. Princeton, etc. Co., 72 N. J. Eq. 883 (1907). A corporation is insolvent when it is seriously embar-



erences are so great that the various states are enacting prohibitory statutes on this subject. Although a state cannot give a preference

passed for funds and has no available assets to pay present debts, even though it is still doing some business. *Catlin v. Vichachi, etc. Co.*, 73 N. J. Eq. 286 (1907). The statute of 1895, prohibiting insolvent corporations from making assignments, did not apply to companies organized before the passage of the statute. Such a statute did not invalidate an assignment for the benefit of creditors given by an insolvent New Jersey corporation in Pennsylvania. *Borton v. Brines-Chase Co.*, 175 Pa. St. 209 (1896). A mortgage given by an insolvent corporation to a creditor for a pre-existing debt is invalid under the New Jersey statutes. *Frost v. Barnert*, 56 N. J. Eq. 290 (1897). The proper way to attack a preference given by an insolvent corporation is in the distribution proceedings in a suit to have the company declared insolvent, and a receiver appointed, and its assets distributed. A warrant of attorney to confess judgment given in September and used in February is evidence of an intent to give a preference if existing notes are taken up and new notes given at the time of entry of judgment. *Consolidated Coal Co. v. National St. Bank*, 55 N. J. Eq. 800 (1897). At common law insolvent corporations may assign for the benefit of creditors. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (1886). And preferences may be given. *Vail v. Jameson*, 41 N. J. Eq. 648 (1886); *Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (1886). A chattel mortgage made in contempt of court and in violation of the statutes against preferences by a corporation is void. *Bissell v. Beson*, 47 N. J. Eq. 580 (1890). See also *Bergen v. Porpoise Fishing Co.*, 42 N. J. Eq. 397 (1886). Under the old New Jersey statute the directors of a corporation might mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400 (1894). It is a disposal of property for the purpose of hindering and delaying

creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. *National Bank v. Sprague*, 21 N. J. Eq. 530 (1870). Although New York corporations are forbidden by the statutes of New York to execute mortgages or give preferences in contemplation of insolvency, yet a mortgage given by a New York corporation on chattels and real estate in New Jersey was upheld in New Jersey, although made in contemplation of insolvency. The New Jersey courts did not apply the New York law, but will apply that of New Jersey. The debt secured by the mortgage in this case was payable in New Jersey, however, and most of the creditors resided there. *Boehme v. Rall*, 51 N. J. Eq. 541 (1893). A levy of execution prior to the appointment of a receiver has a prior claim on the assets levied upon. *Van Steenberg v. Parsil, etc. Co.*, 34 Atl. Rep. 135 (N. J. 1896). An insolvent New Jersey corporation cannot as against some of its creditors issue mortgage bonds to other creditors. *Skirm v. Eastern, etc. Co.*, 57 N. J. Eq. 179 (1898). A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent where the statute prohibits assignments after insolvency. *Bennett v. Keen*, 59 N. J. Eq. 634 (1899). *New York:* In New York, from 1825 to 1892, the statutes prohibited corporations from making any transfers or assignments in contemplation of insolvency, and declared any such transfers and assignments utterly void. (1 R. S. 603, § 4.) By this statute all assignments by New York corporations for the benefit of creditors were held to be void. *Sibell v. Remsen*, 33 N. Y. 95 (1865); *National, etc.*



to its own citizens as against citizens of another state in the distribution of the assets of an insolvent corporation, yet as against corporations of other states such preference may be given.<sup>1</sup>

*Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467 (1882); *Harris v. Thompson*, 15 Barb. 62 (1853); *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168 (1889). 208 N. Y. 442.

The following decisions were as to what was meant by "in contemplation of insolvency": In *Robinson v. Bank of Attica*, 21 N. Y. 406 (1860), where a state bank, three days before its failure, induced a party to give it accommodation checks, and on the following day turned out securities to secure such checks, the court held that the securities could be recovered back by the receiver. In *Marine Bank v. Clements*, 31 N. Y. 33 (1865), where an insolvent corporation assigned a note to a party, and that party brought suit upon the note, the court held that the maker of the note could not set up the insolvency as a defense, there being no proof that the indorsee did not give value at the time he took the note from the insolvent corporation. In *Dutcher v. Importers', etc. Nat. Bank*, 59 N. Y. 5 (1874), the court held that where the bank paid a check to a depositor who had no knowledge of the insolvency of the bank, this was not such a preference as was prohibited by the statute. In *Paulding v. Chrome Steel Co.*, 94 N. Y. 334 (1884), although a chattel mortgage had been given five years before the company became insolvent, and had not been recorded, and was renewed and recorded at the time when the corporation was insolvent, yet the court held that the mortgage was valid. Under the New York act a director cannot obtain a preference by attachment, nor by a judgment taken by default. *Throop v. Hatch Lithog. Co.*, 125 N. Y. 530 (1891). In 1892 the above statute was changed so that assignments by insolvent corporations are now legal, provided no preferences are given. (Stock Corporation Law, § 48.) A trust com-

pany holding the notes of a corporation with a good indorser may take a transfer of the property of the corporation in payment, even though the corporation thereby becomes insolvent. The New York statute against conveyances by an insolvent corporation does not apply. *Perry v. Van Norden, etc. Co.*, 192 N. Y. 189 (1908). Preferences given to any creditor, whether a corporate officer, or stockholder, or outsider, are void. A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state. *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78 (1900). An assignment of personal property by an insolvent corporation for the benefit of such of its creditors as accept the same, one of the provisions being that they should extend the time of payment of their claims, is illegal under the statute of frauds in New York, in that it delays and hinders the creditors in obliging them to extend the time of payment and in that the assignee was authorized to sell on credit. The fact that such an instrument was legal in Michigan, where the corporation existed, did not legalize the instrument as to personal property in New York state. *Dearing v. McKinnon, etc. Co.*, 33 N. Y. App. Div. 31 (1898). The New York statute does not render invalid a judgment obtained by a corporate creditor by default for failure to answer. *Lopez v. Campbell*, 163 N. Y. 340 (1900). A New York corporation may transfer all its property to a new corporation to carry on business and pay the profits to the former's creditors. *Gill v. Bell's, etc. Mills*, 128 N. Y. App. Div. 691 (1908). Where

<sup>1</sup> *Blake v. McClung*, 172 U. S. 239 (1898).



The rights of the creditors of an insolvent corporation or individual who mortgages property to secure bonds and then disposes of the bonds or offers them to the creditors is considered elsewhere.<sup>1</sup>

an insolvent corporation has illegally transferred its property, a permanent receiver may bring a suit at law for conversion instead of suing in a court of equity. *McQueen v. New*, 45 N. Y. App. Div. 579 (1899). A judgment obtained by collusion with the president may be an illegal preference. *Rossman v. Seaver*, 41 N. Y. App. Div. 603 (1899). Where a corporation is formed to make advances to an insolvent copartnership, taking a lien on the property of the latter, and the latter continues the business in its own name and turns over the proceeds of the sales to the former, the scheme is illegal as giving the firm a false credit and as being inconsistent with the nature of a chattel mortgage. *Mathews v. Hardt*, 37 N. Y. Misc. Rep. 653 (1902); *aff'd*, 79 N. Y. App. Div. 570. In *Baker v. Emerson*, 4 N. Y. App. Div. 348 (1896), where a manufacturing company, being insolvent, paid a note for \$3,000, leaving \$17,000 of debts unpaid, payment being made May 29, 1893, and the company suspended business June 5, 1893, the court held that the payment was illegal, although the company expected at the time of the payment to raise sufficient money to go on with its business; citing to this effect, *Vennard v. McConnell*, 93 Mass. 555, 562 (1866); also *Forbes v. Howe*, 102 Mass. 427, 436 (1869). A preference to a partnership of which a stockholder is a member is illegal. *Jones v. Blun*, 145 N. Y. 333 (1895). An assignment for the benefit of creditors is authorized by the directors and not the stockholders. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority; but he should not select himself as assignee. *Rogers v. Pell*, 154 N. Y. 518 (1898). In New York an insolvent corporation may make an

assignment for the benefit of creditors, but there must not be any preferences. *Croll v. Empire, etc. Co.*, 17 N. Y. App. Div. 282 (1897). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. *Marbury v. Stone*, 17 N. Y. App. Div. 352 (1897); *aff'd*, 160 N. Y. 701. The fact that the company is unable to meet its obligations, and that judgments are being entered against it, shows insolvency. *Nealis v. American, etc. Co.*, 76 Hun, 220 (1894); *aff'd*, 150 N. Y. 42. Even in New York, where a conveyance in view of insolvency is void, an embarrassed corporation may mortgage all its property to secure bonds which are given to creditors for their debts, where the creditor who refuses to take the bonds waits over three years before attacking the mortgage. *New Britain Nat. Bank v. A. B. Cleveland Co.*, 91 Hun, 447 (1895); *aff'd*, 158 N. Y. 722 (1899). An insolvent corporation may give a mortgage to secure bonds given at that time, if the issue is a fair business transaction and for the purpose of saving the company and its property. *Cochran v. Anglo-American, etc. Co.*, 69 Hun, 168 (1893). In an action by a receiver to set aside a transfer of property made in violation of the statute, it seems that it is no defense that an execution sale by a third party had taken all the equity of the company in the property. *Stonebridge v. Perkins*, 141

<sup>1</sup> See §§ 672, 674, *supra*.



§ 692. *Preferences and assignments by insolvent corporations to directors, officers, or stockholders — Loans by directors to the corporation — Mortgages by corporations to directors.* — Turning now from preferences given to the ordinary creditor of a corporation to

N. Y. 1 (1894). Formerly a foreign corporation might make, in New York, an assignment for the benefit of its creditors, where such assignment would be valid if made in the state where the company was incorporated; in this case in New Jersey. The New York statute against such assignments applied only to a domestic corporation. At common law any corporation might make such an assignment, and the president and secretary, under authority of the board of directors, might execute an assignment for the benefit of creditors made by the corporation. *Vanderpoel v. Gorman*, 140 N. Y. 563 (1894). An insolvent Massachusetts corporation, having goods in New York, might transfer the same to a creditor, and the transfer takes precedence of an attachment subsequently levied in New York by another creditor. The New York act against assignments by insolvent corporations formerly applied only to domestic corporations. *Lane v. Wheelwright*, 69 Hun, 180 (1893); *aff'd*, 143 N. Y. 634. A creditor of a foreign corporation could obtain a preference in New York upon assets in New York. *Logan v. McCall Pub. Co.*, 140 N. Y. 447 (1893); *Coats v. Donnell*, 94 N. Y. 168 (1883), holding that a statute prohibiting preferences by corporations did not apply to foreign corporations. In the case *Standard, etc. Bank v. Garfield, etc. Bank*, 56 N. Y. App. Div. 43 (1900), it is held that the New York statute against assignments by an insolvent corporation does not apply to a foreign corporation, and that a statute of another state against such assignments does not apply in New York state. A foreign corporation not doing business in New York state is presumed to have power to make an assignment for the benefit of creditors with preferences. *Matter of Hulbert Bros. etc.*, 38 N. Y. App. Div. 323 (1899); *rev'd* on another point in 160 N. Y. 9. As to foreign

corporations now in New York, see L. 1897, ch. 384.

*North Carolina*: Preferences are upheld. *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99 (1892). An insolvent corporation may prefer creditors in North Carolina subject to a sixty-day statutory restriction. *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507 (1894). A corporation is not insolvent so long as its property, at market prices, is equal in value to its debts. *Silver, etc. Co. v. North, etc. Co.*, 119 N. C. 417 (1896). *Cf. s. c.*, 122 N. C. 542 (1898).

*Ohio*: Preferences are illegal. *Damarin v. Huron Iron Co.*, 47 Ohio St. 581 (1890); *Sayler v. Simpson*, 46 Ohio St. 510 (1890); *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493 (1889); followed in *Smith, etc. Co. v. McGroarty*, 136 U. S. 237 (1890), in an Ohio case.

*Oregon*: A failing corporation may give a mortgage if in good faith. *Currie v. Bowman*, 25 Ore. 364 (1894); *Savin v. Columbia Fuel Co.*, 25 Ore. 15 (1894). A judgment creditor who has levied an execution may file a bill to set aside an illegal assignment, but cannot claim a preference on that fund. *Kerslake v. Brower, etc. Co.*, 40 Ore. 44 (1901).

*Pennsylvania*: The written statement by the officers to a bank that if anything happened the latter should be preferred, does not give it a preference over the claims of the officers against the company. *In re Kittanning, etc. Co.'s estate*, 210 Pa. St. 6 (1904). Assignments may be made. *Ardesco Oil Co. v. North American, etc. Co.*, 66 Pa. St. 375 (1870). A New York corporation may execute a judgment note which is good in Pennsylvania, notwithstanding the New York statute against preferences. *East Side Bank v. Columbus Tanning Co.*, 170 Pa. St. 1 (1895). A New Jersey corporation, although forbidden by New Jersey statutes from giving



preferences given to a director of the corporation, it is found that entirely different rules prevail. No statute is necessary to prevent pref-

a preference by way of confession of judgment, yet may do so in Pennsylvania, where such a preference is legal, the New Jersey laws allowing preference by any other means than a confessed judgment. *Pairpoint Mfg. Co. v. Philadelphia, etc. Co.*, 161 Pa. St. 17 (1894). See also *Borton v. Brines-Chase Co.*, 175 Pa. St. 209 (1896). A preference given by a meeting of the board of directors at which a quorum is present, notice of which was not given to the other directors, may be valid if no officer or stockholder thereafter objected to the same. *Moller v. Keystone, etc. Co.*, 187 Pa. St. 553 (1898).

*Rhode Island*: A New York corporation owning property in Rhode Island cannot make in the latter state an assignment which the New York statutes prohibit. *Pierce v. Crompton*, 13 R. I. 312 (1881). Where a corporation conveys away its property in order to enforce a settlement with its creditors it cannot compel a reconveyance of such property. *Apponaug, etc. Co. v. Rawson*, 22 R. I. 123 (1900).

*South Carolina*: Where the assignee for the benefit of creditors of an insolvent corporation becomes insolvent, the assets of the latter will be separated by the court from his assets. *Ex parte Savings Bank, etc.*, 73 S. C. 393 (1906). The vice-president who takes part in having the insolvent corporation prefer creditors cannot thereafter object. *Forbes v. Bowman*, 87 S. C. 495 (1911).

*South Dakota*: A preference by an insolvent corporation is illegal. *Furber v. Williams, etc. Co.*, 21 S. Dak. 228 (1907). An assignment for the benefit of creditors may be made by a corporation. A foreign corporation may make such an assignment. It is legal, although the foreign corporation has not complied with the law relative to filing a copy of its charter and appointing a resident agent. The assignment is properly made by the directors, and not by a meeting of the stockholders. Where the assignment is made to a director and there

are indications of fraud, it is for the jury to say whether there was fraud. *Wright v. Lee*, 2 S. Dak. 596 (1892); s. c., 4 S. Dak. 237.

*Tennessee*: It has been held that preferences are illegal. *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634 (1895). Cf. *Hopkins v. Gallatin, etc. Co.*, 4 Humph. 403 (1843). In Tennessee a corporate creditor cannot obtain a preference by attaching the property of an insolvent foreign corporation which has ceased doing business, the assets being a trust fund for the benefit of all. *Voightman & Co. v. Southern Ry.*, 123 Tenn. 452 (1910). But a diligent creditor may obtain a preference by a judgment although the corporation is insolvent, it being a going concern. *Buchanan v. Barnes*, 34 S. W. Rep. 425 (Tenn. 1896). An assignment by a corporation for the benefit of creditors does not displace existing attachments. *First Nat. Bank v. Lumber, etc. Co.*, 91 Tenn. 12 (1891). An insolvent corporation cannot turn over practically all its assets to one creditor by way of preference. *Smith v. Bradt Printing Co.*, 97 Tenn. 351 (1896). After a corporation has been declared insolvent by the board of directors and directions given to file a bill to wind up its affairs, a creditor cannot obtain a preference by levy of execution before the bill is actually filed. *Memphis B. etc. Co. v. Ward*, 99 Tenn. 172 (1897). The Tennessee statute giving its citizens preference as to assets of an insolvent foreign corporation within the state is unconstitutional as to non-resident persons, but is constitutional as to foreign corporations which are creditors of the insolvent corporation. *McClung v. Embreeville, etc. Ry.*, 103 Tenn. 399 (1899), following *Blake v. McClung*, 172 U. S. 239, 259 (1898). Where an insolvent corporation has assigned for the benefit of its creditors, and then one of the creditors files a bill to wind up the company and for distribution, his attorneys will not be given an allowance, inasmuch as no new assets were disclosed



erences to a director of an insolvent corporation. It is undoubtedly true that the law allows a director to loan money to a corporation, and

and no beneficial effect shown. *Parkhurst, etc. Co. v. Wilkinson Co.*, 54 S. W. Rep. 58 (Tenn. 1899). A stockholder cannot bring suit against an assignee for the benefit of creditors to hold him liable for maladministration, inasmuch as any surplus, after paying the debts, would belong to the corporation. A request to the directors to bring suit is first necessary. *State v. Mitchell*, 104 Tenn. 336 (1898).

*Texas*: In Texas the statutes as construed by the courts make the corporate property upon insolvency a trust fund to be distributed equally among all creditors. The corporation may turn the property over to its directors for that purpose. *Wright v. Euless*, 12 Tex. Civ. App. 136 (1896). An insolvent corporation cannot prefer its creditors by giving a mortgage. Judgment creditors may cause it to be set aside and an accounting had. *Lyons, etc. Co. v. Perry, etc. Co.*, 88 Tex. 468 (1894). An insolvent corporation cannot prefer certain creditors, and equity will prevent unjust preferences. *Lang v. Daugherty*, 74 Tex. 226 (1889). In Texas, however, any creditor may obtain a preference by legal proceedings. *Moon, etc. Co. v. Waxahachie, etc. Co.*, 13 Tex. Civ. App. 103 (1896); *aff'd*, 89 Tex. 511 (1896); *Florsheim, etc. Co., v. Wettermark*, 10 Tex. Civ. App. 102 (1895); *Harrigan v. Quay*, 27 S. W. Rep. 897 (Tex. 1894). But not by assignment. *Orr, etc. Co. v. Thompson*, 36 S. W. Rep. 1129 (Tex. 1896); *aff'd*, 89 Tex. 501 (1896); *Fowler v. Bell*, 90 Tex. 150 (1896); *Specht v. Bookhout*, 14 Tex. Civ. App. 443 (1896), the court holding also that a debtor of the corporation who pays such preferred creditor, to whom the claim has been assigned, does so at his peril. It has been held that no preference is sustained, even by attachment against an insolvent corporation, in *Texas Farmers', etc. Bank v. Waco, etc. Co.*, 36 S. W. Rep. 131 (Tex. 1896). Attachment lies against a corporation, although it is insolvent

but is still doing business. *American Nat. Bank v. Dallas, etc. Co.*, 15 Tex. Civ. App. 631 (1897). The directors of an insolvent corporation may authorize an assignment for the benefit of creditors. *Birmingham, etc. Co. v. Freeman*, 15 Tex. Civ. App. 451 (1897). A purchaser of the assets of an insolvent corporation, under an order of court in a suit instituted by a creditor, may contest the validity of a mortgage given by the insolvent corporation by way of preference, the validity thereof not having been passed upon in such suit, and may also contest the validity of a transfer by the insolvent corporation of its assets by way of preference. *Rogers v. Southern, etc. Co.*, 21 Tex. Civ. App. 48 (1899). An attachment against a corporation carrying on its business in the usual way is good, even though the corporation is insolvent. *Mallette v. Ft. Worth, etc. Co.*, 21 Tex. Civ. App. 267 (1899).

*Utah*: Preferences are legal. *Weyeth, etc. Co. v. James, etc. Co.*, 15 Utah, 110 (1897). A mortgage by an insolvent corporation may be legal. *Singer v. Salt Lake City, etc. Co.*, 17 Utah, 143 (1898). Only the board of directors of a bank may make an assignment for the benefit of creditors. *Cupit v. Park City Bank*, 20 Utah, 292 (1899).

*Vermont*: Preferences are legal. *Warner v. Mower*, 11 Vt. 385, 390 (1839).

*Virginia*: Assignments may be made. *Lewis v. Glenn*, 84 Va. 947 (1888). And preferences given. *Planters' Bank v. Whittle*, 78 Va. 737 (1884).

*Washington*: A corporation may assign for the benefit of creditors. *Nyman v. Berry*, 3 Wash. St. 734 (1892). But preferences are illegal. *Conover v. Hull*, 10 Wash. St. 673 (1895); *Thompson v. Huron Lumber Co.*, 4 Wash. St. 600 (1892). An insolvent corporation may sell its property to one of its creditors. *Klosterman v. Mason, etc. R. R.*, 8 Wash. 281 (1894); *Holbrook v. Peters, etc. Co.*, 8 Wash. 344 (1894). A mortgage by an embar-



allows the corporation, while it is solvent, to give a mortgage to the director to secure the money so loaned. The giving of the mortgage

rassed corporation is valid, if in good faith, even though the company soon after fails. *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566 (1894). Even though a corporation has made an assignment for the benefit of creditors, yet a court of equity may appoint a receiver of the assets so assigned under the Washington statutes. *Oleson v. Bank of Tacoma*, 15 Wash. 143 (1896). Preferences are illegal. *Compton v. Schwabacher, etc. Co.*, 15 Wash. 306 (1896). An insolvent corporation cannot make a voluntary preference by way of mortgage. *Biddle, etc. Co. v. Port Townsend, etc. Co.*, 16 Wash. 681 (1897). A mortgage by an insolvent corporation to one of its creditors as a preference is illegal. *Cook v. Moody*, 18 Wash. 114 (1897). Where a preference by an insolvent corporation is invalid the agreement of all creditors that an insolvent bank may borrow money and pledge its securities as collateral is not valid and such pledge is illegal. *Burrell v. Bennett*, 20 Wash. 644 (1899). But such pledge is legal as against creditors assenting thereto. *Bank of California v. Puget Sound, etc. Co.*, 20 Wash. 636 (1899). An attachment by a creditor prior to a receiver being appointed in insolvency proceedings will be set aside on the theory that the assets are a trust fund for creditors. *Washington, etc. Co. v. Alladio Cafe Co.*, 28 Wash. 176 (1902). 131 Pac. Rep. 1149.

*West Virginia*: Assignments formerly were legal. *Lamb v. Cecil*, 25 W. Va. 288 (1884); *Lamb v. Pannell*, 25 W. Va. 298 (1884). And preferences also. *Pyles v. Furniture Co.*, 30 W. Va., 123 (1887). A mining company having assets of \$25,000 and debts of \$20,000 is solvent, and may execute a mortgage. *Coaldale Min. etc. Co. v. Clark*, 43 W. Va. 84 (1897). Preferences by insolvent corporations are now prohibited by statute. In West Virginia the board of directors have no power to make an assignment for the benefit of creditors, and in a stockholders' suit to set aside such

assignment the corporation is not a necessary party if all stockholders, officers, and directors are made parties to the suit. *Kyle v. Wagner*, 45 W. Va. 349 (1898). Even though an assignment by an insolvent corporation may be only by vote of the stockholders, yet if made on a vote of the directors, and the stockholders acquiesce for a considerable time, it is legal. *Young v. Improvement, etc. Assoc.* 48 W. Va. 512 (1900).

*Wisconsin*: Where a grain dealing corporation becomes insolvent and a trustee is appointed and thereafter the president continues to do business on his own account, but uses the name of the corporation, moneys received by him are not subject to the debts of the corporation. *Boyle v. Northwestern, etc. Bank*, 125 Wis. 498 (1905). At common law a corporation may make an assignment for the benefit of creditors. *Garden City, etc. Co. v. Geilfuss*, 86 Wis. 612 (1893). In Wisconsin it is held that a trust deed executed by an insolvent corporation, giving the trustee power to take charge of the business and carry it on, is void, as intended to defeat and delay corporate creditors. *First Nat. Bank v. McDonald Mfg. Co.*, 67 Wis. 373 (1886). In Wisconsin an insolvent corporation cannot prefer creditors. *Ford v. Plankinton Bank*, 87 Wis. 363 (1894). The mere insolvency of a corporation does not convert its property into a trust fund, so as to prevent preferences. *Ford v. Hill*, 92 Wis. 188 (1896). A creditor of an insolvent corporation may levy an attachment on its property, and thereby obtain a preference. *Ballin v. Merchants' Exch. Bank*, 89 Wis. 278 (1895). An insolvent corporation may give a preference, and such preference may be to creditors who by contract have named two of the five directors. *South Bend, etc. Co. v. George, etc. Co.*, 97 Wis. 230 (1897); s. c., 105 Wis. 443 (1900). A corporation may make an assignment for the benefit of creditors. *Goetz v. Knie*, 103 Wis. 366 (1899). A cor-



is viewed with suspicion, but it is legal when it is perfectly free from actual fraud.<sup>1</sup>

poration is not insolvent merely because it has not enough assets to pay its debts and still have its capital stock intact. *Hamilton v. Menominee, etc. Co.*, 106 Wis. 352 (1900). A corporation may assign for the benefit of creditors. *Binder v. McDonald*, 106 Wis. 332 (1900).

*Wyoming*: Preferences are legal. *Conway v. Smith, etc. Co.*, 6 Wyo. 468 (1896).

*England*: An agreement to give a preference must be registered in the public registry, under the English statute. *Re Jackson, etc. Co. Ltd.*, [1906] 2 Ch. 467.

<sup>1</sup> *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 (1875); *Duncomb v. N. Y. etc. R. R.*, 88 N. Y. 1 (1882), 84 N. Y. 190; *Hotel Co. v. Wade*, 97 U. S. 13 (1877). A director in a solvent corporation may take a mortgage from it as security for money advanced. *In re Estate, etc.*, 202 Pa. St. 589 (1902). Directors may execute judgment bonds to themselves at a time when the company is solvent, and may enforce them after it becomes insolvent. *Neal's appeal*, 129 Pa. St. 64 (1889). A corporation, at the time of borrowing money from its treasurer personally, who is also a director, may give him a judgment bill to enter judgment. *Cowan v. Pennsylvania, etc. Co.*, 184 Pa. St. 1 (1898). In a foreclosure suit a subsequent judgment creditor who was made a party defendant cannot set up that the mortgagee was a director of the company and took part in authorizing the mortgage, the good faith of the mortgage not being otherwise questioned. *Marsters v. Umpqua, etc. Co.*, 49 Oreg. 374 (1907). A mortgage is not void on the ground that it was to a director, where the director was absent when elected, did not serve, was not eligible, and soon sent in a resignation. *Augusta, etc. R. R. v. Kittel*, 52 Fed. Rep. 63 (1892). A solvent corporation may make a mortgage to one of its officers and stockholders to secure a loan made by him. *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655 (1891). Notwithstanding the California statute prohibiting directors from being interested as individuals in transactions with the company, a mortgage to two directors is not void where it was authorized by a majority of the directors and ratified by a majority of the stockholders, and the whole transaction was in the utmost good faith. *Ætna, etc. Co. v. Altadena, etc.*, 11 Cal. App. 26 (1909). The fairness of a debt alleged to be due from the corporation to directors and audited by them will be closely scrutinized and a note and mortgage therefor set aside if not found entirely in good faith and the whole amount justly due. *Graves v. Mono Lake, etc. Co.*, 81 Cal. 303 (1889). A director may loan money to a corporation and take a mortgage to secure the same, and foreclose and buy in the property. *Preston v. Loughran*, 58 Hun, 210 (1890). A solvent corporation may give a mortgage to a director who had indorsed its note and afterwards paid it. *Kurtz v. Ogden, etc. Co.*, 37 Utah, 313 (1910). A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guarantee certain debts of the company. *Re Pyle Works*, [1891] 1 Ch. 173. A mortgage by a company to its directors to secure them as loaners of money to the company is valid, and may be enforced where the transaction was in good faith and beneficial to the company, and sanctioned by the stockholders, and no offer is made to restore the consideration. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (1893); *Hope v. Valley City Salt Co.*, 25 W. Va. 789 (1885); *Warfield v. Marshall, etc. Co.*, 72 Iowa, 666 (1887). And see the principles and cases in § 653, *supra*. See also *Harpending v. Munson*, 91 N. Y. 650 (1883); *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178 (1881), where, however, the purchase of the property by the director at the foreclosure sale for a small price was set aside; *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880). *Cf. Wilbur v. Lynde*, 49 Cal.



The supreme court of the United States, speaking of loans made by an officer and stockholder to a corporation, said: "Undoubtedly

290 (1832), invalidating a note given to a director. In the important case *Koehler v. Black River, etc. Co.*, 2 Black, 715 (1862), the court held void a mortgage given by the directors to themselves, where there were other unsecured claims and where the giving of the mortgage was inequitable. In *Cumberland, etc. Co. v. Parish*, 42 Md. 598 (1875), a mortgage to a director was defeated, there being no clear proof that the debt was actually incurred. Directors who guarantee a corporate debt may take a mortgage from the company as security, and may foreclose it. *Hopson v. Aetna, etc. Co.*, 50 Conn. 597 (1883). A company indebted to its president may, to secure such debt, give a mortgage to secure a debt due from him to a third party. *Bank v. Flour Co.*, 41 Ohio St. 552 (1885). Directors may loan money to the corporation and have it repaid. *Ulster Ry. v. Banbridge, etc. Ry.*, Ir. L. R. 2 Eq. 190 (1868); *Borland v. Haven*, 37 Fed. Rep. 394 (1888). A director may loan money to the company. *Wainwright v. Roots Co.*, 97 N. E. Rep. 8 (Ind. 1912). Directors may purchase bonds of the company. *Medford v. Myrick*, 147 S. W. Rep. 876 (Tex. 1912). A stockholder may enjoin the issue of a large amount of bonds and stock to take up debenture bonds on an unfair basis where the directors are holders of debenture bonds. *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709 (1912). A person may enforce a note against a corporation although he was a promoter thereof, and is a director, stockholder, and manager of the corporation. *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98, 110 (1890). Where two directors borrow money for the corporation and give their own notes therefor, the company, being still solvent, may give them security. *First Nat. Bank v. Dovetail, etc. Co.*, 143 Ind. 534 (1896). *Cf. Cahill v. People's, etc. Co.*, 47 La. Ann. 1483 (1895). A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to

secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president. *Hook v. Ayers*, 63 Fed. Rep. 347 (1894); s. c., 64 Fed. Rep. 660. A corporation may make a mortgage to one of its directors. *St. Joe, etc. Co. v. First Nat. Bank*, 10 Colo. App. 339 (1897). A director may take a mortgage from the company for money loaned at the time of the mortgage, and may buy in the property at the foreclosure sale thereof. *Jones v. Hale*, 32 Oreg. 465 (1898). Even though a person who is secretary, treasurer and director of a company, illegally loans to it funds which he holds as trustee, he may recover his *pro rata* share of the assets upon corporate insolvency. *Costner v. Piedmont, etc. Co.*, 155 N. C. 128 (1911). A mortgage given by a solvent corporation to a director, which, in order to preserve the credit of the corporation, is not recorded, is invalid. *Montgomery v. Phillips*, 53 N. J. Eq. 203 (1895), holding also that a mortgage by an insolvent corporation to a director is illegal. An officer advancing money to a corporation may repay the money to himself from the treasury when its condition will permit. *Stokes v. Stokes*, 91 Hun, 605 (1895). The president may own receivers' certificates. *McKittrick v. Arkansas Central Ry.*, 152 U. S. 473 (1894). A loan by the president of a bank to himself is legal, if the directors acquiesce therein. *Reynolds v. Bank of Mt. Vernon*, 6 N. Y. App. Div. 62 (1896); *aff'd*, 158 N. Y. 740 (1899). A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement and the stock turned over to the corporation. *Kinsman v. Fisk*, 83 Hun, 494 (1895). It is legal for a solvent corporation to give a mortgage to the president to secure a debt due to him. *Strohl v. Seattle, etc. Bank*, 25 Wash. 28 (1901). Two



his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."<sup>1</sup>

But where the corporation is insolvent an entirely different question arises. There has been a difference of opinion in the courts, but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay or secure a preëxisting debt due to a director in preference to debts due others, either by transferring property or cash to him or by giving him a mortgage on corporate assets.<sup>2</sup>

years' delay on the part of a stockholder in complaining of a mortgage given by the corporation to raise money to pay a debt due to the president is fatal, even though the president had originally agreed to require payment only out of sales of property by the corporation. *Wills v. Porter*, 132 Cal. 516 (1901). A foreclosure is not invalid, even though some of the bonds are held by the directors. *Rawlins v. New Memphis, etc. Co.*, 105 Tenn. 268 (1900), holding also that a director who owns bonds may purchase the property at foreclosure sale. Stockholders and directors may loan money to the corporation and participate ratably as creditors upon its insolvency, and in insolvency proceedings the legal existence of the corporation cannot be questioned. *Hooven, etc. Co. v. Evans, etc. Co.*, 193 Pa. St. 28 (1899). A bank director may foreclose a mortgage given by the bank for money loaned, even though the bank becomes insolvent after the loan was made. *Millsaps v. Chapman*, 76 Miss. 942 (1899). The Ohio statute prohibiting a director being interested in the purchase of bonds from his corporation at less than par does not apply to an issue of bonds to an outsider who subsequently admits a director as a partner in the transaction. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). Where

the trustee of a mortgage makes a loan to the mortgagor on the bonds secured by the mortgage and then sells out the collateral and buys it in himself, he can upon foreclosure enforce the bonds only to the extent of the amount loaned and interest. *Knickerbocker Trust Co. v. Peñacook Mfg. Co.*, 100 Fed. Rep. 814 (1900). Directors may loan money to the corporation. *Savage v. Madelia, etc. Co.*, 98 Minn. 343 (1906). Where the stockholders and directors have either approved or not objected to a note given by the treasurer to the president for money borrowed, the corporation is bound. *First Nat. Bank v. Com. Travelers' Assoc.*, 108 N. Y. App. Div. 78 (1905); aff'd, 185 N. Y. 575. A preference to a director is legal where it is not shown that the corporation is insolvent. *Wolf & Bro. v. Erwin, etc. Co.*, 71 Ark. 438 (1903).

<sup>1</sup> Hence where an officer, for a loan of \$100,000 to the company, takes its notes therefor and four hundred bonds as collateral, and twelve hundred and fifty shares of paid-up stock as a "bonus," the court characterized the transaction as a fraud, and held that the pledge of the bonds would be disregarded and declared void. *Richardson v. Green*, 133 U. S. 30 (1890). Cf. '86 Atl. Rep. 527.

<sup>2</sup> *Hays v. Citizens' Bank*, 51 Kan. 535 (1893); *Chicago, etc. Bridge Co.*



But a corporation acting in good faith and without any purpose of defrauding its creditors, but with the sole object of continuing a business

*v. Fowler*, 55 Kan. 17 (1895); *Ingwersen v. Edgecombe*, 42 Neb. 740 (1894). In the case *Harding v. Hart*, 113 Fed. Rep. 304 (1902), where an insolvent insurance company turned over to its president and director as a preference, \$100,000 worth of securities, the court, after twenty-five years of litigation, compelled him at the instance of general creditors, to return the amount. In another decision involving the same transaction, *Hart v. Globe Ins. Co.*, 113 Fed. Rep. 307 (1882), the court held that a decision in the state court upholding the transaction, but not bringing in all the parties, was not a bar. See 86 Atl. Rep. 855.

A transfer of property by an insolvent corporation to its directors in part payment of their claims is illegal. *Hill v. Standard, etc. Co.*, 198 Pa. St. 446 (1901). A director cannot obtain a preference, but the invalidity of his preference does not invalidate preferences to others in the same transaction. *Moller v. Keystone, etc. Co.*, 187 Pa. St. 553 (1898). A preference by an insolvent corporation to its directors is illegal. *Pangburn v. American Vault, etc. Co.*, 205 Pa. St. 83 (1903). Property taken by directors in an insolvent corporation by way of preference must be restored or its value at the time of the taking be paid by them, but they are then entitled to share *pro rata* the same as other creditors. *Hill v. Standard, etc. Co.*, 209 Pa. St. 231 (1904). Where directors in an insolvent corporation in violation of statute transfer a part of its property to two of their number to pay certain creditors, the receiver may recover from such two directors the value of the property so transferred and if they have already paid some of the debts they will be subrogated to the rights attached to such debts. All of the directors authorizing or participating in the act are liable jointly and severally. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905). An officer who pays a debt due from the corporation to himself within ten days of a receivership must refund.

*Jessup v. Thomason*, 68 N. J. Eq. 443 (1904). Where the president of an insolvent corporation resigns in order that he may be given a preference, the preference is illegal. *Nixon v. Goodwin*, 3 Cal. App. 358 (1906). A loan by some of the directors to the corporation secured by mortgage is voidable but not void, where a majority of the directors voting for the loan were not interested in it, even though the loan was made to a person who was a mere figurehead, and the purpose of the directors making the loan was to foreclose the property and buy it in, inasmuch as the directors could only purchase at public sale under a decree of foreclosure the same as other stockholders or third persons. *Schnittger v. Old Home, etc. Co.*, 144 Cal. 603 (1904). A preference to the officers is illegal. *Shields v. Hobart*, 172 Mo. 491 (1903). Directors are liable on a note given by them to a bank to make up losses of the bank. *Skordal v. Stanton*, 89 Minn. 511 (1903). Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and, even though one of them resigns, the liability continues for the benefit of past as well as future creditors. *Nix v. Miller*, 26 Colo. 203 (1899). An insolvent corporation cannot prefer one of its directors. *Symonds v. Lewis*, 94 Me. 501 (1901). A receiver may bring suit to set aside a preference given by an insolvent corporation to the directors. *Taylor v. Mitchell*, 80 Minn. 492 (1900). In Indiana it is held that directors may vote as directors on the question of giving themselves a preference. *Nappanee, etc. Co. v. Reid, etc. Co.*, 159 Ind. 614 (1903). An insolvent corporation's mortgage to secure debts due to a majority of its directors and debts for which they are sureties is legal. *Nappanee, etc. Co. v. Reid, etc. Co.*, 159 Ind. 614 (1903), rev'g 60 N. E. Rep. 1068. A receiver may recover back property delivered by an insolvent corporation to its directors as a pref-



which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that

erence; but where the directors in order to relieve corporate property from attachment in another state take an assignment of the claims, their preference in that state out of assets in that state may be allowed. *Dur-ye v. Gray*, 59 N. J. Eq. 621 (1899). A conveyance by an insolvent foreign corporation to four creditors, one of whom is a director, in satisfaction of an antecedent debt, is invalid, and other creditors may attach the property, it appearing that all the vendees knew the facts. *Schmidt v. Perkins*, 74 N. J. L. 785 (1907). A corporate mortgage by an officer to his wife to secure a debt due to himself from the corporation is illegal. *Rowe v. Leuthold*, 101 Wis. 242 (1898). Although a director cannot obtain a preference, yet this does not prevent his estate obtaining a preference. *Nebraska Nat. Bank, etc. v. Clark*, 58 Neb. 183 (1899). In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors, it is not necessary for the court to order an accounting, but the court may hear the entire case and decide it. *Davis v. Hofer*, 38 Oreg. 150 (1900). A preference by an insolvent corporation to the treasurer is illegal. *King v. Wooldridge*, 78 Miss. 179 (1900). A preference to officers as creditors is illegal. *Tatum v. Lehigh*, 136 Ga. 791 (1911). A preference to a director is illegal, even though such preference was agreed to when the money was loaned. *Monroe, etc. Co. v. Arnold*, 108 Ga. 449 (1899). An insolvent corporation cannot give a preference to a director by offsetting against his subscription a debt due to him. *Wyman v. Williams*, 53 Neb. 670 (1898); *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351 (1893). A sale of property by an insolvent company to a director in order to prefer his debt is illegal. *Beach v. Miller*, 130 Ill. 162 (1889). Where a corporation has \$15,000 assets, owes \$160,000, and confesses judgment for \$40,000 to its largest stockholder for

an old indebtedness due him, a court of equity will restrain a sale under that judgment until the rights of all creditors are determined. *Krause v. Malaga, etc. Co.*, 18 Atl. Rep. 367 (N. J. 1889). Where the board of directors borrow money on the statement that the loan is from an outsider, and it afterwards transpires that the loan was by the president and another director, a commission of twenty per cent. paid for the loan can be recovered back by the corporation. *Bensiek v. Thomas*, 66 Fed. Rep. 104 (1895). Where a corporate creditor offers to take payment, but is induced to let the debt stand in order that the president personally may use the money, the corporation is no longer liable. *Edwards v. Carson Water Co.*, 21 Nev. 469 (1893). Corporate creditors may enjoin the collection of judgments fraudulently confessed by an insolvent corporation to its officers and stockholders. *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 230 (1892). A preference by an insolvent corporation to one of its directors is invalid. It is insolvent when early suspension of business and a failure are inevitable. *Corey v. Wadsworth*, 99 Ala. 68 (1892). But see *contra*, s. c., 118 Ala. 488. A director of an insolvent corporation cannot obtain a preference for his debt. *Gibson v. Trowbridge Furnace Co.*, 96 Ala. 357 (1892). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. *Farmers' L. & T. Co. v. San Diego, etc. Co.*, 45 Fed. Rep. 518 (1891). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder, and who signs the mortgage, cannot do so. *Perry v. Pearson*, 135 Ill. 218 (1890). Where a corporation purchases a firm's business, it cannot legally pay a debt due by the firm to a director in the corpora-



credit, and in order to obtain renewals of maturing paper at a time when the corporation, although it may not be then in fact possessed of assets

tion, if such payment is induced by such director and the corporation is insolvent. *Rudd v. Robinson*, 54 Hun, 339 (1889); reversed on another point in 126 N. Y. 113. If a director as a creditor takes all the corporate assets in payment of his debt, he is liable to other creditors for the difference between the actual value of the property and the price at which he took it. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (1886). The president of an insolvent corporation cannot provide for the payment of a debt to his wife, thereby giving her a preference. *West v. West, etc. Co.*, 9 N. Y. St. Rep. 255 (1887). Directors knowing that the company is insolvent cannot assign its property in trust to pay debts due to themselves. *Gaslight Imp. Co. v. Terrell*, L. R. 10 Eq. 168 (1870); *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639 (1885). A preference to a director by an insolvent corporation is unlawful, and the directors who cause the preference are personally liable for property so applied. A director who took no part is not liable. *Adams v. Kehlor Milling Co.*, 36 Fed. Rep. 212 (1888). The law "prohibits directors, when a corporation is insolvent and about to go into liquidation, from preferring debts due to themselves from the corporation, or from preferring debts in the payment of which they have a personal interest." So held in a case where a deceased director was preferred by the other directors, his brothers, and agents. *Adams v. Kehlor Milling Co.*, 35 Fed. Rep. 433 (1888). A director of an insolvent corporation cannot have his own debt due from the corporation paid to the exclusion of other creditors. *Adams v. Cross, etc. Co.*, 27 Ill. App. 313 (1888), holding void a mortgage upon which this suit for foreclosure was brought, it having been given by an insolvent corporation to its directors to secure debts due from it to them. A confession of judgment by an insolvent corporation to one of its directors is a fraudulent preference, and the preference will be cut off. The

director will be allowed to come in the same as other creditors. *Stratton v. Allen*, 16 N. J. Eq. 229 (1863). A mortgage by an insolvent corporation preferring its president and director was canceled in *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577 (1885).

In *Bradley v. Farwell, Holmes*, 433 (1874); s. c., 3 Fed. Cas. 1146, a transfer by an insolvent corporation of all its assets to a partnership in payment of a debt was set aside, where one member of the partnership was also a director in the corporation. The fact that nine months elapsed before the corporation passed into a receiver's hands was immaterial. A sale of corporate property to a director in payment of debts due him from the insolvent company cannot be objected to in a suit at law by him for the conversion of the property. The objection must be made by bill in equity. *Little Rock, etc. Ry. v. Page*, 35 Ark. 304 (1880). In New Jersey, by statute, a receiver is invested with all the rights of creditors. After his appointment a creditor cannot sue to set aside illegal conveyances to the officers, not even in the federal court. *Werner v. Murphy*, 60 Fed. Rep. 769 (1894). A preference to a president is illegal. *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50 (1895). A stockholder may cause to be set aside a lease of a warehouse and a sale of the wheat therein to two of the directors, and a foreclosure by them of a chattel mortgage on the buildings, which chattel mortgage had been purchased by two of the directors and the property purchased by them at the foreclosure sale. *Loftus v. Farmers' Shipping Assoc.*, 8 S. Dak. 201 (1896). Under the Michigan decisions (aside from the statute) and of the federal court sitting in Michigan, the president of an insolvent corporation could secure a preference for debts due him, even though the corporation was insolvent and the debts were old debts. *Childs v. Carlstein Co.*, 76 Fed. Rep. 86 (1896). Where the board of



equal at cash prices to its indebtedness, is in fact a going concern, and is intending and is expecting to continue in business.<sup>1</sup> Even though a

directors of a failing corporation voted all the assets to a few of their number in payment of an antecedent debt, the transaction is fraudulent and will be set aside, even in Michigan, the directors so preferred being three fourths of the board. *Rickerson, etc. Co. v. Farrell, etc. Co.*, 75 Fed. Rep. 554 (1896). Although a director's mortgage is illegal yet where, after its foreclosure, another prior mortgage is foreclosed, he is not liable to stockholders as having wrecked the corporation. *Keeney v. Converse*, 99 Mich. 316 (1894). In *Doyle v. Leitelt*, 97 Mich. 298 (1893), the court refused to compel a director to refund moneys applied on his claim against the corporation, although he had caused all the corporate property to be sold, it appearing that substantial justice had been done and that complainant had no real grievance. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. *Rogers v. Pell*, 154 N. Y. 518 (1898). At common law a mortgage may be made by a corporation to a director as trustee for creditors. *Savage v. Miller*, 56 N. J. Eq. 432 (1898). The corporation itself cannot defend against a suit by a director on a note on the ground that the judgment will be an illegal preference. *Welling v. Ivoroyd Mfg. Co.*, 15 N. Y. App. Div. 116 (1897); *aff'd*, 162 N. Y. 599; *Bangs v. National Macaroni Co.*, 15 N. Y. App. Div. 522 (1897). The New York statute does not prevent an officer assigning his claim against the corporation to his assignee for the benefit of creditors, and such assignee may obtain judg-

ment and thereby obtain a preference. *Jefferson, etc. Bank v. Townley*, 159 N. Y. 490 (1899). In New York a director may be assignee. *Linderman v. Hastings, etc. Co.*, 38 N. Y. App. Div. 488 (1899). For a detailed review of the authorities on this subject, see *Lamb v. Laughlin*, 25 W. Va. 300 (1884). Directors may be compelled to pay back salaries which they pay to themselves when the company is insolvent. *Smith v. Putnam*, 61 N. H. 632 (1882). An insolvent bank cannot legally transfer its real estate to a director in exchange for his stock. *Roan v. Winn*, 93 Mo. 503 (1887). Where the president causes the company illegally to buy its own stock from his wife, a preference to her for the debt will be set aside. *Butler Paper Co. v. Robbins*, 151 Ill. 588 (1894). Preferences to directors are illegal. *Noble, etc. Co. v. Mt. Pleasant, etc. Inst.*, 12 Utah, 213 (1895). Where, three months prior to a petition for winding up a company, the directors, who owe on their stock, offset the same by applying the amount on their unpaid salaries, they jointly and severally will be compelled, under the English statute, to refund the money with interest. The transaction is fraudulent. *Re Washington, etc. Co.*, [1893] 3 Ch. 95, *rev'g* the court below. Where an embarrassed corporation had many secured creditors, but only four unsecured creditors, and three of the latter, with full notice to the former, took charge of the company by a change of its directors and advanced funds to keep the company going, and for two and a half years endeavored to extricate it from trouble, they may then legally take a mortgage upon the corporate property for the money so advanced

<sup>1</sup> Quoted and approved in *Harle-Haas, etc. Co. v. Rogers, etc. Co.*, 113 Pac. Rep. 791 (Wyo. 1911). *Sanford Fork, etc. Co. v. Howe, etc. Co.*, 157 U. S. 312 (1895). An embarrassed corporation may, in order to obtain

working capital, borrow money on its notes indorsed by its stockholders and directors and may give a mortgage to secure them. *Webster v. Ypsilanti, etc. Co.*, 149 Mich. 489 (1907).



corporation is insolvent, yet, if the directors believe it is solvent, although in financial distress, they may loan money to the corporation and take securities as collateral thereto, and they are not bound to know that the corporation is insolvent.<sup>1</sup> But where a director cannot legally obtain a preference directly, he cannot do so indirectly by attachment, or by obtaining judgment and causing execution to be levied.<sup>2</sup> A director cannot legally vote on a renewal of a note to himself.<sup>3</sup> The court will set aside a sale by an insolvent corporation of all its assets to its secretary and treasurer, who was the chief creditor, the sale being in payment of his debt; and the court will hold him liable for such of the assets

and also for their old unsecured debts, and the fourth creditor cannot complain. *American, etc. Bank v. Ward*, 111 Fed. Rep. 782 (1901). A sale of property by an insolvent corporation to one of its directors is valid as against its creditors where a full consideration was paid therefor. *Webb v. Rockefeller*, 66 Kan. 160 (1903). Cf. 652, *supra*. Even though a mortgage is void as to a part by reason of being an illegal preference, it may be valid as to the remainder. *Reed v. Helois, etc. Co.*, 64 N. J. Eq. 231 (1903). A preference to directors who loaned money to pay off debts, some of which are owing to them, is not void, but is voidable at the instance of creditors or stockholders. *Wyman v. Bowman*, 127 Fed. Rep. 257 (1904).

<sup>1</sup> *Converse v. Sharpe*, 161 N. Y. 571 (1900). A failing corporation may borrow money from its directors and majority stockholders, and a judgment therefor may be obtained against the corporation. *Tatem v. Eglanol, etc. Co.*, 42 Mont. 475 (1911).

<sup>2</sup> *Atwater v. American, etc. Bank*, 152 Ill. 605 (1894). The president of the company may loan money to it and take judgment for it and purchase the property at execution sale thereon if he acts in good faith. *Law v. Fuller*, 217 Pa. St. 439 (1907). Under the Pennsylvania statute, directors cannot obtain a preference by taking judgment by default and issuing execution. *Hopkins's Appeal*, 90 Pa. St. 69 (1879). So also in New York. *Throop v. Hatch Lithog. Co.*, 125 N. Y. 530 (1891). The remedy in such a case is in equity and not at law. *Braem v. Merchants' Nat. Bank*,

127 N. Y. 508 (1891). A statute against preference by an insolvent corporation is violated by an offer of judgment by the corporation and the appointment of a receiver under it. *National Broadway Bank v. Wessell Metal Co.*, 59 Hun, 470 (1891), holding also that a director cannot obtain a preference by causing a receiver to be appointed on his judgment and then purchasing the property at an inadequate price. A director may obtain judgment against the company and buy its property on execution sale if no undue advantage was taken by him, and it is not necessary to give special notice to all the stockholders of the sale. *Marr v. Marr*, 72 N. J. Eq. 797 (1907). A judgment against the corporation by the wife of the president is legal, even though he and the directors aided. *Shinn v. Kummerle*, 72 N. J. Eq. 828 (1907). A judgment obtained by a director against an insolvent corporation by confession is illegal and may be set aside. *Hill v. Pioneer Lumber Co.*, 113 N. C. 173 (1893). Where a director of an insolvent corporation obtains judgment against it and sells out its property, another corporate creditor may compel him to account for a proportionate share of the actual value of the property. *Kittel v. Augusta, etc. R. R.*, 84 Fed. Rep. 386 (1898). A judgment lien which is indirectly for the benefit of the directors, the corporation being insolvent, may be set aside at the instance of the receiver. *Taylor v. Fanning*, 87 Minn. 52 (1902).

<sup>3</sup> *Smith v. Los Angeles, etc. Assoc.*, 78 Cal. 289 (1889).



as he has disposed of.<sup>1</sup> A preference, also, to a large stockholder has been condemned by the courts where, under the facts of the case, the transaction amounted to an actual fraud, as distinguished from an implied fraud.<sup>2</sup> It has been held that a mortgage by an insolvent corpora-

<sup>1</sup> *Brown v. Morristown, etc. Co.*, 42 S. W. Rep. 161 (Tenn. 1897).

<sup>2</sup> A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. *Angle v. Chicago, etc. Ry.*, 151 U. S. 1 (1894). Where a stockholder who is also a creditor of an insolvent corporation obtains for himself, just before the cessation of business, an assignment of practically all the assets of the corporation, it is a question for the jury as to whether such assignment is not fraudulent. *Wortendyke v. Salladin*, 45 Neb. 755 (1895). A stockholder may loan money to a corporation and take security. *Villere v. New Orleans, etc. Co.*, 122 La. 717 (1908). A corporation may mortgage its property to a stockholder, even though he controls a large majority of the stock. *Hanchett v. Blair*, 100 Fed. Rep. 817 (1900). It is legal for a corporation to pay one of its creditors who is also a stockholder before the debt is due, especially where the stockholder guarantees the loan which the corporation makes in order to make such payment. *Wills v. Porter*, 132 Cal. 516 (1900). Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that \$75,000 of stock should be subscribed for within a certain time, and then proceeds to organize the company, he himself subscribing for \$25,000 of the stock, and the corporation then purchases certain worthless patents and agency contracts and issues therefor \$63,250 of full-paid stock, including the \$25,000 subscribed for by him, and afterwards the corporation collects \$4,000 of such donations and borrows money from such promoter and gives him a mort-

gage therefor, his mortgage is not good as against the parties who donated the \$4,000. *Moore v. Universal, etc. Co.*, 122 Mich. 48 (1899). Even though the purchasers of an equity in land sell it to a corporation which they form, at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. *Fleckenstein v. Waters*, 160 Mo. 649 (1901). A preference to a director or stockholder is illegal. *Reynolds v. Smith*, 60 Neb. 197 (1900). A mortgage given to repay to preferred stockholders the amount they have invested in their stock as well as to secure regular creditors of the company is invalid altogether. *Reagan v. First Nat. Bank*, 157 Ind. 623 (1902). A stockholder as a creditor has the same standing that other creditors have. *Standard, etc. Co. v. Excelsior, etc. Co.*, 108 La. 74 (1902). A stockholder cannot obtain a preference. *Lamb v. Russel*, 81 Miss. 382 (1902). A mortgage to secure debts due to stockholders was upheld in *Crossette v. Jordan*, 132 Mich. 78 (1902). In the case *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 807 (1903), the court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." In Texas the court held that an insolvent corporation could not, by way of mortgage, prefer creditors who were stockholders. *Lyons, etc. Co. v. Perry, etc. Co.*, 86 Tex. 143 (1893); s. c., 88 Tex. 468. See also *Cochran v. Ocean Dry Dock*, 30 La. Ann. 1365 (1878), holding that stockholders cannot appropriate assets to pay their salaries



tion to a creditor corporation, the two corporations having a majority of their directors in common, is illegal.<sup>1</sup> A purchaser of the equity of redemption from the corporation cannot claim that the mortgage was to a director and hence invalid.<sup>2</sup> A creditor who becomes such after

as officers, or to pay money due them on other accounts, until all creditors who are not stockholders have been paid; *Swepson v. Exchange, etc. Bank*, 9 Lea (Tenn.) 713 (1882), holding that a conveyance of land by the president of a bank to its sole stockholder, after its insolvency, would be set aside at the suit of a judgment creditor of the bank who had levied upon and sold it. Where all the corporate property is pledged to a creditor who owns all the stock, other creditors may object. *Stewart v. Gould*, 8 Wash. 367 (1894). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief stockholder. *Ragland v. McFall*, 137 Ill. 81 (1891). See also *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439 (1883). In Massachusetts it has been held that a preference given to a large stockholder is legal. *Sargent v. Webster*, 54 Mass. 497 (1847). An insolvent corporation may give a preference to a stockholder. Moreover, a corporate creditor, who became such after such preference, cannot complain. *Burchinell v. Bennett*, 10 Colo. App. 502 (1898). See also *Krause v. Malaga, etc. Co.*, 18 Atl. Rep. 367 (N. J. 1889).

<sup>1</sup> *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep. 496 (1894). See also 658, *supra*. An insolvent corporation whose president is president also of another corporation, the latter corporation being a creditor of the former corporation, cannot cause a preference to be given to such latter corporation, but if the former corporation is not actually insolvent at the time of the preference it is legal. *Finch, etc. Co. v. Stirling Co.*, 187 Pa. St. 596 (1898). Where an insolvent savings bank is really controlled by a national bank, although they have not the same directors, yet the former cannot prefer the latter. It is an illegal preference

in behalf of the directors. *Slack v. Northwestern, etc. Bank*, 103 Wis. 57 (1899). The fact that an officer of a bank is a director in a manufacturing company does not prevent the latter, though insolvent, giving a preference to the former. *Nat. Bank of Commerce v. Allen*, 90 Fed. Rep. 545 (1898). Mortgage bonds issued by a corporation as security to two banks will be valid, even though the corporation turns out to have been insolvent, but was supposed to be solvent, and even though the directors and stockholders of the corporation are stockholders in the banks. *Chick v. Fuller*, 114 Fed. Rep. 22 (1902). Even though directors are interested in the construction company which takes the bonds, and the property is foreclosed and is bought in by the directors, yet the railroad company cannot set aside the transaction unless it offers to pay to the directors what they have expended, or offers to take the property subject to such mortgage bonds. *San Antonio, etc. Ry. v. San Antonio, etc. R. R.*, 25 Tex. Civ. App. 167 (1900). An insolvent corporation may give a preference to a creditor, another corporation, having stockholders and directors in common with it. *Sells v. Rosedale, etc. Co.*, 72 Miss. 590 (1895). A preference by an insolvent corporation is legal, although one of the directors is interested in the corporation that is preferred. *Colorado, etc. Co. v. Western Hardware Co.*, 16 Utah, 4 (1897). Where the president and a director, without authority from the board of directors of an insolvent corporation, turn over the assets to another corporation in payment of a debt, such president and director being interested in the latter corporation, the transaction is illegal. *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86 (1898).

<sup>2</sup> *Greenstreet v. Paris*, 21 Grant, Ch. (Can.) 229 (1874).



a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful preference.<sup>1</sup>

An officer of an insolvent corporation cannot acquire a preference over its unsecured creditors by accepting its bonds on account of his claims against it, even though the officer did not actually know of the insolvency.<sup>2</sup> A director of a corporation may purchase its mortgage bonds at their market value, and enforce them at their full value.<sup>3</sup> While an ordinary corporate debtor may offset claims against the corporation which he has purchased, yet officers, stockholders, or persons occupying a trust relationship may not legally do so.<sup>4</sup>

If a majority of the directors of an insolvent corporation, knowing it to be insolvent, vote and cause the treasurer to execute to themselves the corporation's judgment note, and then enter judgment on it at once, the judgment is fraudulent as to other creditors, though the debt was legal.<sup>5</sup>

A mortgage by an insolvent corporation to a director may be upheld to the extent that the director, at the time of the mortgage, advanced funds to pay its debts, but not as to antecedent debts due the director.<sup>6</sup>

There are cases which uphold mortgages given by insolvent corporations to their directors, but these cases are wrong in principle and law.<sup>7</sup>

<sup>1</sup> *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). A conveyance to a director in settlement of a claim made two months prior to the insolvency of the corporation is legal so far as subsequent creditors are concerned. *Tennant v. Appleby*, 41 Atl. Rep. 110 (N. J. 1898). A preference by a mortgage to directors is invalid; but where the property is sold by a receiver subject to the mortgage and the purchaser is also a director he cannot attack the mortgage. *Richards v. Haliday*, 92 Fed. Rep. 798 (1899). A corporation may give a mortgage to two of its directors who pay practically all its debts. Subsequent creditors cannot complain. *Powell Bros. v. McMullan, etc. Co.*, 153 N. C. 52 (1910). See also § 46, *supra*.

<sup>2</sup> *Sicardi v. Keystone Oil Co.*, 149 Pa. St. 148 (1892). Unless all the stockholders consent, the directors cannot issue bonds to secure debts due to the directors. *Scott v. Farmers', etc. Bank*, 97 Tex. 31 (1903).

<sup>3</sup> *Camden, etc. Co. v. Citizens', etc. Co.*, 69 N. J. Eq. 718 (1905). But where the president pledges \$100,000 of the company's bonds for a corporate debt

of \$21,500 and then allows them to be sold for non-payment, and the nominal purchaser purchases secretly for a director, secretary, and attorney of the company and for a former president of the company and the company becomes bankrupt, they will be allowed only the amount they paid with interest. *Canton, etc. Co. v. Rolling Mill Co.*, 168 Fed. Rep. 465 (1909). See § 766, *infra*.

<sup>4</sup> *Nix v. Ellis*, 118 Ga. 345 (1903). Cf. § 660, *supra*.

<sup>5</sup> *Roseboom v. Whittaker*, 132 Ill. 81 (1890).

<sup>6</sup> *Corbett v. Woodward*, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. See also *Williams v. Patrons of Husbandry*, 23 Mo. App. 132 (1886); *White, etc. Co. v. Pettes, etc. Co.*, 30 Fed. Rep. 864 (1887); *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577 (1885); *Stout v. Yaeger Milling Co.*, 13 Fed. Rep. 802 (1882).

<sup>7</sup> *Planters' Bank v. Whittle*, 78 Va. 737 (1884), *dictum* that directors may make preferences in favor of themselves if they are creditors; but in so doing they must act in perfect good faith. At common law a corpo-



In a suit by a corporate creditor to set aside a conveyance as an illegal preference he cannot also hold a director liable on watered stock.<sup>1</sup>

ration may give a preference to a director. *Wilson v. Stevens*, 129 Ala. 630 (1901). In the case *Corey v. Wadsworth*, 118 Ala. 488 (1899), the court held that a preference to a director might be legal, but that under the circumstances of that case it was illegal. In Texas a director in an insolvent corporation may obtain a preference by attachment. *Frank Co. v. Berwind*, 47 S. W. Rep. 681 (Tex. 1898). A mortgage given by an insolvent corporation is valid, although given to secure debts due to the wife of a director, the administrator of another deceased director, and the payee of a note indorsed by still another director. *Garrett v. Burlington Plow Co.*, 70 Iowa, 697 (1886). A sale of all the property of an insolvent corporation to a director, who is also present, in payment of his debt, cannot be set aside by other corporate creditors. *Buell v. Buckingham*, 16 Iowa, 284 (1864). A preference is legal, although given by directors who are relatives of the creditor. *Rollins v. Shaver, etc. Co.*, 80 Iowa, 380 (1890). Directors and officers of an insolvent corporation may be given preference, even though their vote was necessary to authorize the same. *City Nat. Bank v. Goshen, etc. Co.*, 163 Ind. 214 (1904). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief stockholder. *Ragland v. McFall*, 137 Ill. 81 (1891). A director may obtain judgment and sell out the assets of an insolvent corporation if he does so in good faith. *Off v. Jack*, 204 Ill. 79 (1903). An insolvent corporation, under the Arkansas decisions, may give a mortgage to one of its directors to secure a present or precedent debt, and such mortgage is valid. *Gould v. Little Rock, etc. Ry.*, 52 Fed. Rep. 680 (1892), reviewing the authorities.

In Michigan an insolvent corporation may give a preference to one of its directors. *El Cajon, etc. Co. v. Robert, etc. Co.*, 165 Fed. Rep. 619 (1908). An insolvent corporation may mortgage its property to any one of its creditors. Such a mortgage is not for the benefit of all creditors, even though it is given to secure several. The mortgage may be given to a director or stockholder. *Bank of Montreal v. Potts, etc. Co.*, 90 Mich. 345 (1892). A director in an insolvent corporation may take security. *Campau v. Detroit, etc. Club*, 135 Mich. 575 (1904). Even though a company sells all its assets for cash to another company it may apply such cash to the payment of some of the creditors, and not to others, and if the president is a creditor he may be included among those who are paid. *Shipman Co. v. Detroit, etc. Ry.*, 140 Mich. 589 (1905). The following cases are exceptions to and not contradictory of the general rule: Where a part of the trustees are the only creditors, and the business is a losing one, they may take a mortgage to secure moneys loaned by them to the company, and may foreclose such mortgage. *Skinner v. Smith*, 134 N. Y. 240 (1892); *Whitwell v. Warner*, 20 Vt. 425 (1848), holding that stockholders who avail themselves of their superior advantages to obtain security from the corporation for debts due them, whether by attachment or assignment, are not guilty of fraud so as to render themselves personally liable for corporate debts. Where a corporation owes money to the directors, and to pay the same borrows money and gives a mortgage, and subsequently the property is sold for less than the mortgage, a creditor whose debt was not due when the mortgage was given cannot complain. *Holt v. Bennett*, 146 Mass. 437 (1888). But see *St. Louis v. Alexander*, 23 Mo. 483, 528, 531 (1856), where it was attempted to

<sup>1</sup> *El Cajon, etc. Co. v. Robert, etc. Co.*, 165 Fed. Rep. 619 (1908).



§ 693. *Preferences in favor of corporate debts upon which the directors are liable as indorsers or otherwise.* — Where a director is merely the indorser, surety, or guarantor of a corporate debt or note, to which a preference is given by an insolvent corporation, a much more difficult question arises than where such debt or note is held by the director himself. The decisions are in conflict on this subject. The great weight of authority undoubtedly is that such a preference is illegal.<sup>1</sup> This is so held because, first, such a preference is practically

overturn a deed of trust on the ground that it was executed by a bare quorum of the directors and one or more of them were legally incapacitated by being directly interested. The language of the court was: "I can see no reason why a member of the board of directors might not sit in the board, and, without fraud, in conjunction with others, consent to an order for securing a debt actually due to him from the corporation." A preference given by an insolvent corporation to directors may be legal. The remedy of corporate creditors against an illegal preference is by creditor's bill and not by an execution sale. *Butler v. Harrison*, etc. Co., 139 Mo. 467 (1897). In Missouri it is held that the directors in an insolvent corporation may prefer their own debts, but a degree of good faith is required which practically nullifies such preference. *State v. Manhattan*, etc. Co., 149 Mo. 181 (1899). Where an insolvent corporation sells property to one of its directors in payment of a debt, he must prove that he did not influence the directors to vote for the transaction. *Pitman v. Chicago*, etc. Co., 93 Mo. App. 592 (1892). A stockholder cannot have a receiver appointed and mortgages set aside where all the stock is "water," even though the controlling party had made the mortgages to himself and is about to sell the assets of the company to another company controlled by himself, and has levied an assessment on the stock of the old company in order to sell out the stock. *Robinson v. Dolores*, etc. Co., 2 Colo. App. 17 (1892). In Illinois it is held that an insolvent corporation may prefer a creditor who is the father of a

majority of the directors. It is also held that a preference may be given to directors for a debt contracted while the company was insolvent. *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624 (1895). In Missouri an insolvent corporation may prefer a director. *Schufeldt v. Smith*, 131 Mo. 280 (1895). Cf. *National Tube Works Co. v. Ring*, etc. Co., 118 Mo. 365 (1893). Under the old New Jersey statute the directors of a corporation could mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400 (1894). In Connecticut it has been held that a corporation may turn over property to a director in payment of a debt, even though the corporation is insolvent, it being shown that all parties supposed at the time that all debts could be paid. *Smith v. Skeary*, 47 Conn. 47 (1879). A mortgage by a solvent corporation to secure its directors as creditors is legal. *Hinz v. Van Dusen*, 95 Wis. 503 (1897).

<sup>1</sup> The president's transfer of corporate property to himself and wife as security for indorsements on notes is not legal. *Hill v. Marston*, 178 Mass. 285 (1901). A corporate creditor may object to payments made by an insolvent corporation on notes indorsed by the treasurer, general manager, and directors. *Asheville*, etc. Co. v. *Hyde*, 172 Fed. Rep. 730 (1909). A mortgage by an insolvent corporation to the president and two of the directors on account of their prior indorsements of its notes is invalid. *Edwards v. Snow Hill*, etc. Co., 150 N. C. 171 (1909). The directors of an insolvent corporation cannot cause



the same as a preference to the director himself, inasmuch as he would have had to take up the debt as indorser if no preference had been given ;

it to give a preference by paying notes on which they are indorsers. *Hazelhurst Lumber Co. v. Carlisle Mfg. Co.*, 130 Ky. 1 (1908). An insolvent New York corporation may not transfer assets as collateral security to directors who have indorsed its paper. *Re Salvator, etc. Co.*, 183 Fed. Rep. 910 (1910). A preference by an insolvent corporation to a debt for which the directors are sureties is illegal. *National, etc. Co. v. Columbia Nat. Bank*, 63 Neb. 234 (1901); *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363 (1901); *Williams v. Turner*, 63 Neb. 575 (1902). A mortgage given by an insolvent corporation to secure debts on which three directors are liable is not legal where the vote of those three directors was necessary to authorize such mortgage. *Swift & Co. v. Dyer-Veatch Co.*, 28 Ind. App. 1 (1901); *aff'd*, 60 N. E. Rep. 169. A mortgage given by an insolvent corporation as security for a debt for which the directors were personally liable as indorsers is not valid as against other creditors, unless the debt was incurred at that time or an agreement to give the mortgage was made when the debt was incurred. *Atlas, etc. Co. v. Exchange Bank, etc.*, 111 Ga. 703 (1900). A sale of all the property of an insolvent corporation to one of its directors, payment being by indorsement by credit on notes on which such director is indorser, is illegal, and other creditors are entitled to share *pro rata*. *Dozier v. Arkadelphia, etc. Co.*, 67 Ark. 11 (1899). 86 Atl. Rep. 579.

Where a director is guarantor of a debt, a preference obtained by a judgment creditor's action is illegal. *Wisconsin, etc. Bank v. Lehigh, etc. Co.*, 64 Fed. Rep. 497 (1894). A draft drawn by an insolvent corporation to pay a debt for which a director is surety is illegal. *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. Rep. 615 (1894). Where two out of four directors of an insolvent corporation are liable as indorsers on a corporate debt, a mortgage given to secure that debt will be set aside as an illegal

preference, even though the mortgage has been foreclosed. *Lippincott v. Shaw Carriage Co.*, 34 Fed. Rep. 570 (1888). Where a corporation is practically insolvent, and has assigned its property by deed of trust to pay certain debts for which the directors are sureties, a court of equity in Missouri will enjoin proceeding under the deed of trust, and will appoint a receiver. *Consolidated, etc. Co. v. Kansas City, etc. Co.*, 43 Fed. Rep. 204 (1890); *s. c.*, 45 Fed. Rep. 7 (1891), holding that in such a case unsecured creditors might maintain a suit to set aside as fraudulent the deed of trust, the court saying that directors cannot secure to themselves directly or indirectly a preference over general creditors when the corporation is *in articulo mortis*. An insolvent corporation may give a preference by confession of judgment, but not to a creditor whose claims were assigned to him by directors. *Gottlieb v. Miller*, 154 Ill. 44 (1895). The directors of an insolvent corporation are trustees for the creditors. They cannot, after it becomes insolvent, take mortgages to themselves on its property to secure advances and indorsements made by them for it. *Olney v. Conanicut Land Co.*, 16 R. I. 597 (1889). Directors of an insolvent corporation cannot apply corporate funds exclusively to corporate debts for which they are sureties. All debts will be allowed to participate ratably. *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263 (1861). An insolvent corporation cannot give a preference to creditors for whose debts the directors are sureties. *Tillson v. Downing*, 45 Neb. 549 (1895). A mortgage to secure a debt upon which one of the directors is liable is illegal. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (1898). A corporation supposed to be solvent may give a mortgage to secure a debt guaranteed by its directors. *Sabin v. Columbia Fuel Co.*, 25 Ore. 15 (1893). An insolvent corporation cannot transfer all its property to pay a note of which a director is an indorser, joint maker, or guarantor. *Goodyear Rubber Co. v.*



and second, because to sustain such a preference would tempt a director holding a corporate obligation to sell the same with his guaranty or indorsement, and then induce the board of directors to prefer that obligation.

Notwithstanding these decisions and reasons, there are circumstances under which such a preference will be sustained. A corporate creditor is not to be punished simply because the directors have guaranteed his claim. The supreme court of the United States has strongly intimated that such is the law;<sup>1</sup> and indeed it is difficult to see how a court

Scott Co., 96 Ala. 439 (1892). A mortgage given by an insolvent corporation to secure debts for which the directors are sureties is illegal. It is not legal, even though it is given for the benefit of co-sureties who are not directors. The directors are bound to know whether the company is solvent or insolvent. *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624 (1893). Where the controlling directors of two corporations are the same persons, and one company becomes liable on paper for the accommodation of the other, and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. *Hutchinson v. Sutton Mfg. Co.*, 57 Fed. Rep. 998 (1893). A preference by an insolvent corporation to creditors whose notes are secured by the indorsements of directors cannot be given by the corporation by the vote of such directors. *Love Mfg. Co. v. Queen City Mfg. Co.*, 74 Miss. 290 (1896). Even though an insolvent corporation illegally, but in good faith, gives a mortgage by way of preference to its president, this does not sustain an attachment by another creditor on the ground that the corporation is disposing of its property with intent to defraud the creditors. *Trebilecock v. Big, etc. Co.*, 9 S. Dak. 206 (1896). An insolvent corporation cannot give a preference to a debt for which its directors are sureties. *Gray v. Taylor*, 38 Atl. Rep. 951 (N. J. 1897). *Cf. s. c.*, *Duryee v. Gray*, 59 N. J. Eq. 62 (1899). But a corporate creditor who advised the directors

to take a mortgage from the corporation to secure them in their indorsement of corporate paper cannot afterwards object to such mortgage. *Re Bloomfield, etc. Mills*, 101 Iowa, 181 (1897). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. *Age-Herald Co. v. Potter*, 109 Ala. 675 (1895). A director cannot legally pay from moneys belonging to an insolvent corporation a debt on which he is a surety. *Graham v. Carr*, 130 N. C. 271 (1902). Directors who are guarantors of corporate notes may assume the payment thereof in consideration of property transferred to them by the corporation. *Swentzel v. Franklin, etc. Co.*, 168 Mo. 272 (1902). Even though the president has personally given security for a loan to a corporation, the lender may obtain a judgment against the corporation, and even though by agreement the security is sold and the money deposited as security for the judgment, this does not constitute payment so far as the statutory liability of stockholders is concerned. *Lancaster v. Knight*, 74 App. Div. 255 (1902). The president of a corporation will not be allowed to set up the statute of limitations to a note running to the corporation indorsed by himself as accommodation indorser. *Livermore T. etc. Co. v. Riley*, 108 Me. 17 (1911).

<sup>1</sup> In *Sanford, etc. Co. v. Howe, etc.*



of equity can refuse to uphold, in behalf of the corporate creditor himself, a preference which has been given to such creditor, even though a

Co., 157 U. S. 312, 318 (1895), *rev'g* Howe, etc. Co. v. Sanford, etc. Co., 44 Fed. Rep. 231, Mr. Justice Brewer said, with much force: "Are creditors who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation, because, forsooth, they have also the guaranty of some of the directors or stockholders whose guaranty may or may not be worth anything?" A preference may be given by an insolvent corporation on a debt that was incurred before insolvency, even though a director is guarantor of such debt. *Rockford, etc. Groc. Co. v. Standard, etc. Co.*, 175 Ill. 89 (1898). A corporate creditor is not guilty of having received a preference under the bankruptcy act, where he had held the personal note of the directors, although the money was paid to the corporation and thereafter the directors borrowed the money elsewhere on their personal notes, and had the corporation apply the proceeds to the payment of the first note. *Keegan v. Hamilton Nat. Bank*, 163 Ind. 216 (1904). Directors who are guarantors of certain notes of an insolvent corporation are not liable to its other creditors by reason of the former creditors having levied an attachment and obtained a preference, the directors not having aided in such preference. *Emanuel v. Barnard*, 71 Neb. 756 (1904). A going corporation may give a mortgage to a director as security on his indorsements of corporate notes. *Harle-Haas, etc. Co. v. Rogers, etc. Co.*, 113 Pac. Rep. 791 (Wyo. 1911). In the case *Irvine v. Randolph, etc. Corporation*, 111 Va. 408 (1910), a judgment obtained by a director on a corporate note indorsed by him, the judgment being confessed by the president, was sustained as against another

corporate creditor. An insolvent corporation may give a mortgage to secure notes on which its directors are sureties. *Swift & Co. v. Dyer-Veatch Co.*, 60 N. E. Rep. 169 (Ind. 1901); modified on another point in 28 Ind. App. 1. Where a director becomes surety for a bank in receiving city deposits the bank may legally transfer notes held by the bank to such director as security. *Klein v. Funk*, 82 Minn. 3 (1900). A corporation may give security to a director at the same time that he indorses its note. *Anglo-American, etc. Co. v. Davis, etc. Co.*, 112 Fed. Rep. 574 (1902). An insolvent corporation in North Carolina may confess judgment to a creditor for whose debt the president is surety. *Howard v. Central, etc. Co.*, 123 N. C. 90 (1898). In Georgia it is held that where the directors are guarantors of a note secured by mortgage and the note is not paid, they may take an assignment of the note and mortgage and enforce the mortgage, even though the corporation might possibly pay the debt if time were given. *Rylander v. Sheffield*, 108 Ga. 111 (1899). An insolvent corporation may give a preference to a note which is indorsed by a director where the company received the money for the note and the indorsement was for accommodation. *Nat. Bank, etc. v. George, etc. Co.*, 18 Utah, 400 (1898). The payment and securing of a corporate debt are not fraudulent merely because some of the directors had guaranteed the debt. *Taylor County Court v. Baltimore, etc. R. R.*, 35 Fed. Rep. 161 (1888). A chattel mortgage securing a part of the creditors of an insolvent corporation may be valid although some of the directors and stockholders who voted for the mortgage are guarantors and indorsers of the debts so secured. *Brown v. Grand Rapids, etc. Co.*, 58 Fed. Rep. 286 (1893), following the Michigan decisions, and stating that the supreme court of the United States has not decided that a corporation may not prefer one of its directors. A creditor



director is surety therefor, where the corporate creditor acquired his claim either from the director or from the corporation itself at a time when the corporation was solvent; or where the corporate creditor did not know that the corporation was insolvent when he acquired his claim from the director or from the corporation itself; or where the corporate creditor loaned money to a corporation itself when it was insolvent, and at the same time received a mortgage by way of preference, and also obtained the indorsements of the directors on his paper; or where the directors were merely indorsers for the accommodation of the corporation. It is true that the above rules would enable a corporation to give preference to a corporate creditor in most cases where a director is indorser or guarantor of the claim. But, on the other hand, it is now a general custom in banking circles not to loan to a business corporation unless the directors guarantee the debt. If the law puts such a debt at a disadvantage as compared with other

may be preferred by the giving of security by an insolvent corporation, even though his claim is secured by the directors and stockholders, he not knowing of the insolvency at the time of the giving of the security. *Henderson v. Indiana Trust Co.*, 143 Ind. 561 (1895). An insolvent corporation may give a mortgage to a creditor, by way of preference, even though a director is surety on the debt. *Wagoner, etc. Co. v. Ziegler, etc. Co.*, 128 Mo. 473 (1895). A mortgage to a creditor on part of the property of an insolvent corporation is legal, although some of the stockholders and directors are indorsers of the debt. *Weihl v. Atlanta, etc. Co.*, 89 Ga. 297 (1892). In Arkansas it is held that an insolvent corporation may prefer certain creditors, even though their claim is secured by the indorsements of the directors. *Worthen v. Griffith*, 59 Ark. 562 (1894). In *Milledgeville Banking Co. v. McIntyre Alliance Store*, 98 Ga. 503 (1896), the court very properly held that a mortgage given by an insolvent corporation to an outside creditor was valid, although the directors had given their personal note as additional security for the debt, such note being purely an accommodation note. The court distinguished *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624. A director who votes for a preference on

debts for which other directors are liable cannot complain. *Lucas v. Friant*, 111 Mich. 426 (1897). Although a mortgage is invalid as to the debts in which the directors are interested, it may be valid as to the remaining debts secured by it. *Savage v. Miller*, 56 N. J. Eq. 432 (1898). A preference is legal although some of the directors voting therefor were sureties on the paper to which such preference is given, their votes not being necessary. *Levering v. Bimel*, 146 Ind. 545 (1897). Where a mortgage is given by an insolvent corporation to secure an antecedent debt for which a director is surety, the mortgage is not necessarily illegal; but if the transaction is actually a scheme to give the director a preference, it is illegal. *Atlas Tack Co. v. Macon Hardware Co.*, 101 Ga. 391 (1897). Where the debts equal only one third of the market value of the corporate property, and certain creditors holding notes on which the directors are indorsers demand security or else threaten to sue the corporation, the directors may authorize confession of judgment in their favor. *Mueller v. Monongahela, etc. Co.*, 183 Pa. St. 450 (1898). A preference may be given to debts for which the directors are sureties. *Nappanee, etc. Co. v. Reid, etc. Co.*, 159 Ind. 614 (1903).



corporate debts, the credit of business corporations will be greatly curtailed, thereby rendering insolvent many corporations which otherwise would be able to extricate themselves from their troubles. In New Jersey the ingenious rule has been sustained that where a preference has been given by an insolvent corporation to debts guaranteed by the directors, the amount realized from such preference, over and above what would have been realized if there had been no preference, may be recovered by the other creditors from the directors.<sup>1</sup> Where the directors are indorsers of an insolvent company's note and cause it to issue mortgage bonds to them and then they pay and cancel the note, they may be compelled to cancel the bonds and become general creditors of the corporation.<sup>2</sup>

§ 694. *Land may be purchased by a domestic corporation.*<sup>3</sup> — The English statutes of mortmain are not in force in this country except

<sup>1</sup> *Savage v. Miller*, 56 N. J. Eq. 432 (1898). Where the president as indorser has been discharged by the payment of a note illegally, the court may set the transaction aside and restore the president's liability. *Miller v. Audenried*, 67 N. J. Eq. 252 (1904).

<sup>2</sup> *Whitlock v. Alexander*, 76 S. E. Rep. 483 (N. C. 1912).

<sup>3</sup> *Richardson v. Massachusetts, etc. Assoc.*, 131 Mass. 174 (1881); *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576 (1894); *Kelly v. People's Transp. Co.*, 3 Oreg. 189 (1870); *Page v. Heineberg*, 40 Vt. 81 (1868); *Central Gold Min. Co. v. Platt*, 3 Daly, 263 (1870), to the effect that the holding may be upon special trust; *Nicoll v. New York, etc. R. R.*, 12 N. Y. 121, 127 (1854); *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Sherwood v. American Bible Soc.*, 1 Keyes, 561 (1864); *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13 (1850); *Riley v. Rochester*, 9 N. Y. 64 (1853); *Downing v. Marshall*, 23 N. Y. 366 (1861); *State v. Mansfield*, 23 N. J. L. 510 (1852); *State v. Newark*, 25 N. J. L. 315 (1855); *First Parish v. Cole*, 20 Mass. 232 (1825); *Old Colony R. R. v. Evans*, 72 Mass. 25 (1856), where the company purchased a gravel pit to transport and sell the gravel. And see *Smith v. Sheeley*, 12 Wall. 358 (1870). A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land. *Stockton Sav.*

*Bank v. Staples*, 98 Cal. 189 (1893). In a suit by a railroad to quiet title to its land, the defendants cannot question the power of a railroad to hold land. *Russell v. Texas, etc. Ry.*, 68 Tex. 646 (1887). In a bill to quiet title, a corporation need not allege that it has power to hold land. *Torrent F. Eng. Co. v. Mobile*, 101 Ala. 559 (1894). A publishing company may take a lease of a building and may sublet such parts of it as it does not use. *Oswald v. St. Paul, etc. Pub. Co.*, 60 Minn. 82 (1895). A bank may accept a deed of real estate from a stockholder and director to make good an impairment of the capital stock, it being agreed that compensation therefor should be paid from future profits. *Brown v. Bradford*, 103 Iowa, 378 (1897). Where a bank has legally acquired a part interest in real estate, it may purchase the remaining interest for the purpose of handling the property. *Cockrill v. Abeles*, 86 Fed. Rep. 505 (1898). The contract of a religious corporation to purchase land for speculative purposes is not enforceable, and a note given in connection therewith is not valid except in *bona fide* hands. *Thompson v. West*, 59 Neb. 677 (1900). Although a statute prescribes that a corporation shall not hold real estate if more than twenty per cent. of its stock is owned by aliens, it is presumed that not more than twenty per cent. is so held by aliens until the contrary is proved.



in Pennsylvania. The only limitation upon the right of corporations to hold real property is that the purchase must be a natural incident of the business specified in the charter.<sup>1</sup> A different rule prevails in Pennsylvania.<sup>2</sup> In that state the mortmain laws are held to still exist, and the state itself has enacted a statute restricting the right.

*Northwestern, etc. Co. v. Chicago, etc. Ry.*, 76 Minn. 334 (1899). A statute prohibiting a corporation, a majority of whose stock is held by aliens, from acquiring land, does not prohibit it from acquiring fishing lands. *Hastings v. Anacortes, etc. Co.*, 29 Wash. 224 (1902). Where a corporation buys land in the name of its agent as trustee it is liable for the price thereof. *Hurst v. Am. Assoc.*, 49 S. W. Rep. 800 (Ky. 1899). Although a deed of a corporation provides that in a certain contingency the land "should revert to the stockholders, their heirs and assigns," yet such reversion is to the corporation and not to the stockholders. *Pettit v. Stuttgart, etc. Institute*, 67 Ark. 430 (1900). A corporation may be a *bona fide* purchaser of land, even though it was not authorized by its charter to purchase the land. *Schneider v. Sellers*, 98 Tex. 380 (1905).

<sup>1</sup> 2 Kent, Com. \*282; *Moore v. Moore*, 4 Dana (Ky.), 354 (1836); *Lathrop v. Scioto Comm. Bank*, 8 Dana (Ky.), 114, 121 (1839); *Potter v. Thornton*, 7 R. I. 252 (1862); *Perin v. Carey*, 24 How. 465 (1860); *McCartee v. Orphan Asylum Soc.*, 9 Cow. 437, 451 (1827); *Page v. Heineberg*, 40 Vt. 81 (1868). See also *Odell v. Odell*, 92 Mass. 1 (1865); *Downing v. Marshall*, 23 N. Y. 366, 392 (1861); *First Parish v. Cole*, 20 Mass. 232, 239 (1825); *Richardson v. Massachusetts, etc. Assoc.*, 131 Mass. 174 (1881). There are no real mortmain acts in Massachusetts. *Hubbard v. Worcester, etc.*, 194 Mass. 280 (1907). One who agrees to sell land to a corporation is not bound to see that it is required for the purposes of the corporation, and if acting in good faith, and without knowledge of an intention to misapply the corporate funds, he may enforce specific performance of the contract. *Eastern Counties Ry. v. Hawkes*, 5 H. L. Cas.

331 (1855). Frequently the charter places some limitations or grants some privileges herein. A charter power to hold land for business purposes and to secure debts does not authorize the purchase of land for the purpose of selling it again. *Bank of Michigan v. Niles, Walk.* (Mich.) 99 (1842); *aff'd*, 1 Douglas, 401. *Pacific R. R. v. Seely*, 45 Mo. 212 (1870), where a railroad was held to have no power to acquire land for speculation; *Land v. Coffman*, 50 Mo. 243 (1872); *Rensselaer, etc. R. R. v. Davis*, 43 N. Y. 137 (1870). Under such an express power the corporation cannot purchase merely for the convenience of the corporation, nor for purposes foreign to its objects. *State v. Mansfield*, 23 N. J. L. 510 (1852); *State v. Newark*, 25 N. J. L. 315 (1855). But the purchase is presumed to be for purposes mentioned in the charter. *Chautauque County Bank v. Risley*, 19 N. Y. 369 (1859); *Ex parte Peru Iron Co.*, 7 Cow. 540 (1827); *Moss v. Rossie Lead Min. Co.*, 5 Hill. 137 (1843); *Alward v. Holmes*, 10 Abb. N. Cas. 96 (1880), where a foreign bank had purchased. A railroad, instead of condemning a right of way, may purchase the fee. *Nicoll v. New York, etc. R. R.*, 12 N. Y. 121 (1854). A bank owning a bank building may tear it down, and erect a larger one, even though it intends to rent the extra space. *Wingert v. First Nat. Bank*, 175 Fed. Rep. 739 (1909). A corporation may take land in payment of a debt. *Ronaldson, etc. Co. v. Bynum*, 122 La. 687 (1909). Where a corporation cannot hold land, it cannot do so by holding it in the name of a trustee, but stockholders are entitled to the land as against creditors of the trustee. *Walker v. Taylor*, 252 Ill. 424 (1911).

<sup>2</sup> This arose from the fact that the judges of the supreme court, appointed to examine and report to



In the other states, however, the rule is firmly established that the right of a domestic corporation to purchase and hold land can be questioned only by a stockholder or by the state in a direct proceeding for that purpose. The objection cannot be made by others.<sup>1</sup> Whether

the legislature such of the English statutes as were in force in that state, reported that the statutes of mortmain were "so far in force that all conveyances . . . made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly." The report may be found in 3 Binney (Pa.), 595, 626 (1808). See also *Methodist Church v. Remington*, 1 Watts (Pa.), 218 (1832); *Miller v. Porter*, 53 Pa. St. 292 (1866). The statute of April 6, 1833, made all purchases of land by or for corporations, without the license of the commonwealth, subject to forfeiture. Under this act it has been held that a foreign corporation may purchase and hold real estate in Pennsylvania, subject to being divested by the direct action of the state. *Runyan v. Coster*, 14 Pet. 122 (1840). To same effect, *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313 (1821). A similar statute, passed April 26, 1855, was construed to the same effect in *Hickory Farm Oil Co. v. Buffalo*, etc. R. R., 32 Fed. Rep. 22 (1887), after having been declared a mortmain act in *American Slate Co. v. Phillipsburg*, etc. Bank, 8 W. N. Cas. 430 (1880). A person sued in Pennsylvania on a debt to a foreign corporation cannot set up that the corporation is illegally holding land in the state. *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208 (1876). Where a foreign corporation cannot directly own land in a state, it cannot own land indirectly by owning a majority of the stock of a domestic corporation which owns the land. The state may escheat the land. *Commonwealth v. New York*, etc. R. R., 114 Pa. St. 340 (1886). But under the statutes of Pennsylvania it is legal for a railroad company to own all the stock of a mining company which owns land, and such land does not escheat. *Commonwealth v. New York*, etc. R. R., 139 Pa. St. 457 (1891). A foreign

corporation that has qualified to do business in Pennsylvania may purchase land and mortgage it against everybody except the state. *Re Palmer*, etc. Co., 183 Fed. Rep. 902 (1911). See also § 695, *infra*.

<sup>1</sup> Only the state can question the power of a corporation to acquire land. *Bowman v. Trainor Co.*, 93 Ark. 435 (1910). The vendor of land to a corporation cannot maintain a suit to have the sale vacated on the ground that the company had no power to buy. *Ancell v. Southern*, etc. Co., 223 Mo. 209 (1909). A person transferring land to a corporation for stock cannot claim the land on the ground that the corporation could not legally acquire it, nor on the ground that her certificates of stock had been stolen by the corporation. *Hayden v. Hayden*, 241 Ill. 183 (1909). A contract for the purchase of real estate cannot be avoided on the ground that a prior owner was a corporation without authority to hold. *Milton v. Crawford*, 65 Wash. 145 (1911). In a suit by a corporation to quiet title to its land the defendant cannot set up that the corporation owns more land than the statute allows. *Touart v. Jett*, etc. Co., 169 Ala. 638 (1910). A corporation organized to operate turpentine lands cannot defeat an action by a real estate broker for his commissions for obtaining a purchaser for lands offered by the corporation, by alleging the defense that the company did not own the lands and had no power to speculate in them. *McQuaig v. Gulf*, etc. Co., 56 Fla. 505 (1908). A partnership which holds itself out as a corporation and buys and sells land in its name is estopped from denying the validity of a deed to it in a suit against it for violating the terms of the deed. *Daniels v. Roanoke*, etc. Co., 74 S. E. Rep. 331 (N. C. 1912). Only the state can raise the question that the corporation was not entitled to acquire real estate. *Cooney*



a corporation has purchased more land than it is authorized to purchase concerns only the state and cannot be raised collaterally by private

*v. Booth, etc. Co.*, 169 Ill. 370 (1897); *Land v. Coffman*, 50 Mo. 243 (1872), holding also that a deed voluntarily made to the corporation of real property in excess of the amount allowed by its charter will pass a good title; *Natoma Water, etc. Co. v. Clarkin*, 14 Cal. 544, 552 (1860), *Field, C. J.*, saying: "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." The right of a corporation to take an assignment of the lease cannot be questioned by the lessor. *Springer v. Chicago, etc. Co.*, 202 Ill. 17 (1903). A grantor of a right of way for a telephone line cannot claim that the grantee—a water company—had no power to take such a grant. *North Eastern, etc. Co. v. Hepburn*, 72 N. J. Eq. 7 (1907). The *cestui que trust* cannot claim that a bank which purchased land from their trustee had no power to purchase it. *State v. Hoskins*, 130 Iowa, 339 (1906). A grantor of a right of way to a tramway company cannot repudiate the deed on the ground that the company was not authorized to construct a railroad. *Beasley v. Aberdeen, etc. R. R.*, 145 N. C. 272 (1907). The lessor of oil and gas rights cannot maintain a suit to cancel the contract on the ground that the lessee corporation had no authority to make it. *Harris v. Independence Gas Co.*, 76 Kan. 750 (1907). Even though a safe deposit company is authorized to possess real estate necessary for the transaction of its business, and it erects a large office building fourteen stories high and rents nearly all of it, yet a tenant cannot avoid payment of rent on the ground that it holds too much real estate. *Rector v. Hartford Deposit Co.*, 190 Ill. 380 (1901). A person claiming land by adverse possession as against a corporation

cannot set up that the corporation had no power to acquire the land. Only the state can raise this question. *Chicago, etc. R. R. v. Keegan*, 185 Ill. 70 (1900). The right of a beneficial association to purchase land as an investment cannot be questioned by any one but the state. *Hagerstown, etc. Co. v. Keedy*, 91 Md. 430 (1900). A vendor of land to a corporation cannot afterwards claim that the corporation had no power to purchase. *Miller v. Flemingsburg, etc. Co.*, 109 Ky. 475 (1900). A party who has made an executory contract to sell real estate to a corporation cannot refuse to transfer on the ground that the company had no power to buy, the company having made improvements. *Coleridge, etc. Co. v. Jenkins*, 66 Neb. 129 (1902). The power of a private corporation to acquire land cannot be questioned by the grantor of land to the corporation, and moreover, even if the rule were otherwise, an agent who bought for the corporation as agent would not be personally liable. *Ray v. Foster*, 53 S. W. Rep. 54 (Tex. 1899). A grantor of property to a railroad company for picnic purposes cannot avoid his deed and its obligations by claiming that the purchase by the company was *ultra vires*. *Shelby v. Chicago, etc. R. R.*, 143 Ill. 385 (1892). The corporation cannot defend against a mortgage on the ground that it had no power to purchase the property. *Butterworth, etc. v. Kritzer, etc. Co.*, 115 Mich. 1 (1897). There are many other cases in which it is held that the state alone can raise this objection. *National Bank v. Matthews*, 98 U. S. 621, 628 (1878), and cases cited; *Cowell v. Springs Co.*, 100 U. S. 55 (1879); *Myers v. Croft*, 13 Wall. 291 (1871); *Southern Pac. R. R. v. Orton*, 6 Sawy. 157, 181 (1879), and cases cited; s. c., 32 Fed. Rep. 457, 470; *Shewalter v. Pirner*, 55 Mo. 218 (1874); *Chambers v. St. Louis*, 29 Mo. 543, 576 (1860); *McIndoe v. St. Louis*, 10 Mo. 576 (1847); *People v. Mauran*, 5 Denio, 389 (1848); *Silver Lake*



persons.<sup>1</sup> But where the statute prohibits incorporation for acquiring and holding land, a corporation cannot be formed to take a lease of

Bank v. North, 4 Johns. Ch. 370 (1820); Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313 (1821); Goundie v. Northampton Water Co., 7 Pa. St. 233 (1847); Steamboat Co. v. McCutcheon, 13 Pa. St. 13 (1850); Kelly v. People's Transp. Co., 3 Oreg. 189 (1870); Morgan v. Donovan, 58 Ala. 241 (1877). But in this case it was said that in a suit to enforce a contract of purchase which remained executory, or to recover for its breach, the question of *ultra vires* would be material. Banks v. Poitiaux, 3 Rand. (Va.) 136, 146 (1825); Barrow v. Nashville, etc. Co., 9 Humph. (Tenn.) 304 (1848), holding that the fact that a corporation uses real estate for purposes beyond its powers furnishes no ground to the vendor for a rescission of the contract of sale; Runyan v. Coster, 14 Pet. 122, 129 (1840); Chicago, etc. R. R. v. Lewis, 53 Iowa, 101 (1880); Mapes v. Scott, 94 Ill. 379 (1880), in which the rule was applied to national banks; Alexander v. Tolleston Club, 110 Ill. 65 (1884); Smith v. Sheeley, 12 Wall. 358 (1870); De Camp v. Dobbins, 29 N. J. Eq. 36 (1878), which case was affirmed in 31 N. J. Eq. 671 (1879), where it was, however, held that an heir-at-law may object that a corporation cannot hold land in trust in excess of its statutory powers. See this report for a well-considered opinion, citing cases, and notes by the reporter. Bone v. Delaware, etc. Co., 5 Atl. Rep. 751 (Pa. 1886); Chicago, etc. R. R. v. Lewis, 53 Iowa, 101 (1880); Missouri, etc. Co. v. Bushnell, 11 Neb. 192 (1881); Jones v. Habersham, 107 U. S. 174 (1882); Barnes v. Suddard, 117 Ill. 237 (1886), in which the rule was applied to a foreign corporation; Hickory Farm Oil Co. v. Buffalo, etc. R. R., 32 Fed. Rep. 22 (1887), to the same effect; Spear v. Crawford, 14 Wend. 20 (1835),

where a stockholder was held liable on his statutory liability to a corporate creditor who had sold land to the corporation.

If a corporation buys land and then finds it is *ultra vires*, and sells its contract to a third person, it may collect from the latter moneys paid on the purchase. Crutcher v. Nashville Bridge Co., 8 Humph. (Tenn.) 403 (1847). A railroad company cannot refuse to complete a purchase of lands which, *prima facie*, it could use for railroad purposes. It cannot claim that the purchase was *ultra vires*. Eastern Counties Ry. v. Hawkes, 5 H. L. Cas. 331 (1855). A turnpike company may take a lease of land for storing purposes. Crawford v. Longstreet, 43 N. J. L. 325 (1881). An agreement of a company to buy land if a certain bill passes is legal and binding. Taylor v. Chichester, etc. Ry., L. R. 4 H. L. 628 (1870), reversing s. c., L. R. 2 Exch. 356 (1867). Coleman v. San Rafael Turnp. Co., 49 Cal. 517 (1875), holds that, in an action to quiet title, a bond to convey to a corporation for purposes beyond its requirements is void. Thweatt v. Bank of Hopkinsville, 81 Ky. 1 (1883), where an execution sale to a bank was held to be void at the suit of the execution debtor; Riley v. Rochester, 9 N. Y. 64 (1853), holding, in an action of trespass, that a conveyance to a municipal corporation of land beyond its limits for the purposes of a street is void. Although a corporation purchases land in excess of the amount limited by its charter, yet only the state can object, and its remedy is forfeiture of the charter. Fayette Land Co. v. Louisville, etc. R. R., 93 Va. 274 (1896). The power of a trust company to buy a tax title cannot be attacked by a mortgagee foreclos-

<sup>1</sup> Blair v. Chicago, 201 U. S. 400 (1906). The question of whether a corporation holds more land than it is allowed by law can be raised only

by the state in a direct proceeding for that purpose. Thomas v. Wilcox, 18 S. Dak. 625 (1904). See 156 S. W. Rep. 791.



land and erect a building upon it to rent, and hence such a corporation cannot maintain a suit for such rent, although possibly it might maintain a suit for use and occupation.<sup>1</sup> It is legal for a corporation to hold property in excess of the amount of its capital stock.<sup>2</sup>

A statute to the effect that a corporation must sell its unnecessary real estate within five years does not give the state title to such real estate if not so sold.<sup>3</sup> But the constitutional provision that real estate held by a corporation for more than five years and not necessary for its business will be escheated to the state may be enforced by the legislature and the real estate may be given by it to the school fund. The escheat does not apply to land sold before proceedings are commenced, and no one else can object to its holding the property, and a judgment is necessary before the state can take possession.<sup>4</sup> Where a constitution prohibits a corporation from holding for more than five years any real estate which it does not need in its business, this cannot be avoided by a railroad company organizing a land company to hold such real estate. The state may escheat the land.<sup>5</sup>

A stockholder has the same right to object to an *ultra vires* purchase of land as he has to object to any other *ultra vires* act; <sup>6</sup> but he must be

ing a mortgage on the land. *Watts v. Gantt*, 42 Neb. 869 (1894). In a suit by a corporation to quiet title, a grantee of its grantees cannot set up that the corporation had no power to acquire or hold title. *Butte Hardware Co. v. Cobban*, 13 Mont. 351 (1893). For a careful review of the authorities, and an argument that the corporation or its stockholders are in all cases protected as to real estate purchased *ultra vires*, see 8 *Harvard L. Rev.* 15 (1894). *Cf.* 77 *S. E. Rep.* 812.

<sup>1</sup> *Imperial Bldg. Co. v. Chicago*, etc., 238 *Ill.* 100 (1908).

<sup>2</sup> *Barry v. Merchants' Exchange Co.*, 1 *Sandf. Ch.* 280 (1844). Where a corporation owns property in excess of an amount specified and limited by the charter, an exemption from taxation does not apply to such excess. *The Children's Seashore House*, etc. *v. City of Atlantic City*, 65 *N. J. L.* 488 (1900).

<sup>3</sup> *People v. Stockton, etc. Soc.*, 133 *Cal.* 611 (1901). Only the state can claim that a corporation has held land for longer than ten years in violation of a statute, such land not being in actual use. *Pere Marquette R. R. v. Graham*, 136 *Mich.* 444 (1904).

<sup>4</sup> *Louisville, etc. v. King*, 127 *Ky.* 824 (1908).

<sup>5</sup> *Commonwealth v. Louisville, etc. Co.*, 139 *Ky.* 689 (1909). In the case *German Ins. Co. v. Commonwealth*, 141 *Ky.* 606 (1911), the court sustained an escheat to the state of real estate which an insurance company had held more than five years without needing it in violation of the Kentucky statute. Under the Kentucky constitutional provision that land cannot be held by a corporation more than five years unless proper or necessary for its business, a lot conveyed by a railroad company reserving a purchase money mortgage for the price to a company whose stock was originally held by the railroad and which has been distributed among the stockholders, is subject to escheat. *Louisville, etc. R. R. v. Commonwealth*, 151 *S. W. Rep.* 934 (*Ky.* 1912).

<sup>6</sup> *Re Kent Benefit Bldg. Soc.*, 1 *Dr. & Sm.* 417 (1861); *Grimes v. Harrison*, 26 *Beav.* 435 (1859), where the directors were compelled to make good the funds of the corporation used *ultra vires* to purchase land. A corporation will not be dissolved at the instance of a stockholder because it



prompt in his objection,<sup>1</sup> and must bring suit in behalf of all the stockholders to set the purchase aside.<sup>2</sup> Under a statute authorizing the court to dissolve any corporation on good cause shown, a minority stockholder may file a bill to have the corporation dissolved for purchasing unnecessary real estate.<sup>3</sup> Whenever a corporation may take the legal title to land it may take the beneficial interest in it, but if it cannot hold a legal title it cannot hold as *cestui que trust*.<sup>4</sup> A corporation taking out patents to land in the names of its employees, and then taking a conveyance from them, holds the land subject to forfeiture by the government.<sup>5</sup> The state may by *quo warranto* proceedings forfeit the

purchased a half acre of land *ultra vires*, where it sold the same immediately upon complaint being made. *Bixler v. Summerfield*, 210 Ill. 66 (1904).

<sup>1</sup> See ch. XLIV, *infra*.

<sup>2</sup> See ch. XLV, *infra*.

<sup>3</sup> *Bixler v. Summerfield*, 195 Ill. 147 (1902).

<sup>4</sup> *Coleman v. San Rafael Turnp. Co.*, 49 Cal. 517, 522 (1875). In this case a bond to an individual to convey land in trust for the stockholders of a corporation, with power to sell under direction of its board of trustees, was held to constitute the corporation a *cestuis que trust*. *Vidal v. Girard*, 2 How. 127, 187 (1844), holding also that, if the trust be repugnant to or inconsistent with the purposes of the corporation, a new trustee may be substituted, but no ground is furnished to declare the trust void. See also *De Camp v. Dobbins*, 29 N. J. Eq. 36 (1878); affirmed, 31 N. J. Eq. 671 (1879); *Clemens v. Clemens*, 37 N. Y. 59 (1867); *Chamberlain v. Chamberlain*, 43 N. Y. 424 (1871); *Harris v. American Bible Soc.*, 2 Abb. App. Dec. 316 (1867), but here the corporation had express power to hold in trust; *Downing v. Marshall*, 23 N. Y. 366 (1861).

<sup>5</sup> *United States v. Trinidad Coal, etc. Co.*, 137 U. S. 160 (1890). Where several persons, in order to evade section 2331 of the United States Revised Statutes, which limits to twenty acres the amount of placer-mining ground that a single person may locate, agree that "dummies" shall be used as locators, and the "dummies" shall transfer the land to one person, who

shall hold it for all of the principal parties, and all this is done, the person thus obtaining title cannot be compelled by the others to divide. The contract is illegal and the court will not aid any party. *Mitchell v. Cline*, 84 Cal. 409 (1890). See also *Case v. Kelly*, 133 U. S. 21 (1890). Where land is entered in the names of individuals in order to evade a statute against corporations, and then they deed to the corporations, the state may set aside the grants. *Wichita, etc. Co. v. State*, 80 Tex. 684 (1891). A corporation which engages in the business of buying and selling real estate through a trustee does not forfeit its title to land acquired by such trustee, although contrary to 2 Utah Comp. L. 1888, § 2272, which provides that a corporation "shall not have power to enter into, as a business, the buying and selling of real estate," but affixed no penalty for its violation. *Fisk v. Patton*, 7 Utah, 399 (1891). Even a domestic corporation cannot obtain a patent to a mining claim under the federal statutes, unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. *Thomas v. Chisholm*, 13 Colo. 105 (1889). A foreign corporation not authorized to own and register ships in America cannot evade the law by taking title in the names of trustees who are residents of America. *Ogden v. Murray*, 39 N. Y. 202 (1868), — a dictum. Under a constitutional provision that conveyances to a corporation, a majority of the stock of which is held by aliens, shall be void, the



charter of a corporation which has acquired land not reasonably needed for the purposes of the business specified in its charter.<sup>1</sup>

Although the officers of a railroad company take in their own names the title to lands, which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands.<sup>2</sup> A creditor of an insolvent company may reach land owned by it but held in the name of another company, and it is no defense that the former company had no power to hold such land.<sup>3</sup> The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.<sup>4</sup>

*Quo warranto* does not lie to oust a corporation from the possession of land. *Quo warranto* lies only to oust a company from the franchises it claims, and not to divest it of property.<sup>5</sup>

It is well settled that corporations may, without special authority, dispose of land as they may deem expedient,<sup>6</sup> and may mortgage lands

attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such majority having since that time passed into alien hands. *State v. Hudson Land Co.*, 19 Wash. 85 (1898).

<sup>1</sup> A corporation organized to manufacture railway cars has no power to lay out a town around its works and build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theater, a gas plant, a system of water-works and a brick plant, and to own and run a farm for supplies to sell and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor to passengers on its cars, and may sell surplus steam power. The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state, or that a legislative committee had reported that the real estate was properly taxed. *People v. Pullman's Palace*

*Car Co.*, 175 Ill. 125 (1898). A religious corporation has no implied power to use its real estate for business purposes. *First M. E. Church, etc. v. Dixon*, 178 Ill. 260 (1899).

<sup>2</sup> *Case v. Kelly*, 133 U. S. 21 (1890). Land given to the president in consideration of the company extending its line, belongs to the corporation, even though the corporation had no power to acquire such property. *Scott v. Farmers', etc. Bank*, 97 Tex. 31 (1903).

<sup>3</sup> *First, etc. Co. v. Southwestern, etc. Co.*, 138 S. W. Rep. 443 (Tex. 1911).

<sup>4</sup> *Slide, etc. Mines v. Seymour*, 153 U. S. 509, 520 (1894).

<sup>5</sup> *State v. Pittsburgh, etc. R. R.*, 50 Ohio St. 239 (1893).

<sup>6</sup> *White Water, etc. Co. v. Vallette*, 21 How. 414, 424 (1858); *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Dupee v. Boston Water Power Co.*, 114 Mass. 37 (1873); *Burton's Appeal*, 57 Pa. St. 213 (1868); *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869); *Reynolds v. Stark County*, 5 Ohio, 204 (1831); *Newark v. Elliott*, 5 Ohio St. 113 (1855); *De Ruyter v. St. Peter's Church*, 3 Barb. Ch. 119 (1848); *aff'd*, 3 N. Y. 238; *Buell v. Buckingham*, 16 Iowa, 284 (1864), holding also that the sale may be by directors having general powers to make contracts. *Aurora, etc. Soc.*



in the course of legitimate business.<sup>1</sup> A statute authorizing a sale of corporate property in whole or in part upon a vote of the stockholders does not require such vote upon an ordinary sale of real estate.<sup>2</sup> A railroad which has no further use for certain terminal land cannot deed it to trustees to develop and sell for the benefit of the railroad company and other persons who might become interested in the trust.<sup>3</sup>

Under the English statute of wills a devise of land to certain bodies corporate is unlawful. Similar statutes have been enacted quite generally in America.<sup>4</sup> A corporation may acquire real estate, and hence an art museum may take real estate by devise.<sup>5</sup>

*v. Paddock*, 80 Ill. 263 (1875). And see *Binney's Case*, 2 Bland, Ch. 99, 142 (1829); *Railroad Co. v. Howard*, 7 Wall. 392 (1868), in which a sale by a corporation without authority, but with the consent of all the parties interested in the subject-matter of it, was held valid; *Edward v. Fairbanks*, 27 La. Ann. 449 (1879); *Rutland, etc. R. R. v. Proctor*, 29 Vt. 93 (1856), holding also that a purchaser from a corporation cannot defeat an action for the purchase-money by the defense that the corporation had no power to acquire the property. A railroad may sell land which it purchased if it finds it does not need it. *Delaware, etc. Ry. v. Welser*, 233 Pa. St. 154 (1911). A corporation may authorize an agent to deed land belonging to the corporation. *Barcello v. Hapgood*, 118 N. C. 712 (1896). Where a signed copy of a resolution of the board of directors selling certain corporate lands was handed to the vendee this satisfies the statute of frauds. *Western, etc. Co. v. Kalama, etc. Co.*, 42 Wash. 620 (1906). A resolution of the board of directors, even though entered on the minutes, authorizing the president to sell the real estate of the corporation, does not satisfy the statute of frauds. *Cumberland, etc. R. R. v. Shelbyville, etc. R. R.*, 117 Ky. 95 (1903). A mining company having express power to buy land has implied power to sell it. *Re Kingsbury, etc. Ltd.*, [1907] 2 Ch. 259.

<sup>1</sup> See §§ 779, etc., *infra*.

<sup>2</sup> *Marvin v. Anderson*, 11 Wis. 387

(1901). A statute requiring leases by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. *Coal, etc. Co. v. Tennessee, etc. R. R.*, 106 Tenn. 651 (1901). The Michigan statute preventing mining companies from selling their land except by vote of the stockholders does not apply to a sale of standing timber. *Baggaley v. Pittsburg, etc. Co.*, 90 Fed. Rep. 636 (1898). Even though a deed by a mining company has not been ratified by two thirds in interest of the stockholders, as required by statute, yet only a stockholder or some one connected with the title of the corporation can raise this objection. *Galbraith v. Shasta, etc. Co.*, 143 Cal. 94 (1904).

<sup>3</sup> *Williams v. Johnson*, 208 Mass. 544 (1911).

<sup>4</sup> *McCartee v. Orphan Asylum Soc.*, 9 Cow. 437 (1827); *Downing v. Marshall*, 23 N. Y. 366, 384 (1861), but holding that a charter provision enabling a corporation to take land "by direct purchase or otherwise" is an express authority within the meaning of the statute of wills. See also *Kerr v. Dougherty*, 79 N. Y. 327 (1880), overthrowing a bequest by a resident of another state to a New York corporation which was forbidden to take by bequest; *State v. Bates*, 2

<sup>5</sup> *Hubbard v. Worcester Art Museum*, 179 Fed. Rep. 406 (1910); s. c., 196 Fed. Rep. 871.



An educational corporation authorized to accept property to a certain amount cannot take a devise or bequest of property after it already has property equal to the amount limited by its charter.<sup>1</sup> But although the charter of a religious corporation limits the amount of property it may hold, property held by it in excess of that amount is subject to taxation, although illegally held.<sup>2</sup>

A devise or bequest to a corporation to be hereafter created is valid.<sup>3</sup>

Harr. (Del.) 18 (1835), where a devise of money arising from the sale of land was held to be in effect a devise of land; but the contrary view of such a devise was taken in *American Bible Soc. v. Noble*, 11 Rich. Eq. (S. C.) 156 (1859). The statutes of New York against bequests to certain corporations made within a certain time before the testator's death do not apply to a bequest by a foreigner made in a foreign land to a corporation to be organized under the laws of New York, the bequest being valid at the domicile of the testator. *Damert v. Osborn*, 140 N. Y. 30 (1893). In Massachusetts it has been held that a town or a parish may take and hold a devise for the use of schools. *First Parish v. Cole*, 20 Mass. 232 (1825). As to the rule governing bequests to charitable corporations in New York, see *Wetmore v. Parker*, 52 N. Y. 450 (1873). If the objects of the trust are uncertain or vague a devise to a charitable corporation will be void. *Pratt v. Trustees, etc.*, 88 Md. 610 (1898). A foreign charitable corporation cannot take New York land by devise unless the New York statute permits. *White v. Howard*, 46 N. Y. 144 (1871). Cf. *White v. Howard*, 38 Conn. 342 (1871). And concerning the common-law restrictions on the power of charitable corporations to sell land, see *Madison Ave. Bapt. Ch. v. Oliver St. Bapt. Ch.*, 46 N. Y. 131 (1871). See also § 695, *infra*, as to foreign corporations.

<sup>1</sup>*Cornell University v. Fiske*, 136 U. S. 152 (1890); *McGraw v. Cornell University*, 45 Hun, 354 (1887); *Re McGraw*, 111 N. Y. 66 (1888). *Contra* *Hubbard v. Worcester, etc.*, 194 Mass. 280 (1907). Where land is willed to a corporation, the heirs cannot defeat the devise by claiming that the corpora-

tion already has all the land that the statutes allow. Only the state can raise that question. *Hamsher v. Hamsher*, 132 Ill. 273 (1890). In *Jones v. Habersham*, 107 U. S. 174 (1882), where the limit was on the income and the gift increased it beyond the limit, the court held that only the state could object. Where the limitation upon the capacity of a corporation to hold land is based upon a yearly value, the yearly value at the time it is acquired is intended, and the title is not affected by a subsequent increase in its value above the amount limited. *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633 (1847); *Humbert v. Trinity Church*, 24 Wend. 587, 629 (1840). And see *Harvard College v. Boston*, 104 Mass. 470 (1870); *Church of Redemption v. Grace Church*, 68 N. Y. 570 (1877); *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633 (1847). Cf. *Rainey v. Laing*, 58 Barb. 453 (1871). Although a corporation is limited by its charter as to the amount of property it may take, yet a devise to it of property greater in value than that amount is not void, inasmuch as only the state can complain. *Farington v. Putnam*, 90 Me. 405 (1897).

<sup>2</sup>*Evangelical, etc. Soc. v. City of Boston*, 204 Mass. 28 (1910).

<sup>3</sup>*Russell v. Allen*, 107 U. S. 163 (1882); *Burrill v. Boardman*, 43 N. Y. 254 (1871); *Webster v. Wiggin*, 19 R. I. 73 (1895). A bequest to a company to be incorporated within the time allowed by statute is valid. *People v. Simonson*, 126 N. Y. 299 (1891). "That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not



A deed made before incorporation, to be delivered to the corporation after incorporation, is good.<sup>1</sup> A corporation may take the title to land in fee although the duration of the corporation itself is limited.<sup>2</sup> Where a deed is made by or to a *de facto* corporation, the corporate existence cannot be questioned by any of the parties.<sup>3</sup> A devise of real estate to an unincorporated association does not fail. The title descends

denied." *Tilden v. Green*, 130 N. Y. 29, 47 (1891), the court holding, however, that the devise should be to the corporation to be formed and should not be in trust to the executors to convey to such corporation when formed if the executors think best. See also *Burrill v. Boardman*, 43 N. Y. 254 (1871); *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 99 (1830); *Dammert v. Osborn*, 140 N. Y. 30 (1893). A devise and bequest to a corporation to be organized is legal if it is to be organized within the period of two lives in being at the time of the execution of the instrument. *St. John v. Andrews Institute*, 191 N. Y. 254 (1908). A devise to a corporation to be created is legal. *Brigham v. Peter, etc. Hospital*, 126 Fed. Rep. 796 (1903); *aff'd*, 134 Fed. Rep. 513.

<sup>1</sup> *Spring, etc. Bank v. Hurlings, etc. Co.*, 32 W. Va. 357 (1889). Where the promoters pay for land and take a deed in the name of the proposed corporation, the vendor cannot claim that the deed was void, even though the corporation was not actually organized until three years after such deed was given. *White Oak, etc. v. Murray*, 145 Mo. 622 (1898). A grant assigned to a corporation before it is incorporated takes effect upon its incorporation. *Hecht v. Acme Coal Co.*, 113 Pac. Rep. 786 (Wyo. 1911). A deed to a corporation before its charter was taken out may be accepted after the charter is granted, and is valid, even though a slightly different name is adopted from that which appears in the deed. *Sumter, etc. Co. v. Phoenix Ins. Co.*, 76 S. C. 76 (1907). A deed to a corporation before it is organized is not void, but is valid in equity and conveys title to the individuals as partners. *Smith v. First, etc. Bank*, 43 Tex. Civ. App. 495 (1906).

A lease to a corporation not yet organized is void. *Utah, etc. Co. v. Keith*, 18 Utah, 464 (1899). A deed dated before incorporation but actually delivered after incorporation is valid. *San Diego, etc. Co. v. Frame*, 137 Cal. 441 (1902). A deed to certain persons "as incorporators" of a company not yet incorporated does not vest title in the company when incorporated. *McCandless v. Inland, etc. Co.*, 112 Ga. 291 (1900); *s. c.*, 115 Ga. 968. See also §§ 504, 637, *supra*.

<sup>2</sup> *Nicoll v. New York, etc. R. R.*, 12 N. Y. 121 (1854); *Rives v. Dudley*, 3 Jones, Eq. (N. C.) 126 (1856); *Asheville Division v. Aston*, 92 N. C. 578 (1885); *Delhi School Dist. v. Everett*, 52 Mich. 314 (1883). A deed of property to a railroad for fifty years, or so long as its charter continued, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. *Davis v. Memphis, etc. R. R.*, 87 Ala. 633 (1888). A dissolution of a corporation after it has conveyed real estate does not impair the title of the grantees. *People v. Mauran*, 5 Denio, 389 (1848). See also § 641, *supra*.

<sup>3</sup> See § 637, *supra*. Where the owner of real estate deeds it to a supposed corporation, and many years afterwards makes another deed to another corporation, the latter cannot claim that the first corporation was illegally organized. It is for the state alone to make such claim. *Los Angeles, etc. v. Spires*, 126 Cal. 541 (1899). A person who has contracted to purchase land from a supposed corporation cannot avoid the contract by the defense that the charter of the company had expired. *West Missouri, etc. Co. v. Kansas City, etc. Ry.*, 161 Mo. 595 (1901). Under the Montana statutes,



to the heir at law, who holds the same as trustee for the use and benefit of the association.<sup>1</sup> The land owned by such an association is generally vested in trustees for its benefit.<sup>2</sup>

§ 695. *Land may be purchased, held, and sold by a foreign as distinguished from an alien corporation, if there is no statute of the state to the contrary.* — A foreign corporation, other than an alien corporation, having power to buy and sell land, may at common law buy and sell land in other states, as well as that in which it was incorporated.<sup>3</sup>

In the exercise of comity between the states, corporations created in one of them may acquire, hold, and transfer land in another, the same as individuals.<sup>4</sup>

even though no organization meetings of the stockholders and directors are held, yet a deed of property to the corporation may be valid. *Morrison v. Clark*, 24 Mont. 515 (1900).

<sup>1</sup> *American Bible Soc. v. American Tract Soc.*, 62 N. J. Eq. 219 (1901), the court refusing to follow the New York decisions to the contrary. See also § 504, *supra*.

<sup>2</sup> See §§ 504 and 622*h*, *supra*.

<sup>3</sup> *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576, 584 (1894), wherein the court said: "As a corporation *de facto*, possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred; and unless in the laws of this state we are able to find a prohibition, expressed herein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed."

<sup>4</sup> *Cowell v. Springs Co.*, 100 U. S. 55 (1879); *Runyan v. Coster*, 14 Pet. 122, 130 (1840); *Christian Union v. Yount*, 101 U. S. 352 (1879); *Barnes v. Suddard*, 117 Ill. 237 (1886); *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73 (1884); *Lathrop v. Commercial Bank*, 8 Dana (Ky.), 114 (1839); *American Bible Soc. v. Marshall*, 15 Ohio St. 537 (1864); *State v. Boston*, etc. R. R., 25 Vt. 433 (1853); *Claremont Bridge v. Royce*, 42 Vt. 730, 736 (1870); *Lumbard v. Aldrich*, 8 N. H. 31 (1835); *Cincinnati, etc. R. R. v.*

*Pearce*, 28 Ind. 502 (1867); *Silver Lake Bank v. North*, 4 Johns, Ch. 370 (1820), holding that a corporation of another state may file a bill for the foreclosure of a mortgage on land in New York; *Columbus Buggy Co. v. Graves*, 108 Ill. 459 (1884); *Black v. Delaware, etc. Canal Co.*, 22 N. J. Eq. 130, 422 (1871), the chancellor saying "that a foreign corporation may own property in this state and transact business, and make contracts in it to be performed here, is too well settled to discuss;" *Northern Transp. Co. v. Chicago*, 7 Biss. 45, 52 (1874); s. c., 18 Fed. Cas. 362, 365; *aff'd*, 99 U. S. 635; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322 (1882); *New York Dry Dock v. Hicks*, 5 McLean, 111 (1850); s. c., 18 Fed. Cas. 151; *Whitman Gold, etc. Co. v. Baker*, 3 Nev. 386 (1867); *Metropolitan Bank v. Godfrey*, 23 Ill. 579 (1860), holding also that foreign corporations can only acquire and hold lands upon the terms and conditions and in the way authorized by the law of their creation. They may loan money on real-estate mortgages. See § 690, *supra*. *Cf. Northwestern, etc. Ins. Co. v. Overholt*, 4 Dill. 287 (1878); s. c., 18 Fed. Cas. 403; *Morris Canal, etc. Co. v. Townsend*, 24 Barb. 658 (1857), where a statute authorizing a foreign corporation to appropriate land on payment of a just compensation to its owners was held valid (affirmed as to this point, *Re Townsend*, 39 N. Y. 171-1868); *Stewart v. Lehigh Valley R. R.*, 38 N. J. L. 505 (1875);



This right of foreign corporations to acquire and hold real estate is, however, subject to the statutory laws of the state wherein the land is situated, and also to its public policy and the general policy of its statutes relating to domestic corporations.<sup>1</sup> Hence the heirs of a testa-

National Trust Co. v. Murphy, 30 N. J. Eq. 408 (1879); *Sherwood v. American Bible Soc.*, 1 Keyes, 561 (1864); *Elston v. Piggott*, 94 Ind. 14 (1883), to the effect that it may hold land purchased at a judicial sale under a decree in its favor. A corporation organized in one state may own land in another state unless the statutes of the latter prohibit the same. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893 (1903). An alien corporation may purchase and hold land in Missouri. *Missouri, etc. Co. v. Reinhard*, 114 Mo. 218 (1893). The Connecticut Land Company was organized in Connecticut in 1795 and owned the entire Connecticut "Western Reserve." This land was held in the names of trustees for the benefit of the stockholders of the company until 1809, when the company partitioned the land among its stockholders and divided its assets and was dissolved. *Holmes v. Cleveland R. R.*, 93 Fed. Rep. 100 (1861), where the court held that a small parcel of land which accidentally was omitted in making such division of the assets could not be claimed by the heirs of the stockholders fifty years after the division was made. Although an alien cannot own real estate, yet he may own stock in a corporation which owns real estate. *Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530 (1888). As to foreign corporations holding land, see 35 Cent. L. J. 166. As to the act of Congress prohibiting foreign corporations from owning land in the territories, see *Potter v. Rio Arriba, etc. Co.*, 4 N. M. 322 (1888). Where a Colorado corporation has power, among other things, to deal in real estate, its purchases of land in Texas cannot be questioned by any one except the state, even though Texas does not allow incorporation for that purpose. *Galveston, etc. Co. v. Perkins*, 26 S. W. Rep. 256 (Tex. 1894). Where a banker sells stock to a

lawyer, and informs the latter that the company, the owner of land in Mexico, had a right, though an alien to Mexico, to own land therein, as the banker had been informed by his attorney, a note of the vendee in payment of the stock cannot be defeated on the ground that such corporation could not legally hold the land. *Daly v. Brennan*, 87 Wis. 36 (1894). A foreign corporation may buy and sell land if authorized so to do by its charter. *Barcello v. Hapgood*, 118 N. C. 712 (1896). A foreign corporation may own land in Mississippi. *Taylor v. Alliance Trust Co.*, 71 Miss. 694 (1894).

<sup>1</sup> *Christian Union v. Yount*, 101 U. S. 352 (1879); *Carroll v. East St. Louis*, 67 Ill. 568 (1873), where a corporation chartered by Connecticut for the sole purpose of buying and selling land was held not competent to acquire land in Illinois, because such business was contrary to the general policy of the state and tended to create perpetuities; *U. S. Trust Co. v. Lee*, 73 Ill. 142 (1874), in which the court denied the right of a foreign corporation to hold real estate in Illinois beyond what is necessary to the transaction of its business of the collection of its debts, either for its own benefit or in trust for others; *U. S. Mortgage Co. v. Gross*, 7 Cent. L. J. 226 (1878), in which the Illinois rule was explained so as not to exclude foreign corporations empowered to loan money on real-estate securities; *Thompson v. Waters*, 25 Mich. 214 (1872); *Holbert v. St. Louis, etc. Ry.*, 45 Iowa, 23 (1876), holding that statutes authorizing railroads to take land for their right of way do not apply to foreign corporations; *Farmers' L. & T. Co. v. McKinney*, 6 McLean, 1 (1853); s. c., 8 Fed. Cas. 1048; *Farmers' L. & T. Co. v. Harmony F. & M. Ins. Co.*, 51 Barb. 33 (1868); aff'd, 41 N. Y. 619; *White v. Howard*, 46 N. Y. 144 (1871); *Hollis v. Drew Theol. Seminary*, 95 N. Y.



tor who has devised land to a foreign corporation may defeat the devise on the ground that domestic corporations of a similar class could not take such land under the statutes of the state.<sup>1</sup>

Generally, however, only the state or a dissenting stockholder can question the power of a foreign corporation to hold land.<sup>2</sup> Only the

166 (1884), holding that foreign corporations are subject to the New York statute which declares invalid a devise or bequest in a will executed less than two months before the death of the testator. In *Re Prime's Estate*, 136 N. Y. 347, 362 (1893), the court said: "A general law of the state prohibiting corporations from exercising particular powers will operate upon foreign corporations, not because the act binds such corporations *ex proprio vigore*, but for the reason that their exercise of such powers here would violate the public policy of the state, indicated by the general restraint imposed upon our own corporations." A foreign corporation that has qualified to do business in Pennsylvania may purchase land and mortgage it against everybody except the state. *Re Palmer, etc. Co.*, 183 Fed. Rep. 902 (1911). For the decisions in Pennsylvania on its statutes and policy excluding corporations from holding land, see § 694, *supra*. Where land is claimed by a foreign corporation, the courts of the state in which the land is situated will construe its charter and determine whether it authorizes the corporation to hold the real estate. *Boyce v. St. Louis*, 29 Barb. 650 (1859); *White v. Howard*, 38 Conn. 342 (1871). And in construing such foreign charters the court will consider the decisions of the courts of the state granting them, though it will not be bound thereby. *Thompson v. Waters*, 25 Mich. 214 (1872); *Boyce v. St. Louis*, 29 Barb. 650 (1859). The right of a corporation to hold realty is determined not alone by its charter, but by the statutes of the state where the land is. A corporate deed in a chain of title is presumed good. *Tarpey v. Deseret Salt Co.*, 5 Utah, 494 (1888). If a foreign corporation is not authorized to hold real estate, it cannot take land in another state by devise. *Boyce v. St. Louis*, 29 Barb.

650 (1859); *Starkweather v. American Bible Soc.*, 72 Ill. 50 (1874).

On the other hand, if by its charter, either expressly or impliedly, a corporation may take lands by devise, an independent provision of law in its own state prohibiting corporations from taking by devise, unless expressly authorized to do so, will not prevent its taking by devise in another state. *American Bible Soc. v. Marshall*, 15 Ohio St. 537 (1864); *Thompson v. Swoope*, 24 Pa. St. 474 (1855); *Chamberlain v. Chamberlain*, 43 N. Y. 424 (1871), but here the bequest was of personal property. To same effect, *Sherwood v. American Bible Soc.*, 4 Abb. App. Dec. 227 (1864). A devise of land to a foreign corporation is void unless authorized by the law of the state where it lies, even though such foreign corporation is duly authorized by its charter to take it. *White v. Howard*, 46 N. Y. 144 (1871), followed in *United States v. Fox*, 94 U. S. 315 (1876), declaring void a devise of land in New York to the government of the United States.

<sup>1</sup> *Proctor v. Board of Trustees, etc.*, 225 Mo. 51 (1909).

<sup>2</sup> *Seymour v. Slide, etc. Mines*, 153 U. S. 523 (1894). The state alone can object to a foreign corporation holding more than five thousand acres of land in the state as prescribed by the statutes. *American Mortgage Co. v. Tennille*, 87 Ga. 28 (1891). Where a Connecticut company owning land in South Dakota sells it to a Minnesota corporation organized to speculate in land, a subsequent deed by the former company to an individual is not good. Only the state can question the power of the Minnesota corporation to take title. The constitutional provision of South Dakota relative to land does not change this rule. *Gilbert v. Hole*, 2 S. Dak. 164 (1891). Only the state can claim that a foreign corporation has no power



state can object that a foreign corporation has held land in the state for more than five years in violation of the constitution.<sup>1</sup> And only the state can object to a foreign corporation holding more land than the statutes permit.<sup>2</sup> A deed of land to a foreign corporation in Colorado is valid, although the corporation has not filed a copy of its charter as required by the statutes. The grantor cannot complain.<sup>3</sup>

A state may restrict the right of foreign corporations to take and hold real property within its borders.<sup>4</sup> For instance, the state may require a foreign corporation to qualify to do business in the state before buying land.<sup>5</sup> Thus, a deed of land to a foreign corporation that has not qualified is void, under the Wisconsin statute, which prohibits a company acquiring property without qualifying.<sup>6</sup> A foreign corporation which has not qualified but which has made a lease of property, may maintain a suit for the recovery of the property, the lease being void.<sup>7</sup>

§§ 696-700. *Foreign corporations — Their right to do business in the various states — Restrictions thereon. — Common law right:* The corporation of one state may exercise any or all of its powers in

to own land in the state. McKinley, etc. Co. v. Gordon, 113 Iowa, 481 (1901). In a suit by an Illinois corporation to recover land in Wisconsin, a claimant of the land cannot set up that the Illinois corporation had no power to acquire the land. Illinois Steel Co. v. Warras, 141 Wis. 119 (1909). Only the federal government can object to a national bank purchasing land. De Witt, etc. Bank v. Mickleberry, 244 Ill. 77 (1910). A foreign corporation acquiring land in Arkansas may commence suit to quiet title, and it is no defense that the corporation had no authority to buy the land. Rachels v. Stecher, etc. Works, 95 Ark. 6 (1910). Even though a foreign corporation is prohibited by statute from owning land in the state, and it purchases land in the name of an agent, and the agent transfers it without consideration, such foreign corporation may bring suit to recover the title to the land. Only the state can object to its owning the land. Omnium, etc. Co. v. North American T. Co., 65 Kan. 50 (1901).

<sup>1</sup> Summet v. City, etc. Co., 106 S. W. Rep. 614 (Mo. 1907). After an escheat is declared it is too late for the company to offer to pay costs if

permitted to sell the land and retain the proceeds. Louisville Ins. Co. v. Commonwealth, 144 Ky. 459 (1912).

<sup>2</sup> Reorganized Church, etc. v. Church of Christ, 60 Fed. Rep. 937 (1894).

<sup>3</sup> Fritts v. Palmer, 132 U. S. 282 (1889). In a suit by a New Jersey corporation to protect its title to land in Florida, it is no defense that the company was organized in New Jersey to do all its business in Florida for the purpose of avoiding the laws of Florida relative to incorporation. Indian River Mfg. Co. v. Wooten, 55 Fla. 745 (1908). Even though a foreign corporation has not complied with the statutes, yet if it legally acquired land before the statute was passed, it may protect its title at least as against all parties other than the state. War Eagle, etc. Co. v. Dickie, 14 Idaho, 534 (1908).

<sup>4</sup> Runyan v. Coster, 14 Pet. 122 (1840); Thompson v. Waters, 25 Mich. 214 (1872); United States v. Fox, 94 U. S. 315 (1876).

<sup>5</sup> See §§ 696-700, *infra*.

<sup>6</sup> Hanna v. Kelsey Realty Co., 145 Wis. 276 (1911).

<sup>7</sup> United, etc. Co. v. Ramlose, 231 Mo. 508 (1910).



another state, unless the latter state, by its statutes, decisions, or policy, forbids.<sup>1</sup> This right of a corporation to act and contract in any state is due to the spirit of comity between the states.<sup>2</sup>

*This right may be denied.* — It is constitutional, however, for a state to refuse to allow that privilege,<sup>3</sup> except as to interstate commerce.

<sup>1</sup> Quoted and approved in *Tootle v. Singer*, 118 Iowa, 533 (1901). A New Jersey corporation may do business in Missouri even though all of its stock excepting one share is held by citizens of Missouri, and even though the statutes of Missouri forbid foreign corporations doing business in that state where they were organized for the purpose of avoiding the laws of that state. *State v. Cook*, 181 Mo. 596 (1904). A foreign business corporation doing business in Colorado ceases to be a corporation in that state after twenty years, even though by its charter it was to exist fifty years, the duration of domestic corporations in Colorado being limited to twenty years. *Iron, etc. Co. v. Cowie*, 31 Colo. 450 (1903). Where a city refuses to designate the location of poles for a telephone company, as prescribed by statute, and requires the wires to be laid in underground conduits, *mandamus* lies to compel it to designate the location of the poles, and a general statute applicable to telephone companies to that effect applies to foreign as well as domestic telephone companies. *State v. Mayor, etc.*, 30 Mont. 338 (1904). A foreign corporation authorized by its charter to do certain business, may transact that business in another state, even though the statutes of such state do not authorize incorporation for that purpose, the purpose itself being legal. *Haskins v. Kelly*, 77 Kan. 155 (1908).

<sup>2</sup> As to the power of a foreign corporation to do business in New York, the court, in *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576, 591 (1894), said: "It seems to me to be very clear, upon examination of our laws and by reference to such judicial opinions, that there never was a time in the history of the state when a foreign corporation was prevented from entering its boundaries to transact any

lawful business which a non-resident natural person might have transacted here." In *People v. Fidelity, etc. Co.*, 153 Ill. 25 (1894), it was held that, in the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois. *Cf. n. 1, p. 2338, infra.*

<sup>3</sup> *Bank of Augusta v. Earle*, 13 Pet. 519 (1839); *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521 (1876); *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343 (1875); *Paul v. Virginia*, 8 Wall. 168 (1868); affirmed in *Ducat v. Chicago, etc.*, 10 Wall. 410 (1870); *Matthews v. Theological Seminary*, 2 Brewst. (Pa.) 541 (1868); *Land Grant, etc. Co. v. Coffey County*, 6 Kan. 245 (1870); *Ducat v. Chicago*, 48 Ill. 172 (1868); *Williams v. Creswell*, 51 Miss. 817 (1876); *Hadley v. Freedmen's, etc. Co.*, 2 Tenn. Ch. 122 (1874); *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566 (1870); s. c., *sub nom. Oliver v. Liverpool, etc. Ins. Co.*, 100 Mass. 531; *Kennebec Co. v. Augusta Ins. etc. Co.*, 72 Mass. 204 (1856); *Day v. Ogdensburgh, etc. R. R.*, 107 N. Y. 129 (1887), where a domestic company leased a railroad in another state; *Kerehner v. Gettys*, 18 S. C. 521 (1882); *Mutual, etc. Ins. Co. v. Davis*, 12 N. Y. 569 (1855); *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767 (1856); *Doyle v. Continental Ins. Co.*, 94 U. S. 535 (1876); *Fire Department v. Noble*, 3 E. D. Smith (N. Y.), 440 (1854); *People v. Philadelphia Fire Assoc.*, 92 N. Y. 311 (1883); *Atterbury v. Knox*, 4 B. Mon. (Ky.) 90 (1843), where foreign corporations were forbidden to do banking. See also *Cooley, Const. Law*, p. 183; *Wharton, Conf. L.*, § 48a. In *Diamond Match Co. v. Powers*, 51 Mich. 145 (1883), the court refused



As has been truly said by the supreme court of Tennessee, foreign corporations have no inherent power to do business in the state and are mere "guests," and may be ejected by any procedure which the state may care to adopt.<sup>1</sup> But after a foreign corporation under authority granted by the state has acquired property in the state and made large investments under express authority of the statutes of the state, the state cannot prohibit such corporation from doing further business in the state, there being no charge of misuser or non-user.<sup>2</sup>

*Foreign corporations must conform with the general policy of the state — Forbidden business.* — Foreign corporations must exercise their powers and franchises in accordance with the laws of the state where they do business, and in consonance with the principles of its general policy.<sup>3</sup> In Missouri it is held that a foreign corporation ad-

to *mandamus* the defendant, a register of deeds, to allow the plaintiff, a foreign corporation, to make abstracts of all the land in the county, there being no evidence of the corporate powers of the plaintiff. A foreign corporation may make a loan in Missouri. *Ferguson v. Soden*, 111 Mo. 208 (1892). An English corporation is of course an alien corporation. *Eureka, etc. Co. v. Richmond, etc. Co.*, 2 Fed. Rep. 829 (1880). A state may exclude a foreign corporation from doing business in the state unless engaged in interstate business. *Huffman v. Western, etc. Co.*, 13 Tex. Civ. App. 169 (1896). A foreign corporation cannot prevent a state granting a charter to a corporation with the same name and for the same purposes. *National Council, etc. v. State Council*, 203 U. S. 151 (1906).

<sup>1</sup> *State v. Standard Oil Co.*, 120 Tenn. 86 (1908).

<sup>2</sup> *Seaboard, etc. Ry. v. Railroad Commission*, 155 Fed. Rep. 792 (1907). A railroad corporation may enjoin a state officer from forfeiting its right to do business in the state, where it acquired valuable property in the state after being authorized to do business therein. *Chicago, etc. Co. v. Ludwig*, 156 Fed. Rep. 152 (1907). A state may impose additional conditions on foreign corporations doing business in the state, and the court may decree that unless these conditions are complied with within a specified time a foreign corporation

will be excluded from the state. *State v. American, etc. Co.*, 135 N. W. Rep. 365 (Neb. 1912), setting aside opinion in 133 N. W. Rep. 235.

<sup>3</sup> *Runyan v. Coster*, 14 Pet. 122 (1840); *Re Comstock*, 3 Sawyer, 218 (1874); s. c., 6 Fed. Cas. 244; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush (Ky.), 68 (1868); *Gill v. Kentucky, etc. Co.*, 7 Bush (Ky.), 635 (1870); *Martin v. Mobile, etc. R. R.*, 7 Bush (Ky.), 116 (1870); *Milnor v. New York, etc. R. R.*, 53 N. Y. 363 (1873); *Frazier v. Wilcox*, 4 Rob. (La.) 517 (1843); *Bard v. Poole*, 12 N. Y. 495 (1855); *Diamond Match Co. v. Powers*, 51 Mich. 145 (1883); *Pierce v. Crompton*, 13 R. I. 312 (1881); *Stevens v. Pratt*, 101 Ill. 206 (1882), holding that the general policy of a state restricting foreign corporations must be expressed in some affirmative way; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 564 (1847); 2 Kent, Com. 284, 285. The general incorporating law of Massachusetts, which does not allow incorporation for manufacturing liquor, does not prevent incorporation for selling liquor, and hence a foreign corporation may sell liquor in that state. *Enterprise, etc. Co. v. Grimes*, 173 Mass. 252 (1899). A foreign corporation may set up the defense of usury, even though it could not do so by the laws of the state in which it is incorporated. *Stack v. Detour, etc. Co.*, 151 Mich. 21 (1908). A court will not grant *mandamus* at the instance of a foreign corporation to



mitted to do business in the state, either by comity or by express statutory provisions, can transact only the business which a domestic corporation of like character is authorized to transact, and hence that a foreign railroad company having power to build telegraph lines as well as a railroad cannot build a telegraph line in Missouri.<sup>1</sup> Where the statutes provide that no foreign corporation shall transact business which a domestic corporation cannot transact, and domestic corporations are not allowed to act as executors, a foreign corporation cannot act as such in the state.<sup>2</sup> As a rule, however, no such restrictions are placed on foreign corporations.<sup>3</sup>

The validity and enforceability of a contract by a foreign corporation are determined, not by its charter, but by the law prevailing where the contract is made.<sup>4</sup>

compel the secretary of state to issue a permit to it to do business in the state where its business is the selling of mortgages not properly secured. *New York Mtge. Co. v. Secretary of State*, 150 Mich. 197 (1907). A statute requiring resident owners to list property for taxation does not apply to a foreign corporation. *Squire & Co. v. City of Portland*, 106 Me. 234 (1909). A foreign corporation may transact business within the state provided a similar domestic corporation may transact such business within the state. *Floyd v. National, etc. Co.*, 49 W. Va. 327 (1901). Where the statutes of a state provide that a mortgage shall not be given by a domestic mining corporation on its mines, except by the consent of two thirds of the capital stock, and the statutes also provide that foreign corporations shall not be allowed to do business within the state on more favorable terms than domestic corporations, a mortgage by a foreign corporation on a mine within the state, without the consent of the stockholders, is void. *Williams v. Gold Hill, etc. Co.*, 96 Fed. Rep. 454 (1899); *aff'd*, 186 U. S. 157 (1902). *Cf. Saltmarsh v. Spaulding*, 147 Mass. 224 (1888). The legislature may require foreign coal mining corporations to weigh the coal before it is screened. *Woodson v. State*, 69 Ark. 521 (1900).

<sup>1</sup> *State v. Cook*, 171 Mo. 348 (1903). A statute in Washington provides that a foreign corporation cannot transact business in the state which a domes-

tic corporation cannot transact. *State v. Nichols*, 48 Wash. 605 (1908). *Cf. People v. Fidelity, etc. Co.*, 153 Ill. 25 (1894).

<sup>2</sup> *Farmers', etc. Co. v. Smith*, 74 Conn. 625 (1902).

<sup>3</sup> See notes, *supra*; also §§ 237-240.

<sup>4</sup> Quoted and approved in *Skinner v. Southern, etc. Assoc.*, 46 Fla. 547 (1903). A charter provision prohibiting the corporation from selling its bonds below par does not invalidate the bonds when sold to a *bona fide* purchaser in another state. *Elsworth v. St. Louis, etc. R. R.*, 33 Hun. 7; *aff'd*, 98 N. Y. 553 (1885). See also *Philadelphia Loan Co. v. Townner*, 13 Conn. 249 (1839); *Nichols v. Mase*, 94 N. Y. 160 (1883), holding that the holder of bonds issued by a foreign corporation, valid upon their face, is not bound to show that the provisions of the statute which authorized their issue have been complied with; *Bard v. Poole*, 12 N. Y. 495 (1855), holding that a corporation prohibited by its charter from contracting for interest over a certain rate may, however, contract for a greater rate in another state under whose laws it is legal. To same effect, *Knox v. Bank of U. S.*, 26 Miss. 655 (1854), and *Bank of U. S. v. Owens*, 2 Pet. 527 (1829); *American Life Ins. Co. v. Dobbin, Hill & D.* (Lalor's Supp.) 252 (1843), where, construing the New York restraining act, it was held that a foreign corporation could purchase and sell promissory notes, but not



*Conditions may be imposed on foreign corporations.*—A state legislature may impose such terms, conditions, and restrictions upon foreign corporations as it sees fit,<sup>1</sup> unless interstate commerce is interfered with.

*License fees.*—A state may require a foreign corporation to pay a license fee before doing business within its borders.<sup>2</sup> A state may exact

bills of exchange; *Bank of Chillicothe v. Dodge*, 8 Barb. 233 (1850), holding that money paid by a foreign corporation in violation of local law is recoverable by it. For cases under a statute of Missouri, see *Bank of Louisville v. Young*, 37 Mo. 398 (1866); *Connecticut Mut. L. Ins. Co. v. Albert*, 39 Mo. 181 (1866); *Long v. Long*, 79 Mo. 644 (1883). But corporate creditors and stockholders are subject to provisions and regulations contained in the charter. *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 536 (1883), where a statutory recapitalization was held to be valid; *Hitchcock v. U. S. Bank*, 7 Ala. (N. S.) 386, 435 (1845), holding that the corporation can exercise only the powers given to it by its charter. A foreign corporation may take any interest allowed by the place of contract, though such interest is usurious by its charter. *Hitchcock v. U. S. Bank*, 7 Ala. (N. S.) 386 (1845).

<sup>1</sup> *Paul v. Virginia*, 8 Wall. 168 (1868); *Ducat v. Chicago*, 10 Wall. 410 (1870); *Doyle v. Continental Ins. Co.*, 94 U. S. 535 (1876); *Lafayette Ins. Co. v. French*, 18 How. 404 (1855), holding that a corporation doing business in such state is presumed to assent to its rules; *State v. Lathrop*, 10 La. Ann. 398 (1855); *State v. Fosdick*, 21 La. Ann. 434 (1869); *Indiana v. American Exp. Co.*, 7 Biss. 227 (1876); s. c. 13 Fed. Cas. 24; *Fire Department v. Noble*, 3 E. D. Smith, 440 (1854); *Smith v. Alford*, 63 Barb. 415 (1866); *Merrick v. Van Santvoord*, 34 N. Y. 208 (1866); *Lamb v. Lamb*, 13 Bankr. Reg. 17 (1875); s. c., 14 Fed. Cas. 1016; *Farmers', etc. Ins. Co. v. Harrah*, 47 Ind. 236 (1874); *Cincinnati Mut. etc. Co. v. Rosenthal*, 55 Ill. 85 (1870), holding that a charter power to transact business in other states does not exempt them from local restrictions; *People v.*

*Howard*, 50 Mich. 239 (1883); *People v. Philadelphia Fire Assoc.*, 92 N. Y. 311 (1883); *Goldsmith v. Home Ins. Co.*, 62 Ga. 379 (1879), where a statute imposing upon foreign corporations the same license taxes as their own states impose was held constitutional; *Home Ins. Co. v. Davis*, 29 Mich. 238 (1874); *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767 (1856); *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26 (1880); *Matthews v. Theological Seminary*, 2 Brewst. (Pa.) 541 (1868); *Commonwealth v. Milton*, 12 B. Mon. (Ky.) 212 (1851); *Tioga R. R. v. Blossburg, etc. R. R.*, 20 Wall. 137 (1873), prohibiting foreign corporations from setting up the statute of limitations. Foreign corporations doing business in a state which prescribes statutory provisions for that business cannot in contracts do away with the application to it of these provisions. *Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep. 526 (1882). The same rule applies to an insurance corporation chartered by Congress. It must conform to state restrictions. *Daly v. National Life Ins. Co.*, 64 Ind. 1 (1878). A railroad company, by going into another state and having and operating a road there, subjects itself to the legislation of that state. *Stone v. Illinois Central R. R.*, 116 U. S. 347 (1885). Foreign corporations may be compelled to pay a license fee before doing business. *Pembina, etc. Co. v. Pennsylvania*, 125 U. S. 181 (1888). But see below.

<sup>2</sup> *Walker v. Springfield*, 94 Ill. 364 (1880); *Pembina, etc. Co. v. Pennsylvania*, 125 U. S. 181 (1888). A state may levy a privilege tax on the right to do business wholly within the state, and even though the company is engaged in interstate commerce, yet if it has a right to cease to do business wholly within the state, such



a license fee from one foreign corporation without exacting it from another foreign corporation.<sup>1</sup> The Kansas statute requiring foreign corporations before doing business in the state to pay a specified license fee is not valid as against foreign corporations engaged in interstate commerce where such fee is a tax on the interstate business and also a tax on the company's property outside of the state, and hence a judgment of the state court ousting a foreign telegraph corporation from doing business in the state because it did not pay this fee, which amounted to \$20,100, is invalid. The mere fact that the statute recited that it was not intended to burden or regulate interstate commerce is immaterial.<sup>2</sup> A telegraph company may enjoin prosecuting attorneys in

privilege tax will not be regarded as a tax on interstate commerce. *Allen v. Pullman's, etc. Co.*, 191 U. S. 171 (1903). An express company doing interstate business may maintain a suit in the United States court in Alabama to enjoin the collection of an illegal license fee, even though it has not complied with the statutes of that state relative to filing papers before doing business in that state. *Southern Ex. Co. v. Mayor, etc.*, 116 Fed. Rep. 756 (1902). A state may require a foreign corporation to pay an excise tax on its capital stock as a privilege of doing business in the state, and this is not a restriction or regulation of interstate commerce. The statute is not applicable to a corporation engaged entirely in interstate commerce, but applies to a corporation which has a place of business in the state for other purposes, as well as interstate commerce. *Attorney-General v. Electric, etc. Co.*, 188 Mass. 239 (1905). A state may compel a foreign mining company doing business in the state to pay a privilege tax based on the par value of its capital stock, the amount involved being \$500. *Baltic, etc. Co. v. Commonwealth*, 207 Mass. 381 (1911). Where a foreign corporation did business in the state and then withdrew, and then commenced doing business again, it may be compelled to pay a new license fee. *Phoenix, etc. Co. v. Ludwig*, 87 Ark. 465 (1908). A state may require a foreign corporation to pay a license fee graduated according to its capital stock before doing business in the state. Such license tax

may be annual and is not a tax on interstate commerce, even though imposed on the business, and even though only a part of the capital stock is employed in the state. *American, etc. Co. v. People*, 34 Colo. 240 (1905). The United States court has no jurisdiction of a suit brought by a telegraph company against prosecuting attorneys to enjoin them from suing for penalties on account of the telegraph company not taking out a license and paying certain fees as required by statute. *Western Union Tel. Co. v. Andrews*, 154 Fed. Rep. 95 (1907). A statute requiring foreign corporations to file a copy of a charter and pay a fee of \$25, applies to a telegraph company engaged in intrastate business, even though it is also engaged in interstate business, and a penalty of \$1,000 for not so doing may be collected. *Western Union, etc. Co. v. State*, 82 Ark. 309 (1907). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of Congress upon such corporation for doing business in Alaska. *Corbus v. Alaska, etc. Co.*, 187 U. S. 455 (1903). See note 1, p. 2339, *infra*.

<sup>1</sup> *People v. Glynn*, 194 N. Y. 387 (1909).

<sup>2</sup> *Western U. Tel. Co. v. Kansas*, 216 U. S. 1 (1910), rev'g 75 Kan. 609. So also as to the Arkansas statute where the fee amounted to \$25,050. *Ludwig v. W. U. Tel. Co.*, 216 U. S. 146 (1910). So also as to the Pullman Palace Car Company. *Pullman Co. v. Kansas*, 216 U. S. 56 (1910). See 130



different parts of the state from instituting suits to recover illegal penalties based on an unconstitutional statute requiring an excessive license fee from the foreign telegraph corporation before it does business in the state.<sup>1</sup> The California statute imposing a license fee on foreign corporations doing business in the state based on the total capital stock of the corporation is illegal.<sup>2</sup> Where a state has authorized a foreign corporation to do business in the state after paying a certain fee, it cannot by a subsequent statute require it to pay an additional fee which is not exacted also from domestic corporations.<sup>3</sup> The Alabama

Pac. Rep. 966 (Mont.) and Id. 1131 (Oreg.)

<sup>1</sup> Western U. Tel. Co. v. Andrews, 216 U. S. 165 (1910).

<sup>2</sup> Mulford Co. v. Curry, 125 Pac. Rep. 236 (Cal. 1912), where the court in declaring illegal a graduated license fee on the capital stock of foreign corporations as a condition of allowing them to do business in the state said that the recent decisions of the supreme court of the United States had established the following: "The admitted power of the state to regulate and prescribe terms under which a foreign corporation may engage in *intra*-state or domestic business is subject to this limitation, that where such foreign corporation is engaged in *inter*-state, as well as *intra*-state business, no such term, condition or requirement will be constitutional if it imposes any burden upon the *inter*-state business of such corporation, whatever be its name or form; a license or privilege tax, for the conduct of such *intra*-state business, based upon the total capital or the total capital stock of such corporation without just relation to the proportion which the capital or the capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the *intra*-state business of said corporation, is unconstitutional and void, (a) as being in violation of the commerce clause of the constitution by the imposition of an illegal burden upon interstate commerce, and (b) because violative of the XIVth amendment of the constitution and its equal protection and due process of law clause, as an effort to tax the property of citizens of the United

States, which property is situated beyond the jurisdiction of the taxing state and is not amenable to its revenue laws." A state may exact from a foreign manufacturing company as a condition of doing business in the state, the payment annually of one fiftieth of one per cent. of the par value of its authorized capital stock, such tax not to exceed \$2,000 in any one year. White, etc. Co. v. Commonwealth, 212 Mass. 35 (1912).

<sup>3</sup> American, etc. Co. v. Colorado, 204 U. S. 103 (1907). A foreign corporation which has paid a license fee to do business in the state, as required by statute, cannot by a subsequent statute be required to pay an additional fee. British, etc. Co. v. Jones, 76 S. C. 218 (1907). The legislature may increase the fees required from corporations upon increasing the capital stock, even though the corporation is a foreign corporation, doing business in the state. Cudahy, etc. Co. v. Denton, 79 Kan. 368 (1908). A foreign corporation which has paid the fee on its capital stock as required by statute in order to do business in the state and then increases its capital stock must pay a fee also on such increase if it continues to do business in the state, and such tax applies to an authorized increase even though the stock has not actually been issued. State v. St. Louis, etc. Co., 81 Kan. 404 (1909). It has been held that a license fee required of foreign corporations before doing business in the state is unconstitutional as an interference with interstate commerce. Coit v. Sutton, 102 Mich. 324 (1894). But see Moline Plow Co. v. Wilkinson, 105 Mich. 57 (1895). A statute by



statute levying a graduated tax on the capital stock of foreign corporations doing business in the state is unconstitutional as to a foreign railroad company already doing business in the state, especially where such tax is not equally levied on domestic corporations.<sup>1</sup>

*Interstate commerce—Traveling salesmen—Commission agents—Transactions by mail.*—Restrictions by a state on foreign corporations must not conflict with provisions of the federal constitution. Thus, the restriction must not interfere with interstate commerce.<sup>2</sup> A

which Pennsylvania requires a New York railroad corporation doing business in Pennsylvania to pay to the latter a part of coupons due to residents of Pennsylvania, such coupons being by their terms payable in New York, is void. *New York, Lake Erie, etc. R. R. v. Pennsylvania*, 153 U. S. 628 (1894).

<sup>1</sup> *Southern Ry. Co. v. Greene*, 216 U. S. 400 (1910).

<sup>2</sup> *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 (1877); *Telegraph Co. v. Texas*, 105 U. S. 460 (1881); *Rae v. Grand Trunk Ry.*, 14 Fed. Rep. 401 (1882). A sale of goods by a corporation in one state to be shipped and delivered to parties in another state is an act of interstate commerce and notes given in payment therefor can be collected, although payable in the latter state, and although the corporation has not complied with the laws of the latter state in regard to doing business there. *Julius, etc. Co. v. Perilloux & Co.*, 127 Fed. Rep. 1011 (1902). A New Jersey corporation may sell and ship goods to a citizen in South Carolina and collect therefor, even though it did not comply with the statutes of South Carolina in regard to doing business in that state until after the transaction. *Kirven v. Virginia, etc. Co.*, 145 Fed. Rep. 288 (1906). A foreign corporation not having an office in the state may sell machinery to persons in Tennessee without filing its papers, etc. *Milan, etc. Co. v. Gorten*, 93 Tenn. 590 (1894). The Arkansas provision requiring foreign corporations to file certificates, etc., and rendering void contracts made by a foreign corporation not complying therewith, does not apply to a sale of a sewing machine made in Ohio and

shipped to Arkansas, this being interstate commerce. *Gunn v. White S. M. Co.*, 57 Ark. 24 (1892). A state can neither prohibit nor impose conditions on the power of a foreign corporation to transact interstate business within the state, even though it may prohibit such corporation from transacting intrastate business within the state. Hence, a New Jersey manufacturing company may sell goods in Colorado through a selling Colorado corporation, and may sue the Colorado corporation in the United States court on the contract, even though the former has not complied with the Colorado statutes as to filing its charter and paying an annual license tax, and even though it may not be able to maintain a suit in the state court. The jurisdiction of the federal court cannot be impaired by such legislation. *Butler, etc. Co. v. United States Rubber Co.*, 156 Fed. Rep. 1 (1907). A foreign corporation may sue in a state court in regard to interstate commerce without showing that it has complied with the laws of the state entitling it to do business there. *Zion, etc. Assoc. v. Mayo*, 22 Mont. 100 (1899). A foreign corporation may sue a railroad company in Texas for breach of a contract in regard to transportation of cattle from Texas to another state, even though such foreign corporation has not filed its charter with the secretary of state, and hence could not maintain any other suit. A state cannot prohibit a foreign corporation from instituting suit on a contract involving interstate commerce. *Texas, etc. Ry. v. Davis*, 93 Tex. 378 (1900); *Pasteur, etc. Co. v. Burkey*, 22 Tex. Civ. App. 232 (1899), allowing an Indiana corporation shipping goods to Texas to sue in Texas for the price thereof, although



Kentucky lumber company may contract in Kentucky to saw and deliver in Alabama certain lumber, and need not qualify under the Alabama statute so to do, this being interstate commerce.<sup>1</sup> It has already been shown that excessive license fees cannot be levied on foreign corporations doing an interstate business.<sup>2</sup>

A statute making void all contracts made in the state by foreign corporations unless a certain fee is paid to the state is unconstitutional as to sales made by traveling salesmen of foreign corporations.<sup>3</sup> A foreign

it has not filed its articles of incorporation in Texas as required by statute. The business is interstate business. A statute requiring foreign corporations doing business in the state to have a known place of business at which there shall be an agent to accept service, is not applicable to a steamship company engaged in interstate traffic. *Ryman, etc. Co. v. Commonwealth*, 125 Ky. 253 (1907). A state may prohibit a foreign corporation from suing in the state court on business transacted in the state until it has filed its charter as required by the statute, even though the business pertains to interstate commerce. *Sioux Remedy Co. v. Cope*, 133 N. W. Rep. 683 (S. Dak. 1911). 204 Fed. 217.

<sup>1</sup> *Parsons-Willis Lumber Co. v. Stuart*, 182 Fed. Rep. 779 (1910). An Alabama company selling in Alabama pig iron to a Pennsylvania corporation may sue the latter in Pennsylvania, although the former is not qualified under the statutes of Pennsylvania. *Sloss-Sheffield, etc. Co. v. Tacony Iron Co.*, 183 Fed. Rep. 645 (1910); *aff'd*, 188 Fed. Rep. 897.

<sup>2</sup> See cases, *supra*.

<sup>3</sup> *Aultman, etc. Co. v. Holder*, 68 Fed. Rep. 467 (1895); *aff'd*, 169 U. S. 81. A foreign corporation engaged exclusively in interstate commerce need not comply with a state statute imposing duties and obligations on it before it is allowed to sue. This applies to a foreign corporation merely selling goods through a traveling salesman. *Herman Bros. Co. v. Nasiacos*, 46 Colo. 208 (1909). A Pennsylvania cement corporation may by its agent sell cement in Illinois and agree to deliver it and may collect the price even though it has not qualified to do business in Illinois. *Lehigh Portland,*

*etc. Co. v. McLean*, 245 Ill. 326 (1910). A foreign corporation is not doing business within the state in the sense of a statute applying to foreign corporations, even though it sends a solicitor into the state to sell goods and delivers the goods and collects the price. *Bruner v. Kansas, etc. Co.*, 168 Fed. Rep. 218 (1909). Even though an Ohio corporation sells goods in Indiana by a traveling salesman, yet if the goods are delivered and paid for in Ohio this is not doing business in Indiana within the meaning of the Indiana statute. *Mutual Mfg. Co. v. Alspaugh*, 174 Ind. 381 (1910). A state cannot require a foreign corporation manufacturing farm machinery and selling the same in the state by means of agents, local or transient, who take orders subject to approval, to file its articles of incorporation and designate an agent upon whom process may be served. *Belle City, etc. Co. v. Frizzell*, 11 Idaho, 1 (1905). A foreign corporation may send its agents into a state to take orders for the sale of goods without complying with the statutes relative to foreign corporations doing business in the state. *Barnhard Bros., etc. v. Morrison*, 87 S. W. Rep. 376 (Tex. 1905). Where an Illinois corporation by a traveling salesman sells goods in Minnesota, the sales being subject to the approval of the home office in Illinois, it is not doing business in Minnesota, in violation of the statutes, but is interstate commerce, even though the corporation keeps goods on storage in Minnesota for delivery. *Rock Island, etc. Co. v. Peterson*, 93 Minn. 356 (1904). A foreign corporation which employs traveling men in the state to take contracts, the title to remain in the corporation until the



corporation is not "doing business in New York state," even though it sells a cargo of coal in New York city through an agent, who sells through a large territory, including New York city.<sup>1</sup> A state cannot prohibit agents of foreign corporations entering the state and selling goods.<sup>2</sup> A corporation of one state, which sends its goods to another state to be sold by an agent on commission, the title to remain in the company until sold, need not comply with the statutes of the latter.<sup>3</sup> A foreign corporation is not doing business in the state, although it sends goods into another state to be returned on certain conditions.<sup>4</sup> A sale of coal by a Pennsylvania company in Michigan, but not effective until approved in Pennsylvania, may be enforced in the Michigan courts, even though the Pennsylvania company has not qualified under the statutes of Michigan.<sup>5</sup> A state cannot compel a corporation engaged exclu-

goods are paid for after they are delivered, and collection is made in the state, is doing business in the state. *Elliott v. Parlin, etc. Co.*, 71 Kan. 665 (1905). A traveling salesman who displays, sells, and himself delivers goods within the state does not engage in interstate commerce and his principal, a foreign corporation, which has not qualified in the state, cannot collect. *Despres, Bridges, etc. v. Zierleyn*, 163 Mich. 399 (1910). Where a foreign corporation has an agent in the state, who takes orders, this is doing business in the state, especially where the goods were sent to the agent to deliver. *Sherman, etc. Co. v. Aughenbaugh*, 93 Minn. 201 (1904). As to a milling company that solicits business and sells goods through commercial agents, the statute of Texas prohibiting a foreign corporation from transacting business in the state without filing its articles of incorporation with the secretary of state is void as being an interference with interstate commerce. *Bateman v. Western, etc. Co.*, 1 Tex. Civ. App. 90 (1892). A state statute cannot prevent a foreign corporation sending its agent into the state to sell goods and then shipping the goods into the state to fill the orders. *Loverin, etc. Co. v. Travis*, 135 Wis. 323 (1908). A foreign corporation is not doing business in the state, within the meaning of the Ohio law, where the corporation merely sells through traveling agents and delivers goods manufactured outside

of the state. *Toledo, etc. Co. v. Glen, etc. Co.*, 55 Ohio St. 217 (1896). See n. 8, p. 2352, *infra*.

<sup>1</sup> The court said: "To be 'doing business in his state' implies corporate continuity of conduct in that respect, such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on a business. In short, it should appear . . . that the corporation and its officers intended 'to establish a continuous business in the city of New York and not one of a temporary character.'" *Penn., etc. Co. v. McKeever*, 183 N. Y. 98 (1905).

<sup>2</sup> *Davis, etc. Co. v. Dix*, 64 Fed. Rep. 406 (1894). Soliciting business is not doing business in the state. *Berger v. Pennsylvania R.R.*, 27 R. I. 583 (1906). A soliciting agent who has no power to bind the company is not doing business in the state. *Abraham Bros. v. Southern Ry.*, 149 Ala. 547 (1906). See 157 S. W. Rep. 585.

<sup>3</sup> *Atlas Engine Works v. Parkinson*, 161 Fed. Rep. 223 (1908). The sending of a soliciting agent into a state is not doing business in that state sufficient to make him an agent on whom process may be served. *Saxony Mills v. Wagner & Co.*, 94 Miss. 233 (1909).

<sup>4</sup> *Hessing-Ellis Drug Co. v. Sly*, 83 Kan. 60 (1910).

<sup>5</sup> *Pittsburgh Coal Co. v. Northy*,



sively in interstate commerce, such as teaching by mail, to apply for permission to do business in the state and file a detailed statement of its condition, stockholders, etc., before it does business in the state and maintains a suit in the state court.<sup>1</sup> A state cannot prohibit oil and gas being transported into another state. Neither can a state prohibit a foreign corporation from building a pipe line across highways and transporting gas or oil to points outside the state, where it allows a domestic corporation to build such pipe lines for transportation between points in the state.<sup>2</sup>

*Condition that suits shall not be removed to or instituted in United States courts.*—A statute that the license of a foreign corporation to do business in the state shall be revoked if it removes a suit into the federal court is unconstitutional.<sup>3</sup> The Missouri statute forfeiting

158 Mich. 530 (1909). A corporate agent selling goods in the state on orders subject to the approval of the company at its home office, is not doing business in the state. *Low v. Davy*, 83 Atl. Rep. 869 (N. J. 1912).

<sup>1</sup> *International, etc. Co. v. Pigg*, 217 U. S. 91 (1910). A Pennsylvania corporation giving instruction and furnishing textbooks by mail, being engaged exclusively in interstate commerce, need not qualify as a foreign corporation in any particular state. *International, etc. Co. v. Gillespie*, 229 Mo. 397 (1910). A New York corporation in the brokerage business may buy stock for a citizen of Wisconsin and forward it to be paid for in the usual way. This is an act of interstate commerce and not within the meaning of the statute of Wisconsin relative to foreign corporations doing business in the state. *Catlin v. Schuppert*, 130 Wis. 642 (1907).

<sup>2</sup> *West, Atty. Genl. v. Kansas, etc. Gas Co.*, 221 U. S. 229 (1911).

<sup>3</sup> *State v. Johnston*, 234 Mo. 338 (1911). *Southern Pac. Co. v. Denton*, 146 U. S. 202 (1892); *Barron v. Burnside*, 121 U. S. 186 (1887); *Doyle v. Continental Life Ins. Co.*, 94 U. S. 535 (1876); *Insurance Co. v. Morse*, 20 Wall. 445 (1874); *Shelby v. Hoffman*, 7 Ohio St. 450 (1857); *Hartford F. Ins. Co. v. Doyle*, 6 Biss. 461 (1875); s. c., 11 Fed. Cas. 702. A telegraph company may maintain a suit to enjoin state officers from forfeiting its license to do business in the state

on account of its having removed a suit from the state court to the United States court, the penalty for which the statute says shall be the forfeiture of such license. *Western Union Tel. Co. v. Julian*, 169 Fed. Rep. 166 (1909). A statute requiring foreign corporations to agree not to remove suits to the federal courts is void. *Rece v. Newport News, etc. Co.*, 32 W. Va. 164 (1889); *Commonwealth v. East Tennessee Coal Co.*, 97 Ky. 238 (1895). Under the statute of North Carolina requiring foreign telephone companies to file copies of their charter and by-laws and thereby become domestic corporations before doing business in the state, a foreign telephone company that has complied with this cannot remove a case to the federal court on the ground of diverse citizenship. *Debnam v. Southern, etc. Co.*, 126 N. C. 831 (1900). A contrary conclusion was reached in South Carolina as to a foreign railroad corporation. *Wilson v. Southern Ry.*, 36 S. E. Rep. 701 (S. C. 1900). A statute requiring foreign corporations to file a stipulation and obtain a permit, which is forfeited in case the corporation removes any case to the federal courts, is void. And even if valid the corporation cannot be forbidden to litigate past rights or recover property already acquired. *Texas, etc. Co. v. Worsham*, 76 Tex. 556 (1890). See also *Allen v. Texas, etc. Ry.*, 25 Fed. Rep. 518 (1885), where a consolidation of a United States corporation



the right to a foreign corporation to do business in the state if it brings a suit in the United States court, is void.<sup>1</sup> Even though a state statute requires a foreign corporation doing business in the state to file certain papers and declares that it thereby becomes a domestic corporation, yet so far as the jurisdiction of the United States courts is concerned it is still a foreign corporation.<sup>2</sup> Although a state has no power to require a foreign corporation to agree not to remove cases into the federal courts, yet a state may exclude certain foreign corporations from doing intrastate business in the state if they do remove cases to the federal courts.<sup>3</sup>

*Other provisions of the United States constitution protecting foreign corporations*—"Citizen"—"Person"—"Equal protection"—"Due process of law"—"Obligation of contract."—Corporations are not "citizens" entitled to the privileges and immunities of citizens in the several states within the meaning of article 4, section 2, of the constitution of the United States.<sup>4</sup> But a corporation,

with domestic corporations had been made, and state statutes prohibited the removal. A state cannot make it a condition of a foreign corporation doing business in the state that it shall not remove cases to the federal courts, but it may forfeit the permit if such foreign corporation does remove such cases to the federal court. *State v. Louisville & N. R. R.*, 97 Miss. 35, (1910). See 61 S. Rep. (1913). A foreign corporation doing business in Missouri may enjoin the secretary of state from canceling its state license to do business in that state, because it has removed a case to the United States court, even though the statutes of Missouri prescribe that the license shall be revoked if a case is removed to the United States court. *Chicago, etc. Ry. v. Swanger*, 157 Fed. Rep. 783 (1908). See § 759, *infra*.

<sup>1</sup> *Herndon v. Chicago, etc. Ry.*, 218 U. S. 135 (1910). *Baltimore, etc. R. R. v. Cary*, 28 Ohio St. 208 (1876); *Moore v. Chicago, etc. Ry.*, 21 Fed. Rep. 817 (1884). The Alabama state statute that a foreign corporation shall forfeit its right to do business in the state if it brings suit in the United States court is unconstitutional as denying the equal protection of the laws. *Seaboard, etc. Ry. v. Railroad Commission*, 155 Fed. Rep. 792 (1907).

<sup>2</sup> *Southern Ry. v. Allison*, 190

U. S. 326 (1903). A statute compelling a foreign corporation to file its charter before doing business in the state may have the effect of making it a domestic corporation. *James v. St. Louis, etc. Ry.*, 46 Fed. Rep. 47 (1891).

<sup>3</sup> *Security, etc. Co. v. Prewitt*, 202 U. S. 246 (1906). Where an insurance company is sued at law in the state court on a policy, it cannot maintain a suit in equity in the United States court to cancel the policy on the ground of fraud, even though it alleges that it does not remove the suit in the state court to the United States court because thereby its license will probably be revoked by the state on account of such removal. *Cable v. United States, etc. Co.*, 191 U. S. 288 (1903). See also § 759, *infra*.

<sup>4</sup> A corporation is not a citizen whose privileges and immunities as a citizen cannot be impaired by a law of the state, and whose liberty cannot be taken away except by due process of law. *Wester, etc. Assoc. v. Greenberg*, 204 U. S. 359 (1907). The liberty referred to in the fourteenth amendment of the Constitution of the United States is the liberty of natural persons and not corporations. *Northwestern, etc. Co. v. Riggs*, 203 U. S. 243 (1906). A corporation is not a citizen, within the meaning of arti-



foreign or domestic, is a "person" whose property cannot be taken without due process of law and is entitled to the equal protection of the laws within the meaning of the United States constitution.<sup>1</sup> A statute requiring corporations, foreign and domestic, to pay their employees once a month and giving the latter a lien prior to all liens, excepting recorded mortgages, is unconstitutional as being a grant of special privileges, and as denying the corporation the equal protection of the laws, and as depriving it of its property without due process of law in that such statute interferes with the freedom to make contracts.<sup>2</sup> Where a foreign railroad company has extended its lines into a state under a statute, the legislature of the latter state cannot afterwards require it to become a domestic corporation. Such a statute impairs the obligation of the contract.<sup>3</sup>

*Various conditions which may be imposed.* — A statute requiring a foreign railroad company to become a domestic corporation before owning or operating a railroad in the state is constitutional, and hence if a domestic railroad company leases its property to a foreign railroad company without the latter complying with such statute, the former is liable for accidents occurring after the lease.<sup>4</sup> A statute making foreign

cle IV, § 2, of the United States Constitution. *Attorney-General v. Electric, etc. Co.*, 188 Mass. 239 (1905); *In re Speed's Estate*, 216 Ill. 23 (1905). A corporation is not a citizen within the meaning of the fourteenth amendment to the Constitution of the United States prohibiting any law which abridges the privileges or immunities of citizens, and hence a statute in regard to insurance corporations is not affected by that amendment. *Ætna Ins. Co. v. Brigham*, 120 Ga. 925 (1904). *Paul v. Virginia*, 8 Wall. 168 (1868), holding that a statute requiring foreign insurance companies to obtain a license before doing business is not in conflict with that clause; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521 (1876); *Tatem v. Wright*, 23 N. J. L. 429, 444 (1852); *Warren Mfg. Co. v. Ætna Ins. Co.*, 2 Paine 501 (c. 1837); s. c., 29 Fed. Cas., 294; *Fire Department v. Noble*, 3 E. D. Smith, 440 (1854); *Ducat v. Chicago*, 48 Ill. 172 (1868); *aff'd*, 10 Wall. 410; *Cincinnati, etc. Co. v. Rosenthal*, 55 Ill. 85 (1870); *Pierce v. Crompton*, 13 R. I. 312 (1881). *Cf. McKinley v. Wheeler*, 130 U. S. 630 (1889); *Thomas v. Chisholm*, 13 Colo. 105 (1889).

<sup>1</sup> *The Railroad Tax Cases*, 13 Fed. Rep. 722, 747 (1882). *American, etc. Co. v. Superior Court*, 153 Cal. 533 (1908). Corporations are persons within the meaning of the United States constitution against depriving any person of life, liberty or property without due process of law, or depriving him of the equal protection of the law. *Chicago, etc. Ry. v. State*, 86 Ark. 412 (1908). In *Covington, etc. Turnpike Co. v. Sandford*, 164 U. S. 578, 592 (1896) it is said: "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws." A corporation, whether foreign or domestic, is a "person" whose property cannot be taken without due process of law. See § 696, *infra*.

<sup>2</sup> *Johnson v. Goodyear, etc. Co.*, 127 Cal. 4 (1899). To same effect, *State v. Haun*, 61 Kan. 146 (1899).

<sup>3</sup> *Commonwealth v. Mobile, etc. R. R.*, 64 S. W. Rep. 451 (Ky. 1901).

<sup>4</sup> *Plummer v. Chesapeake, etc. Ry.*, 143 Ky. 102 (1911). Under the Kentucky statutes prohibiting foreign cor-



corporations doing business in the state subject to the restrictions, requirements and duties of domestic corporations, does not impose on directors of foreign corporations a penalty for not making reports as is prescribed for domestic corporations.<sup>1</sup> Even though the capital stock of a West Virginia corporation is paid by giving notes and one of its officers in filing a statement with a county clerk in Montana under the Montana statutes in order to do business in that state, sets forth in that statement that "the amount of the capital stock actually paid in is \$100,000," yet he is not liable under the criminal statutes of Montana for making a false report.<sup>2</sup>

*What constitutes doing business in a state—Single transactions—Buying land—Various illustrations.*—A single act, without the purpose of doing others, in a state does not bring a foreign corporation within a statute of the state forbidding it to transact business there without complying with certain requirements.<sup>3</sup> The purchase and sale of a

corporations from owning or operating railroads in the state until they have become domestic corporations and prescribing the method of becoming such, they do become domestic corporations if they comply therewith. *Davis, Adm'r, v. Chesapeake, etc. Ry.*, 116 Ky. 144 (1903). See first opinion in 70 S. W. Rep. 857 (Ky. 1902).

<sup>1</sup> *Young v. Moore*, 162 Mich. 60 (1910).

<sup>2</sup> *State v. Clements*, 37 Mont. 314 (1908).

<sup>3</sup> *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 (1885). A single transaction in the state may be doing business in the state if there is an intent to engage in business in that state. *International, etc. Co. v. Lynch*, 81 Vt. 101 (1908). A single transaction by which a foreign corporation builds a sugar factory in the state and warrants its efficiency is not "carrying on" business in the state within the meaning of the Michigan statute rendering contracts of foreign corporations void unless they have first paid a tax to the state, such statute, however, not being applicable to corporations engaged entirely in interstate commerce. *Oakland, etc. Co. v. Fred W. Wolf Co.*, 118 Fed. Rep. 239 (1902). A single sale of five carloads of cement in the state is not doing business in the state. *Alpena, etc. Co. v. Jenkins, etc. Co.*, 244 Ill. 354 (1910). A

single transaction may be doing business where it is evidently the purpose to carry on further business. *Tomson v. Iowa State, etc. Assoc.*, 88 Neb. 399 (1911). A single transaction is not doing business in the state, and subsequent compliance with the statute is sufficient, and the interstate commerce clause of the federal constitution does not allow such a statute to prevent collection. *Kirven v. Virginia, etc. Co.*, 145 Fed. Rep. 288 (1906), holding also that a statute imposing certain conditions precedent to the right to do business in the state does not render a contract wholly void but only suspends its right to sue thereon until the corporation complies. Two or three isolated transactions do not constitute doing business in the state. *Advance Number Co. v. Moore*, 148 S. W. Rep. 212 (Tenn. 1912). A single sale of a road crusher was held to be doing business in the state in the case *Indiana, etc. Co. v. Town of Lake*, 136 N. W. Rep. 178 (Wis. 1912) by a foreign corporation, and hence it was held not entitled to recover the contract price. A New Jersey corporation may sell and ship goods to a citizen in South Carolina and collect therefor, even though it did not comply with the statutes of South Carolina in regard to doing business in that state until after the transaction. A single transaction is not



single piece of real estate by a foreign corporation is not doing business within the state within the meaning of statutes requiring such foreign

doing business in a territory within the meaning of an act of Congress relative to foreign corporations doing business in such territory. *Ammons v. Brunswick, etc. Co.*, 141 Fed. Rep. 570 (1905). A bond given by a Pennsylvania surety company to a corporation in Wisconsin for the good conduct of the manager of the latter in its business in Pennsylvania, cannot be enforced, if the Wisconsin corporation has not complied with the statutes of Pennsylvania in regard to a foreign corporation doing business in the state. *M'Canna, etc. Co. v. Citizens', etc. Co.*, 76 Fed. Rep. 420 (1896). A Pennsylvania statute relative to foreign corporations applies only to transactions constituting the doing of business in the state, and does not apply to the enforcement of a mortgage given to secure a loan, where such foreign corporation has no charter power to make loans. *New York, etc. Co. v. Winton*, 208 Pa. St. 467 (1904). An isolated transaction is not within the meaning of a statute declaring void a contract made by a foreign corporation in the state without complying with the statutes of the state. *Allegheny Co. v. Allen*, 69 N. J. L. 270 (1903). A single transaction by a foreign corporation is not doing business in the state. *Henry v. Simanton*, 64 N. J. Eq. 572 (1903). A foreign corporation that makes a single sale and takes a guarantee of payment in New Jersey is not doing business within that state within the meaning of the statute applicable to such corporations. *Delaware, etc. Co. v. Mahlenbrock*, 63 N. J. L. 281 (1899). An isolated transaction in the state is not doing business in the state. *Sigel-Campion, etc. v. Haston*, 68 Kan. 749 (1904). A single transaction by a foreign corporation is doing business in the state, where such transaction is a part of the ordinary business and indicates a purpose of carrying on further business in the state. *John Deere, etc. Co. v. Wyland*, 69 Kan. 255 (1904). A single sale is not doing busi-

ness in the state. *Lutes Co. v. Wysong*, 100 Minn. 112 (1907). A mortgagor cannot defend against the mortgage on the ground that it was given to a foreign corporation which had not complied with the statutes of the state. *Prudential, etc. Co. v. Cushman*, 130 Iowa, 378 (1906). A judgment creditor of a foreign corporation cannot have a mortgage given by it canceled on the ground that it was not qualified to do business in the state. *Central Coal, etc. Co. v. Optimo Lead, etc. Co.*, 157 Mo. App. 720 (1911). A New York corporation purchasing in New York a mortgage on property in Alabama may foreclose it in Alabama without qualifying to do business in Alabama. *Worth v. Kniekerbocker Trust Co.*, 171 Ala. 621 (1911). A foreign corporation having a mortgage may foreclose it in the state court without qualifying under the statute. *Diamond Bank v. Van Meter*, 19 Idaho, 225 (1911). A state statute prohibiting foreign corporations from suing on contracts in any court in the state or from holding title to realty in the state without complying with the statute, does not prevent suit in the federal court by a foreign corporation to foreclose a mortgage. *Colby v. Cleaver*, 169 Fed. Rep. 206 (1908). *Northwestern, etc. Ins. Co. v. Overholt*, 4 Dill. 287 (1878); s. c., 18 Fed. Cas. 403, where, the requirement not being made a condition precedent to doing business, a foreign corporation which had not complied with it was held to have power to take a mortgage upon real estate. A loan by a New York building association in Pennsylvania, secured by mortgage in the latter state, but the debt being payable in New York, is not within the Pennsylvania statute prohibiting foreign corporations doing business within the state without complying with certain requirements. *People's, etc. Assoc. v. Berlin*, 201 Pa. St. 1 (1901). A mortgage made in Michigan to a New York building association is not enforceable if the latter has not filed its



corporations to qualify to do business in the state.<sup>1</sup> A foreign corporation is not necessarily doing business in the state, sufficient to authorize service upon one of its directors under the New York statute, merely because its transfers of stock are registered in the state and its directors meet there and it keeps a bank account there.<sup>2</sup> A foreign corporation

certificate of incorporation with the secretary of state as required by statute. *Hoskins v. Rochester, etc. Ass'n*, 133 Mich. 505 (1903). The taking of a single mortgage is not doing business with the state by a foreign corporation, within the meaning of the statute. *Roseberry v. Valley, etc. Ass'n*, 35 Colo. 132 (1905). A single transaction is not doing business in the state. *Jameison v. Simonds Saw Co.*, 2 Cal. App. 582 (1906). A foreign corporation purchasing a piece of property in the state is not thereby doing business in the state. *Louisville, etc. Co. v. Mayor, etc.*, 114 Tenn. 213 (1905). A single transaction is not doing business within the state. *State v. Robb, etc. Co.*, 15 N. Dak. 55 (1906). A foreign trust company may foreclose a mortgage given by a Texas telephone company on its property in Texas, even though such trust company has not been granted permission to transact business in Texas under its statutes. *Commercial, etc. Co. v. Territorial, etc. Co.*, 38 Tex. Civ. App. 192 (1905). A holding company incorporated in South Africa does business in London, within the meaning of the income tax law, where most of its purchases and sales of stocks are made in London, and some stockholders' meetings and all directors' meetings are held there. *Goerz & Co. Ltd. v. Bell*, [1904] 2 K. B. 136. Cf. § 572*e*, *supra*, and 155 S. W. Rep. 738.

<sup>1</sup> *General Conference, etc. v. Berkey*, 156 Cal. 466 (1909). A statute forbidding a corporation to do business in the state without qualifying does not prevent it acquiring land, although the state may prevent its continuing to exercise its franchise in the state. *Reed v. Todd*, 25 S. Dak. 421 (1910). A foreign corporation acquiring land in Arkansas may commence suit to quiet title, and it is no defense that the corporation had no authority to buy the land. *Rachels v. Stecher, etc.*

*Works*, 95 Ark. 6 (1910). A foreign corporation which has not qualified but which has made a lease of property, may maintain a suit for the recovery of the property, the lease being void. *United, etc. Co. v. Ramlose*, 231 Mo. 508 (1910). Owning land in the state and leasing the same on shares is not doing business in the state. *Wilson v. Peace*, 38 Tex. Civ. App. 234 (1905). The purchase of a piece of real estate on judicial sale thereof at the instance of the purchaser is not doing business in the state. *Meddis v. Kennedy*, 176 Mo. 200 (1903). A deed of land to a foreign corporation that has not qualified is void, under the Wisconsin statute, which prohibits a company acquiring property without qualifying. *Hanna v. Kelsey Realty Co.*, 145 Wis. 276 (1911). The purchase of a lease is not doing business in the state. *Ferkel v. Columbia Clay Works*, 192 Fed. Rep. 119 (1911). Leasing space to make an exhibit is not doing business in the state. *Cody Motors Co. v. Warren, etc. Co.*, 196 Fed. Rep. 254 (1912). An American cable company is not doing business in Newfoundland, even though its cables land in Newfoundland, where the company has a station to repeat the messages. *Commercial Cable Co. v. Attorney-General*, 107 L. T. Rep. 101 (1912).

<sup>2</sup> *Honeyman v. Colorado, etc. Co.*, 133 Fed. Rep. 96 (1904). A foreign corporation does not by employing a trust company in New York to make transfers thereby transact business in the state and come under a statute requiring it to allow stockholders to inspect its stock book. *Althause v. The Guaranty Trust Co.*, 78 N. Y. Misc. Rep. 181 (1912). Keeping a transfer agent in a state for the convenience of stockholders and to facilitate the sale of stock is not maintaining an "office for the transaction of business" in the state on the part of a foreign corporation rendering it liable



owning stock in a domestic corporation is not transacting business in the state of the latter.<sup>1</sup> But the taking of subscriptions to stock in the state may be "doing business,"<sup>2</sup> or the making of a loan.<sup>3</sup> A North Carolina corporation may bring suit in the state of New Jersey against a New York corporation and recover judgment on a note, even though the North Carolina corporation has not complied with the statutes of New York relative to doing business in that state.<sup>4</sup> A foreign construc-

for not allowing stockholders to inspect its stock book as required by the New York statute. *Wadsworth v. Equitable Trust Co.*, 153 N. Y. App. Div. 737 (1912). See *People v. Equitable Trust Co.*, 96 N. Y. 387 (1884), a tax case, where the court said (p. 397), "Does a corporation that keeps an office in this State merely for the record and transfer of its stock while it does the business for which it was chartered elsewhere, do its corporate business within this State within the meaning of the statute?"

<sup>1</sup> *Mannington v. Hoeking Valley Ry.*, 183 Fed. Rep. 133, 156 (1910).

<sup>2</sup> A South Dakota corporation cannot collect in Wisconsin a subscription to its stock made in Wisconsin where it has not qualified to do business in that state, it appearing that the subscription was obtained by a Wisconsin agent who was to receive fifteen per cent. of the subscription price. *Southwestern, etc. Co. v. Stephens*, 139 Wis. 616 (1909). A note given in Florida to the agents of a foreign insurance company for stock of the latter to be delivered on payment of the note, cannot be collected if that company is not qualified to do business in that state. *Ulmer v. First, etc. Bank of Petersburg*, 61 Fla. 469 (1911). A foreign corporation issuing its stock in exchange for advertising in the state is not doing business in the state. *Clark v. Kansas, etc. Co.*, 144 Mo. App. 182 (1910). A foreign telephone company selling its stock in the state is not doing business in the state. *First Nat. Bank v. Leeper*, 121 Mo. App. 688 (1906). A foreign corporation selling its stock to a resident and taking a mortgage on land in the state as security for the payment, is not doing business in the state. *Brown v. Guarantee, etc. Co.*, 46 Tex. Civ. App. 29 (1907).

<sup>3</sup> A Delaware holding company which makes loans in Pennsylvania to one of its subsidiary companies cannot collect those loans in Pennsylvania if it has not complied with the Pennsylvania statutes relative to foreign corporations doing business in the state. *Re Montello Brick Works*, 163 Fed. Rep. 621 (1908). Cf. cases *supra* as to mortgages. Where residents of Pennsylvania in order to finance Pennsylvania corporations organize a holding company in Delaware, and that company carries on its financial operations in Pennsylvania without qualifying under the Pennsylvania statutes as a foreign corporation, no business being done by the Delaware corporation anywhere else, the Delaware corporation cannot enforce in the bankruptcy court in Pennsylvania notes which one of the Pennsylvania corporations had given to it. *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. Rep. 310 (1909), the court saying (p. 313): "Courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms." A foreign trading company suing on a note dated New York must prove that it has qualified to do business in New York. *Manufacturers', etc. Co. v. Blitz*, 131 N. Y. App. Div. 17 (1909). The Tennessee statute prohibiting foreign corporations doing business in the state without first complying with certain requisites does not render invalid a note held by a *bona fide* purchaser from a foreign corporation. *Lauter v. Jarvis, etc. Co.*, 85 Fed. Rep. 894 (1897).

<sup>4</sup> *Allen v. Allegheny Co.*, 196 U. S. 458 (1905). See §§ 757-759, *infra*, also 142 N. W. Rep. 305.



tion company which has not qualified under the statute, cannot enforce a construction contract, even though it took it and sub-let the work to other contractors.<sup>1</sup> But a foreign corporation may without qualifying under the Illinois statute complete a contract to prevent suit in another jurisdiction and may collect therefor.<sup>2</sup> Merely entering into a contract with a city for street lighting is not doing business within the state, within the meaning of laws requiring the keeping of a public office and paying a license fee, etc.<sup>3</sup> Where a foreign corporation makes a contract in Michigan appointing an agent for a certain county to sell its product, etc., this is doing business in the state.<sup>4</sup> A New Jersey iron manufacturing corporation may sell iron to be delivered in New York, and may collect therefor in the New York courts, it not appearing that the contract was made in New York state, and it appearing that this was the only business transacted by it in New York state.<sup>5</sup> It is not doing business in the state for a railroad to have an agent solicit the routing of traffic over its lines.<sup>6</sup> A surety company that has given a bond to a city that a foreign corporation will carry out its contract with the city cannot defend on the ground that the foreign corporation had not qualified under the statutes to do business in the state.<sup>7</sup> The supreme court of the United States has held that, where a contract made by a foreign corporation is not to be valid until approved in its home office in another state, the contract is not made within the former state, within the meaning of the Michigan statute declaring all contracts void when made by foreign corporations in the state without having filed their articles of association in that state.<sup>8</sup> A much

<sup>1</sup> Alabama, etc. R. R. v. Talley-Bates, etc. Co., 162 Ala. 396 (1909).

<sup>2</sup> Meader Furniture, etc. Co. v. Commercial, etc. Co., 192 Fed. Rep. 616 (1911).

<sup>3</sup> Hogan v. City of St. Louis, 176 Mo. 149 (1903).

<sup>4</sup> Neyens v. Worthington, 50 Mich. 580 (1908).

<sup>5</sup> New York, etc. Co. v. Williams, 102 N. Y. App. Div. 1 (1905); aff'd, 184 N. Y. 579.

<sup>6</sup> North, etc. Co. v. Oregon, etc. Co., 105 Minn. 198 (1908).

<sup>7</sup> Kuennan v. United States, etc. Co., 159 Mich. 122 (1909).

<sup>8</sup> Holder v. Aultman, 169 U. S. 81 (1898). An agreement of a foreign corporation to sell all its property cannot be enforced by the corporation in Michigan, where such corporation has not complied with the Michigan statute relative to doing business within

the state. Rough v. Breitung, 117 Mich. 48 (1898). Where a Maine corporation has no office in New York, but merely receives orders from New York and fills them by shipments to New York, it is not doing business in the latter state within the meaning of the statute requiring foreign corporations to obtain a certificate allowing it to do business in the state. Vaughn, etc. Co. v. Lighthouse, 64 N. Y. App. Div. 138 (1901). A foreign corporation which merely sells its bonds and stocks in New York and borrows money therein is not doing business therein within the meaning of the New York statute applicable to foreign corporations. Union Trust Co. v. Sickels, 125 N. Y. App. Div. 105 (1908). A foreign corporation which has sold a bill of goods to an Illinois corporation in that state may sue for the price, although it has no office in the



broader meaning is given to the words "doing business" under a tax statute.<sup>1</sup>

*Penalties for failing to qualify — Disability to enforce contracts by suit — Rule in United States courts in enforcing state statutes — Liability of stockholders and officers — Statutes declaring contracts void — Right to defend.* — The highest court in Delaware says: "In the several states there is a variety of legislation, constitutional and statutory, concerning foreign corporations doing business by branch offices or resident agents. In some (a) there is simply a prohibition; in others (b) a prohibition and penalty; in others (c) in addition the contracts made by such agents are declared to be void for non-compliance; in others (d), they are declared unenforceable; in others (e), they are unenforceable until compliance; and various rules have been adopted respecting them in the several jurisdictions."<sup>2</sup> Even though a foreign corporation is engaged in a state in manufacturing products and sending them beyond the limits of the state, yet it is subject to a state statute forbidding foreign corporations to transact business in the state until they have filed a copy of their charter with the secretary of state, and the penalty that the contracts of such a corporation in the state shall be void as regards the corporation, but shall be enforceable against the corporation itself, applies, and such a statute may be held to apply to a contract made after the statute was enacted but before it went into effect.<sup>3</sup> A foreign corporation may, however,

state. *John Spry, etc. Co. v. Chappell*, 184 Ill. 539 (1900). A foreign corporation's purchase of property located in the state, the purchase being made out of the state, is not doing business in the state. *Lakeview, etc. Co. v. San Antonio, etc. Co.*, 95 Tex. 252 (1902). The Montana statute requiring foreign corporations to file their charter in the state before doing business there does not apply to a foreign trust company which purchases bonds of a domestic corporation and takes a mortgage to secure them. *Gilchrist v. Helena, etc. R. R.*, 47 Fed. Rep. 593 (1891). The statute relative to foreign corporations doing business in the state is not applicable to loans made out of the state, and the securities delivered and money paid out of the state. *Scruggs v. Scottish Mortgage Co.*, 54 Ark. 566 (1891). Even though a foreign corporation purchases land in the state, yet if the purchase was made outside of the

state, this is not doing business in the state. *Goldsberry v. Carter*, 100 Va. 438 (1902). Sales by a foreign corporation in its own state by written orders there accepted, entitle it to sue for the price even though the sale was made, delivery to be in the state where suit is brought. *Coffin v. Smith*, 26 S. Dak. 536 (1910). See n. 3, p. 2343, *supra*.

<sup>1</sup> In the case *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171 (1911), the court in deciding whether corporations were engaged in business within the meaning of the corporation tax act of Congress said, "'Business' is a very comprehensive term and embraces everything about which a person can be employed."

<sup>2</sup> *Model, etc. Co. v. Magarity*, 81 Atl. Rep. 394 (Del. 1911), reviewing the decisions in many states.

<sup>3</sup> *Diamond, etc. Co. v. United States, etc. Co.*, 187 U. S. 611 (1903), the court holding also that the corpora-



sue without qualifying where it has *not* done business in the state.<sup>1</sup> The officers and agents of a foreign corporation are not liable as partners on account of its doing business in the state without complying with the statute,<sup>2</sup> but a statute may render them liable.<sup>3</sup> The legislature may validate contracts made in the state by foreign corporations in violation of the statute.<sup>4</sup> A person dealing with a foreign corporation in New York State cannot recover his money back on the ground that the company had not qualified to do business in that state.<sup>5</sup> A foreign corporation may recover its property in Pennsylvania by replevin from one having no contractual relation with the company, even though it has not qualified under the Pennsylvania statute.<sup>6</sup> In Indiana a foreign corporation may maintain an action in tort, even though it has not qualified under the statute.<sup>7</sup> A state may declare void the contracts of a foreign corporation which does business in the state without designating a local agent and paying a license.<sup>8</sup> But where the statute does

tion is doing business in the state when it takes the management of a factory and helps to operate it and supplies it with a superintendent. The supreme court of the United States will not review a decision of the highest court of a state to the effect that a foreign corporation that has not complied with the statute of the state relative to filing a copy of its charter, etc., cannot have the benefit of the laws of the state. *Telluride, etc. Co. v. Rio Grande, etc. Co.*, 187 U. S. 569 (1903).

<sup>1</sup> *Desserich v. Merle, etc. Co.*, 48 Colo. 370 (1910). A foreign corporation not doing business in the state may nevertheless maintain a suit in the state court. *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487 (1908). The statute relative to foreign corporations doing business in the state does not prevent a corporation bringing suit on a contract made elsewhere. *Mason v. Edward Thompson Co.*, 94 Minn. 472 (1905). A foreign corporation may bring suit in the state on a contract made outside of the state without filing a certificate to do business in the state. *MacMillan Co. v. Stewart*, 69 N. J. L. 212 (1903); *Slaytor-Jennings Co. v. Specialty, etc. Co.*, 69 N. J. L. 214 (1903).

<sup>2</sup> *National Bank, etc. v. Spot Cash Coal Co.*, 98 Ark. 597 (1911). The fact that a foreign corporation doing

business in the state has not qualified under the statute does not render the stockholders liable as partners. *Tribble v. Halbert*, 143 Mo. App. 524 (1910). A resident agent of a foreign corporation who does business in its name without its having qualified under the statute is personally liable on contracts so made. *Raff v. Isman*, 235 Pa. St. 347 (1912).

<sup>3</sup> The North Dakota statute rendering stockholders and officers of a foreign corporation liable for its contracts within the state where it has not complied with the statutes was applied in *Chesley v. Soo, etc. Co.*, 19 N. Dak. 18 (1909).

<sup>4</sup> *West Side R. R. v. Pittsburgh Cons. Co.*, 219 U. S. 92 (1911).

<sup>5</sup> *Mahar v. Harrington Park, etc.*, 204 N. Y. 231 (1912).

<sup>6</sup> *United States, etc. Co. v. Reynolds*, 224 Pa. St. 577 (1909).

<sup>7</sup> *Pittsburg, etc. Ry. v. German Ins. Co.*, 44 Ind. App. 268 (1909).

<sup>8</sup> *Chattanooga, etc. Ass'n v. Denson*, 189 U. S. 408 (1902). *Re Comstock*, 3 Sawyer, 218 (1874); s. c., 6 Fed. Cas. 244; *Bank of British Columbia v. Page*, 6 Oreg. 431 (1877); *Semple v. Bank of British Columbia*, 5 Sawyer, 88 (1878); s. c., 21 Fed. Cas. 1063; *Oregon, etc. Inv. Co. v. Rathbun*, 5 Sawyer, 32 (1877); s. c., 18 Fed. Cas. 764; but here a note made in Oregon, but payable in Scotland, was treated as if made on Scotland; *American*



not invalidate the contract and merely bars any remedy in the courts, this does not prevent suit in the United States courts, because of course a state statute cannot control the jurisdiction of the United States courts.<sup>1</sup> But where the statute makes the contract absolutely void

*Button, etc. Co. v. Moore*, 2 Dak. 280 (1880), holding under a similar statute that the foreign corporation could sue in the courts of the state, but could not transact business. To same effect, *Utley v. Clark-Gardner, etc. Co.*, 4 Colo. 369 (1878); *Columbus Ins. Co. v. Walsh*, 18 Mo. 229 (1853); *Union, etc. Co. v. Thomas*, 46 Ind. 44 (1874); *Farmers', etc. Ins. Co. v. Harrah*, 47 Ind. 236 (1874); *Smith v. Little*, 67 Ind. 549 (1879), holding that the statute referred only to actions upon contract and not to suits in replevin; *Beard v. Union, etc. Pub. Co.*, 71 Ala. 60 (1881), holding that soliciting subscriptions for a foreign newspaper is not "doing business" with the meaning of such a statute; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536 (1865), holding, however, that a contract is not void as to a citizen; *Morgan v. White*, 101 Ind. 413 (1884), holding that requiring an agent to file his authority to act does not apply to a general agent appointing local agents; *American Ins. Co. v. Butler*, 70 Ind. 1 (1880), holding that a failure of the state officer to furnish the proper certificate after the corporation has substantially complied with the statute does not affect its contracts; *Aetna Ins. Co. v. Harvey*, 11 Wis. 394 (1860). So far as possible the courts construe these statutes as suspending the enforceability of contracts until the statute is complied with. *Walter A. Wood, etc. Co. v. Caldwell*, 54 Ind. 270 (1876); *Singer Mfg. Co. v. Brown*, 64 Ind. 548 (1878); *Elston v. Piggott*, 94 Ind. 14 (1883), holding that advantage of the failure to comply can only be taken by answer in abatement, and that a foreclosure and title under sale cannot be questioned on that ground; *American Ins. Co. v. Butler*, 70 Ind. 1 (1880); *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347 (1879); *National Mut. F. Ins. Co. v. Pursell*, 92 Mass. 231 (1865); *Hagerman v. Empire Slate Co.*, 97 Pa.

St. 534 (1881), holding that a foreign corporation cannot take advantage of its own neglect to file the power of attorney; and that service upon an acting agent will suffice in such case; *American Ins. Co. v. Wellman*, 69 Ind. 413 (1879); *American, etc. Co. v. East, etc. R. R.*, 37 Fed. Rep. 242 (1889).

<sup>1</sup> The New York statute prohibiting a suit by a foreign corporation on a contract made in New York, unless the foreign corporation qualified, does not prevent suit of the foreign corporation in the United States court, inasmuch as the contract is not declared invalid. *Johnson v. New York, etc. Co.*, 178 Fed. Rep. 513 (1910).

See also *Sullivan v. Beck*, 79 Fed. Rep. 200 (1897). The United States court will entertain a suit by a foreign corporation which has not complied with the statutes of the state, where such statutes do not make the contract void. *Groton, etc. Co. v. American Bridge Co.*, 151 Fed. Rep. 871 (1907). A foreign corporation may bring suit in the United States court in New York on a contract made outside of the state, even though it has not filed papers so as to do business in New York. *Robinson v. American, etc. Co.*, 147 Fed. Rep. 885 (1906). A statute prohibiting a foreign corporation from bringing suit if it does not file its certificate of incorporation and appoint an agent to accept service and pay a fee to the state, does not prevent such corporation bringing suit in the federal court. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893 (1903). A foreign corporation may bring suit in the federal court for goods sold outside but delivered in the state, but a state statute applies to goods sent into the state for sale in the general market in that state. *United States, etc. Co. v. Butler, etc. Co.*, 132 Fed. Rep. 398 (1904); *aff'd*, *Butler, etc. Co. v. United States, etc. Co.*, 156 Fed. Rep. 1 (1907). A state can neither prohibit nor impose con-



and non-enforceable, so far as the foreign corporation is concerned, this may prevent its suing on the contract in the United States court.<sup>1</sup> A failure to file the certificate is a question that cannot be raised for the first time in the higher court.<sup>2</sup> A decision of the state court that a foreign insurance company cannot collect assessments on a policy issued in the state, because the company has not qualified under the state law to do business in such state, does not present any federal question.<sup>3</sup>

ditions on the power of a foreign corporation to transact interstate business within the state, even though it may prohibit such corporation from transacting intrastate business within the state. Hence, a New Jersey manufacturing company may sell goods in Colorado, through a selling Colorado corporation, and may sue the Colorado corporation in the United States court on the contract, even though the former has not complied with the Colorado statutes as to filing its charter and paying an annual license tax, and even though it may not be able to maintain a suit in the state court. The jurisdiction of the federal court cannot be impaired by such legislation. *Butler, etc. Co. v. United States Rubber Co.*, 156 Fed. Rep. 1 (1907). *Dunlop v. Mercer*, 156 Fed. Rep. 545 (1907), the latter case being a case where two Arizona corporations had been doing business in Minnesota without complying with the statute, and both became bankrupt, and the trustee of one petitioned that the trustee of the other return certain property. The court held that a state statute prohibiting a suit in such a case did not apply to the federal courts. A state statute which does not invalidate a contract made by a foreign corporation which has not complied with the statutes but prohibits its bringing suit thereon, does not prevent suit in the United States court. *Vitagraph Co. v. Twentieth, etc. Co.*, 157 Fed. Rep. 699 (1907). A statute that no suit shall be brought by a foreign corporation which shall not have filed a statement concerning its business does not prevent the federal courts from exercising jurisdiction. *Barling v. Bank of British N. A.*, 50 Fed. Rep. 260 (1892). A state statute prohibiting foreign

corporations from suing on contracts in any court in the state or from holding title to realty in the state without complying with the statute, does not prevent suit in the federal court by a foreign corporation to foreclose a mortgage. *Colby v. Cleaver*, 169 Fed. Rep. 206 (1908).

<sup>1</sup> The federal courts will apply a state statute requiring foreign corporations doing business in that state to qualify under the statute, and rendering it unlawful and criminal to do otherwise, and a foreign corporation which has not complied with the statute cannot enforce a contract in the federal courts. An agreement to furnish and erect in Pennsylvania an ice plant is doing business in the state. *Buffalo, etc. Co. v. Penn. etc. Co.*, 178 Fed. Rep. 696 (1910). A foreign corporation cannot make a legal contract to construct a railroad in Pennsylvania where it has not complied with the Pennsylvania statute relative to doing business in that state, and hence cannot recover on such a contract, even though it complied with the statute before doing the work, and even though the railroad received the benefit of the contract, although the judgment may not be a bar to a suit for services performed. *Pittsburg, etc. Co. v. West Side, etc. Co.*, 151 Fed. Rep. 125 (1907); *aff'd*, 154 Fed. Rep. 930. Where a state statute provides that a foreign corporation shall not maintain a suit in its courts until it has qualified under the statute, such corporation cannot maintain a suit in the federal court without qualifying. *Cyclone, etc. Co. v. Baker, etc. Co.*, 165 Fed. Rep. 996 (1908).

<sup>2</sup> *Dahl v. Montana Copper Co.*, 132 U. S. 264 (1889).

<sup>3</sup> *Swing v. Weston, etc. Co.*, 205 U. S. 275 (1907); *aff'g*, 140 Mich. 344.



A foreign corporation may be sued in the state even though it has not qualified.<sup>1</sup> A foreign corporation when sued on its contract cannot set up the defense that it had not qualified to do business in the state,<sup>2</sup> but it may defend the suit.<sup>3</sup> A statute, however, may provide that a foreign corporation shall not be allowed to defend a suit brought by the state if it refuses to produce its books and officers as witnesses in that suit, even though the books and witnesses are out of the state, the corporation failing to show that it had made a *bona fide* effort to comply.<sup>4</sup> The statute of limitations relative to a penalty payable to a foreign corporation begins at once, even though the company has not qualified to do business in the state.<sup>5</sup>

*State statutes and decisions on this subject.* — Inasmuch as the decisions on this whole subject turn largely on the wording of the particular statute under consideration and the decisions of the courts of each particular state in construing and applying its statutes, many cases are cited in the notes below, arranged according to the states.<sup>6</sup>

<sup>1</sup> *Gaul v. Kiel, etc. Co.*, 199 N. Y. 472 (1910). A foreign corporation doing business in New York is liable to the statutory penalty for refusing to show its stock book to its stockholders, even though it has not qualified to do business in the state. *Hovey v. De Long, etc. Co.*, 147 N. Y. App. Div. 881 (1911).

<sup>2</sup> *Swan v. Watertown F. Ins. Co.*, 96 Pa. St. 37 (1880), holding that a foreign corporation doing business in the state cannot set up its failure to comply with the provisions of the statute relating to such companies to defeat an action on contract. A corporation cannot repudiate its obligations on the ground that it was not authorized to do business in the state. *Williams v. Bank of Commerce*, 71 Miss. 858 (1894). A foreign corporation doing business in Pennsylvania without authority cannot defeat its contract on that ground. *In re Naylor Mfg. Co.*, 135 Fed. Rep. 206 (1905).

<sup>3</sup> *American, etc. Co. v. Superior Court*, 153 Cal. 533 (1908). In a suit for the appointment of a receiver of the property of a foreign corporation where its title is attacked it is entitled to defend, even though it has not qualified to do business under the statutes. *Idaho, etc. Co. v. Great Western, etc. Co.*, 17 Idaho, 273 (1909). A statute against a for-

eign corporation bringing suit unless it has qualified under the statutes, does not prevent its defending a suit and interposing a counterclaim to the extent of plaintiff's claim. *Boston, etc. Co. v. Sesnon Co.*, 199 Fed. Rep. 445 (1912). Under the California statute service on a foreign corporation doing business in the state without qualifying, may be on the secretary of state, but even though the foreign corporation defaults by reason of its not knowing of such service, it may apply to open the default, the same as though service was constructive by publication. *Holiness Church, etc. v. Metropolitan, etc. Ass'n*, 12 Cal. App. 445 (1910).

<sup>4</sup> *Hammond, etc. Co. v. Arkansas*, 212 U. S. 322 (1909).

<sup>5</sup> *Western Electrical Co. v. Pickett*, 51 Colo. 415 (1911).

<sup>6</sup> *Alabama*: A contract of a foreign corporation to bring in machinery and furnish the labor to erect it in the state, is doing business in the state in that way, and is not interstate commerce. *American Amusement Co. v. East Lake Chutes Co.*, 56 S. Rep. 961 (Ala. 1911). In *Dundee, etc. Co. v. Nixon*, 95 Ala. 318 (1891), an alien corporation failed in its suit on a note because it had no known place of business or authorized agent in Alabama, as required by the constitu-



*Service by statute on state officials.* — A statute authorizing service on the secretary of state as regards business done by a foreign corpo-

tion and statutes of the state. The note was dated in that state. A statute in regard to foreign corporations doing business in the state does not prevent a foreign corporation bringing suit in the state if it does no business in the state. *Woodall & Son v. People's Nat. Bank*, 153 Ala. 576 (1907). A foreign corporation may bring suit in the state without complying with the state law in regard to having a place of business and an agent in the state. *Cook v. Rome Brick Co.*, 98 Ala. 409 (1893). Where a foreign corporation not complying with the statute sells chattels, the sale is void and the corporation may reclaim its property. *Boulden v. Estey Organ Co.*, 92 Ala. 182 (1890). The statute against foreign corporations doing business in the state unless they conform to certain requisites does not apply to interstate traffic, such as selling goods to be shipped in, having been sold out of the state. *Ware v. Hamilton, etc. Co.*, 92 Ala. 145 (1890). The objection as to the failure to file the certificate cannot be raised for the first time on appeal. *Ginn v. New England, etc. Co.*, 92 Ala. 135 (1890). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was *ultra vires* and no certificate was filed. *Boulware v. Davis*, 90 Ala. 207 (1890). A mortgage taken by a foreign corporation in Alabama which has no known place of business or authorized agent in the state, as required by the constitution of the state, is void and not enforceable. *Farrior v. New England, etc. Co.*, 88 Ala. 275 (1889). A foreign corporation suing in Alabama to enforce a mortgage made in that state must allege that it has a known place of business and an authorized agent in the state. *Christian v. American, etc. Co.*, 89 Ala. 198 (1889). An agent suing a person for a commission on a loan made by the latter with a foreign corporation which has not filed its certificate as required by statute cannot recover. *Dudley v. Col-*

*lier*, 87 Ala. 431 (1888). For a valuable discussion as to what constitutes the doing of business in the state, see *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371 (1894). A foreign corporation which has not qualified cannot enforce a mortgage which it has taken. *Peters v. Brunswick-Balke-Collender Co.*, 60 S. Rep. 431 (Ala. 1912).

*Arkansas:* Under the Arkansas statute a foreign corporation may comply with the statute and then sue on business transacted prior to such compliance. *Woolfort v. Dixie, etc. Co.*, 77 Ark. 203 (1905). A foreign corporation may sue on contracts made out of the state, although it has not complied with the law as to contracts made in the state. *White River Lumber Co. v. Southwestern Imp. Assoc.*, 55 Ark. 625 (1892).

*California:* A foreign corporation may defend against a suit in California, even though it has not filed its charter, etc., as required by statute. *American, etc. Co. v. Superior Court*, 153 Cal. 533 (1908). In California a foreign corporation cannot commence suit until it has filed a copy of its certificate of incorporation. *Ward, etc. Co. v. Mapes*, 147 Cal. 747 (1905). The California statute requiring a corporation purchasing property to file a copy of its charter in the office of the clerk of the county does not apply to a mortgage. *Anglo-Californian Bank v. Field*, 146 Cal. 644 (1905). The California act requiring foreign corporations to designate an agent does not affect the validity of business transacted before such agent was designated. *Black v. Vermont, etc. Co.*, 1 Cal. App. 718 (1905). Under the California statute forbidding foreign corporations to maintain suits until a certain statement has been published, the publication may be prior to the time specified in the statute. *Bank of British N. A. v. Madison*, 99 Cal. 125 (1893), passing upon the requisites of the statute, and what constitutes compliance therewith. The defense that a corporation has not filed its articles



ration in the state unless such foreign corporation has appointed an agent to accept service, is constitutional.<sup>1</sup> A state may constitute the

in the county where property is to be foreclosed must be set up by plea in abatement. *Ontario State Bank v. Tibbits*, 80 Cal. 68 (1890).

*Colorado*: The defense that the plaintiff as a foreign corporation has not qualified to do business in the state, must be pleaded. *Illinois, etc. Co. v. Harrison*, 43 Colo. 362 (1908). Even though a note is payable to the order of a foreign corporation which has not complied with the laws of the state, yet a *bona fide* purchaser of such note before maturity may enforce it. *McMann v. Walker*, 31 Colo. 261 (1903). A foreign corporation purchasing a piece of machinery in the state may be held liable therefor, although it has not filed the certificate. *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499 (1890). A sale by a foreign corporation f. o. b. its factory in the state where it is incorporated is not doing business in the state. *International, etc. Co. v. A. Leschen, etc. Co.*, 41 Colo. 299 (1907).

*Delaware*: Even though a foreign corporation has not qualified in accordance with a provision prohibiting foreign corporations doing business under penalty, yet a foreign corporation may collect for goods sold in the state and actually delivered. *Model, etc. Co. v. Magarity*, 81 Atl. Rep. 394 (Del. 1911). The Delaware statute prohibiting foreign corporations doing business in the state until they have qualified, renders contracts before qualification void, and they cannot be recovered on. *Model, etc. Co. v. Magarity*, 75 Atl. Rep. 614 (Del. 1910).

*Florida*: A purchase of brick in another state, to be delivered in the state, is an act of interstate commerce, and a foreign corporation making the sale need not comply with the state laws. A foreign corporation not complying with the statute as to doing business in the state cannot recover

for goods sold, even though the statute did not prescribe a penalty. *Armour, etc. Co. v. Vinegar, etc. Co.*, 149 Fla. 205 (1906).

*Idaho*: A purchaser with notice from a foreign corporation of a note taken by the latter while doing business in the state without complying with a statute requiring it to file its charter, etc., before doing business, cannot collect such note. *Katz v. Herrick*, 12 Idaho, 1 (1906).

*Illinois*: A Wisconsin corporation constructing a plant in Illinois may recover the price, even though it has not qualified under the Illinois statute, such statutes being applicable to a permanent business and not to a single contract. *Natural, etc. Co. v. Fred Bredel Co.*, 193 Fed. Rep. 897 (1911).

*Indiana*: Where the statute requires foreign corporations to file a statement of their condition before doing business, a foreign corporation cannot enforce a contract until it does so. *Walter A. Wood, etc. Co. v. Caldwell*, 54 Ind. 271 (1876). But it may recover from an agent money paid to him for it. *U. S. Express Co. v. Lucas*, 36 Ind. 361 (1871).

*Kansas*: The Kansas statute that foreign corporations doing business in the state without complying with the statute shall not bring suit, does not prevent suit if they cease doing business, even though the suit grew out of business done in the state. *Boggs v. Kelly Mfg. Co.*, 76 Kan. 9 (1907). Even though a foreign corporation may not be able to enforce a note because it has not complied with the state statutes, yet its indorsee may enforce it. *Northwest etc. Co. v. Riggs*, 75 Kan. 518 (1907). In Kansas a foreign corporation doing business in the state must file certain papers or else be unable to bring a suit until it has filed such papers. *Vickers v. Buck's Stove, etc. Co.*, 70 Kan. 584 (1905). A foreign telegraph company that has tried to comply

<sup>1</sup> *Olender v. Crystalline, etc. Co.*, 149 Cal. 482 (1906).



state auditor as attorney-in-fact to accept process on all foreign corporations doing business in the state, and may require them to pay him ten dollars annually.<sup>1</sup>

with the state law requiring the filing of papers may maintain a suit. *Jordan v. Western, etc. Co.*, 69 Kan. 140 (1904). Contracts made by a foreign corporation are not void, even though under the statute such foreign corporations cannot maintain suit thereon in the state court until they have complied with certain regulations. *State v. American Book Co.*, 69 Kan. 1 (1904).

*Kentucky*: The Kentucky statute that it shall not be lawful for a foreign corporation to do business in the state until it complies with certain requisites, renders unenforceable a contract by such a corporation which has not complied. *Fruin-Colnon, etc. Co. v. Chatterson*, 143 S. W. Rep. 6 (Ky. 1912). An unincorporated express company need not obtain a permit from a state under a statute requiring foreign corporations to do so. *Commonwealth v. Adams Express Co.*, 123 Ky. 720 (1906). A foreign railroad company cannot avoid its contracts in the state by reason of a subsequent statute prohibiting it from doing business in the state unless it first becomes a domestic corporation. *Newport, etc. Co. v. McDonauld, etc.*, Assignee, 109 Ky. 408 (1900).

*Massachusetts*: The Massachusetts statute in regard to foreign corporations maintaining suits in that state without complying with the statutes was considered in *National, etc. Co. v. Fall River, etc. Bank*, 196 Mass. 458 (1907). Although the statute requires foreign corporations doing business in the state to file a power of attorney authorizing the commissioner of corporations to accept service for them, yet a corporation not doing so may sue on one of the contracts. *Rogers, etc. Co. v. Simmons*, 155 Mass. 259 (1892).

*Michigan*: Under the Michigan statutes a foreign quasi-public corporation will not be authorized to do business in the state until after the Michi-

gan Railroad Commission has passed upon its issues of stock and bonds. *Peninsular Power Co. v. Secretary of State*, 135 N. W. Rep. 656 (Mich. 1912). A foreign corporation doing business in the state without qualifying cannot collect an amount due on a contract. *Imperial, etc. Co. v. Jacob*, 163 Mich. 72 (1910). A foreign corporation for mining and various other purposes cannot file its certificate under the Michigan statute authorizing foreign corporations for mining purposes to file such certificate and have all the rights of domestic corporations. *Isle Royale Land Corp. v. Osmun*, 76 Mich. 162 (1889).

*Minnesota*: In Minnesota a resident agent of a foreign corporation may, in a suit by the company against him for moneys received by him for its use, interpose the defense that it is not qualified to do business in the state. *Thomas, etc. Co. v. Knapp*, 101 Minn. 432 (1907). A foreign corporation is presumed to have complied with the statutes. *Lehigh, etc. Co. v. Gilmore*, 93 Minn. 432 (1904). In Minnesota the statute prohibiting foreign corporations from maintaining suits in the state where they have not complied with the law relative to filing papers with the secretary of the state is construed as prohibiting suit, even though such papers were filed after the commencement of the suit; and the court intimated that even a compliance with the statute after the contract was made would be insufficient. *Heilman, etc. Co. v. Peimeisl*, 85 Minn. 121 (1901). A statute to the effect that foreign corporations doing business in the state shall file an appointment of an agent in the state does not prohibit the doing of such business without the appointment of an agent, but merely provides for a convenient means of obtaining jurisdiction. *Tolerton, etc. Co. v. Barek*, 84 Minn. 497 (1901).

<sup>1</sup> *St. Mary's, etc. v. West Virginia*, 203 U. S. 183 (1906).



*Revocation of agency.* — A foreign corporation may be unable to revoke a designation of an agent upon whom service may be made, so

*Mississippi:* As to the Mississippi statute relative to foreign corporations doing business in the state, see *Hart v. Livermore, etc. Co.*, 72 Miss. 809 (1895).

*Missouri:* In Missouri a note given in payment for goods sold in the state by a foreign corporation which has not qualified, is void, even though a part of the consideration of the note was valid. *Parke, Davis & Co. v. Mullett*, 149 S. W. Rep. 461 (Mo. 1912). Under the Missouri statute a contract made in the state by a foreign corporation which has not complied with the statute cannot be enforced. *Chicago, etc. Co. v. Sims*, 197 Mo. 507 (1906). Under the Missouri statute a foreign corporation cannot maintain suit on business transacted before it complies with the statute. *Tri-State, etc. Co. v. Forest, etc. Co.*, 192 Mo. 404 (1905). A person who sells his stock in a ferry company to a trust company cannot repudiate the sale on the ground that the trust company purchased it for a foreign railroad company, which was not entitled to do business in the state, the stockholder not knowing that the purchase was for the railroad company. *Newman v. Mercantile T. Co.*, 189 Mo. 423 (1905). A foreign corporation's suit failed in *Amalgamated, etc. Co. v. Bay State, etc. Co.*, 221 Mo. 7 (1909). 157 S. W. Rep. 615.

*Montana:* An alien corporation may sue to recover back taxes paid under protest although it has not filed its charter as required by statute. *Powder River Cattle Co. v. Custer County*, 9 Mont. 145 (1889).

*New York:* Under the New York statute a foreign corporation in bringing suit must allege that it has complied with the statutes and the defendant does not waive the defense by failing to demur or set it up in his answer. *Wood & Selick v. Ball*, 190 N. Y. 217 (1907); *South Bay Co. v. Howey*, 190 N. Y. 241 (1907). But the defendant must set up that the plaintiff is a stock corporation. *Portland Co. v. Hall, etc. Co.*, 121 N. Y. App. Div. 779 (1907). The defense of failure to pay the license fee, must be

set up as a defense. *Halsey v. Jewett, etc. Co.*, 190 N. Y. 231 (1907). Under the New York act providing that foreign corporations shall not sue on contracts where they have not taken out a license from the state, a foreign corporation may, subsequently to the breach of contract, take out a license and then sue. *Neuchatel, etc. Co. v. Mayor, etc.*, 155 N. Y. 373 (1898).

*North Carolina:* Even though a foreign corporation is doing business in the state without complying with the statutes in regard thereto, a domestic corporation thereafter organized under the same name cannot enjoin the foreign corporation from doing business in the state. *Blackwell's, etc. Co. v. American, etc. Co.*, 145 N. C. 367 (1907).

*North Dakota:* Parties who have contracted with a foreign corporation and received the benefits of the contract cannot, when sued upon the contract, set up that the company has not complied with the statutory requisites in regard to doing business in the state. *Washburn Mill Co. v. Bartlett*, 3 N. Dak. 138 (1893).

*Pennsylvania:* Even though a domestic telephone company has erected its lines on the street of the city without the consent of the city, as required by statute, and even though it has leased the same to a foreign telegraph company, which has no right to use the streets for that purpose, yet where the poles have been in the streets for twenty-one years without objection, and have cost a large amount of money, and various ordinances have been passed in regard to them and license fees collected, a bill in equity by the city to remove the poles will be denied. *City of Bradford v. New York, etc. Co.*, 206 Pa. St. 582 (1903). Under the Pennsylvania statute a foreign construction company that has constructed a railroad in the state cannot collect therefor, where it did not file the statement required by statute until two months after the completion of the work, the work having occupied six months.



far as claims already accrued in the state are concerned.<sup>1</sup> But after an insurance company has withdrawn from the state and canceled its

Delaware, etc. *Co. v. Bethel*, etc. Ry., 204 Pa. St. 22 (1902). A corporate agent who employs labor and buys goods in the state for a foreign corporation which has not complied with the law prohibiting such corporations to do business in the state until a resident office and agent have been named is personally liable for such labor and goods. *Lasher v. Stimson*, 145 Pa. St. 30 (1892). The objection that the foreign corporation has not filed the statement as required by statute must be clearly raised in order to be available. *Campbell, etc. Co. v. Hering*, 139 Pa. St. 473 (1891). Stockholders dealing with their corporation cannot defeat their contracts by alleging that it was a foreign corporation and had not complied with the state laws. *Kilgore v. Smith*, 122 Pa. St. 48 (1888). See note 1, p. 2356, *supra*.

*South Carolina*: A statute that a foreign corporation, upon filing its charter, shall become a domestic corporation is constitutional as to the right to construct a railroad. *State v. Southern Ry.*, 48 S. C. 49 (1896).

*South Dakota*: Under the South Dakota statutes a foreign corporation cannot enforce a contract which it has made in the state before complying with the statutes. *American, etc. Co. v. Eureka Bazaar*, 20 S. Dak. 526 (1906). Under the South Dakota statute a foreign corporation cannot maintain a suit in the courts of that state until it has filed a copy of its charter in the office of the secretary of state. *Bishop, etc. Co. v. Schleuning*, 20 S. Dak. 71 (1905). In *Wright v. Lee*, 4 S. Dak. 237 (1893), the court passed upon the statute which requires for-

eign corporations to file a copy of their articles of incorporation, etc., with the secretary of state, and prohibiting the doing of business by such corporations until such certificates are filed. The court held that the failure to file such certificate did not invalidate contracts of the corporation.

*Tennessee*: A foreign corporation is doing business in a state, within the meaning of a statute, where a mortgage deed of trust is made to a resident for the benefit of such foreign corporation. *Myers, etc. Co. v. Wetzel*, 35 S. W. Rep. 896 (Tenn. 1896).

*Texas*: "Transacting business" may be broader than "doing business," and hence a foreign corporation constructing a plant may be transacting business in the state. *Smythe Co. v. Ft. Worth, etc. Co.*, 142 S. W. Rep. 1157 (Tex. 1912). Where a foreign corporation does business in the state without complying with the statute, it cannot enforce in that state a judgment obtained by it in another state on business so transacted. *St. Louis, etc. Co. v. Beilharz*, 88 S. W. Rep. 512 (Tex. 1905). A bondsman for a corporate agent cannot escape liability by alleging that the corporation has not complied with the law relative to foreign corporations. *Singer Mfg. Co. v. Hardee*, 4 N. M. 175 (1888); *American, etc. Co. v. Bateman*, 22 S. W. Rep. 771 (Tex. 1893).

*Utah*: In Utah the courts refuse to enforce a contract made by a foreign corporation in the territory without compliance with the statute for appointing an agent, etc. *A. Booth & Co. v. Weigand*, 28 Utah, 372 (1904). Under the Utah statute a foreign corporation cannot defend against con-

<sup>1</sup> *Groel v. United Electric Co.*, 69 N. J. Eq. 397 (1905). A foreign corporation which has appointed a resident agent and engaged in business, cannot revoke his appointment so far as past transactions are concerned and hence service may still be made upon him. *Brown-Ketcham, etc.*

*Works v. Swift Co.*, 100 N. E. Rep. 584 (Ind. 1913). Ordinarily a foreign corporation may revoke its agency in the state and thereafter process cannot be served upon the agent. *United, etc. Co. v. Wisconsin, etc. Co.*, 44 Mont. 343 (1911).



appointment of an agent to accept service, a non-resident cannot, by assigning a claim on a policy to a resident, obtain judgment by service on the former agent.<sup>1</sup> A state in admitting foreign insurance companies to do business may provide that dissolution of the company shall not prevent its being sued in the corporate name in the state.<sup>2</sup>

*Foreign insurance companies.* — On account of the peculiar nature of insurance and the inability of the owners of insurance policies to protect themselves and understand the real financial responsibility of the company, and on account of the danger of heavy losses by insurance companies in their risks or their investments, the law is particularly favorable towards strict state regulation of non-resident insurance companies transacting business within the state.

Restrictions upon foreign insurance companies are found in all the

demnation if it has not complied with the Utah statute relative to foreign corporations. *Rio Grande, etc. Ry. v. Telluride, etc. Co.*, 23 Utah, 22 (1900).

*Virginia*: A statute making officers of a foreign corporation, doing business in the state without authority, liable for debts, does not authorize an attachment against an officer residing outside of the state. *Richmond, etc. Co. v. Dininny*, 105 Va. 439 (1906). A vice-president of a foreign corporation may be punished criminally for causing the corporation to sell goods through a peddler without taking out a license. *Crall v. Commonwealth*, 103 Va. 855 (1905). The court said: "A corporation can act alone through its officers and agents, and where the business itself involves a violation of the law the correct rule is that all who participate in it are liable."

*Washington*: Although the statutes require a foreign corporation, before doing any business in the state, to file certain papers, and make it a misdemeanor not to do so, yet this does not render contracts void, although such statute is not complied with. *Dearborn Foundry Co. v. Augustine*, 5 Wash. St. 67 (1892).

*West Virginia*: A contract of a West Virginia construction company made in the state of Pennsylvania to construct a railroad in Pennsylvania cannot be enforced if such West Virginia corporation has not complied with the statutes of the state as to

doing business in that state. *Pittsburgh, etc. Co. v. West Side, etc. R. R.*, 154 Fed. Rep. 929 (1907).

*Wisconsin*: The Wisconsin statute was applied and the plaintiff, a foreign corporation, defeated in its suit in *International, etc. Co. v. Peterson*, 133 Wis. 302 (1907). A taxpayer in Wisconsin may enjoin a city from paying to a foreign corporation, which has not complied with the state statute, the contract price of paving. *Allen v. City of Milwaukee*, 128 Wis. 678 (1906). A statute requiring foreign corporations to file certified papers before doing business in the state does not apply to contracts made before such statute was enacted. *Chicago, etc. Co. v. Bashford*, 120 Wis. 281 (1904). The Wisconsin statute that a foreign corporation doing business within the state without complying with the statute cannot enforce a contract, but such contract shall be void, was upheld in *Ashland, etc. Co. v. Detroit Salt Co.*, 114 Wis. 66 (1902).

*Wyoming*: A foreign corporation prohibited from transacting business in the state until it has complied with certain requisites cannot bring suit in the state on business transacted without such compliance. *Gould, etc. Co. v. Rocky, etc. Co.*, 17 Wyo. 507 (1909).

<sup>1</sup> *Hunter v. Mutual, etc. Co.*, 184 N. Y. 136 (1906).

<sup>2</sup> *Frink v. National, etc. Co.*, 74 S. E. Rep. 33 (S. C. 1912).



states and are strictly enforced.<sup>1</sup> A foreign insurance company cannot enjoin a state officer from enforcing a law prescribing the terms upon which it may do business in the state.<sup>2</sup> A state may require foreign insurance companies before doing business in the state to comply with conditions similar to the conditions imposed on foreign insurance com-

<sup>1</sup> If an insurance company does business in the state without complying with the statutory conditions it cannot collect a premium note. *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413 (1894); *Cincinnati Mut. etc. Co. v. Rosenthal*, 55 Ill. 85 (1870), holding that a premium note given to a foreign company which had not obtained a certificate from the state auditor as required was void in its hands. To same effect, *Hoffman v. Banks*, 41 Ind. 1 (1872), and *Roche v. Ladd*, 83 Mass. 436 (1861); *Ætna Ins. Co. v. Harvey*, 11 Wis. 394 (1860), where filing a statement of the condition with the secretary of state was required; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526 (1883); *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387 (1878), but holding that they may sue for or secure debts due from residents without complying with such statutes; *Williams v. Cheney*, 69 Mass. 215 (1855), but holding that a premium note void for this reason is valid in the hands of a *bona fide* holder for value without notice; *Jones v. Smith*, 69 Mass. 500 (1855), holding that the payee of a premium note must prove compliance by the insurance company with the statute; *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471 (1880), holding that if the statute merely imposes penalties for non-compliance with such requirements, the contracts of a foreign corporation not complying are not void. To same effect is *King v. National M. & E. Co.*, 4 Mont. 1 (1881); *Clark v. Middleton*, 19 Mo. 53 (1853), holding that the failure of an agency to file a statement was not to make void a promise to pay premium notes given to the foreign insurance company; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538 (1875), holding that a foreign corporation cannot avail itself of its own failure to comply; *Union, etc.*

*Ins. Co. v. McMillen*, 24 Ohio St. 67 (1873), holding that neglect to comply does not make void a policy issued by a foreign company nor excuse the holder from paying premiums; *Eureka Ins. Co. v. Parks*, 1 Cin. Super. Ct. (Ohio), 574 (1871), holding that a company which issues a policy on property in another state from its home office is not subject to the restricting statute of that state, though it has paid a commission for obtaining the insurance to a resident thereof; *Mutual, etc. Ins. Co. v. Bales*, 92 Pa. St. 352 (1879), holding that it cannot recover from sureties upon an agent's bond unless it has complied with a statute requiring the agents to be commissioned. To same effect, *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15 (1875); but in *U. S. Life Ins. Co. v. Adams*, 7 Biss. 30 (1873); s. c., 28 Fed. Cas. 816, it was held that compliance with a restraining act is not essential to the validity of an agent's bond; *Lamb v. Bowser*, 7 Biss. 315 (1876); s. c., 14 Fed. Cas. 980; aff'd, 14 Fed. Cas. 982, holding that a policy of insurance is not void because the company has not complied with the statute. Cf. *Isle Royale Land Corp. v. Osmun*, 76 Mich. 162 (1889). As a defense to a note, see *Dudley v. Collier*, 87 Ala. 431 (1880). See also § 696, notes, *supra*; *Charter Oak, etc. Ins. Co. v. Sawyer*, 44 Wis. 387 (1878), holding that it may sue or take security for a debt without complying with the local act. To same effect, *Columbus Ins. Co. v. Walsh*, 18 Mo. 229 (1853). See also *People v. Howard*, 50 Mich. 239 (1883). A state may impose such conditions as it sees fit on the admission of a foreign insurance company to do business in the state. *State v. Blake*, 241 Mo. 100 (1912).

<sup>2</sup> *Hartford, etc. Co. v. Perkins*, 125 Fed. Rep. 502 (1903).



panies by the laws of the state under which they are organized; in other words may impose reciprocal burdens.<sup>1</sup> A foreign mutual insurance company cannot collect an assessment where a similar domestic corporation would not be allowed to collect.<sup>2</sup> A state may tax premiums collected in the state by a foreign insurance company.<sup>3</sup>

*Preferences to residents as to assets of foreign corporations.*—A statute of a state giving its citizens preference as to assets of an insolvent foreign corporation within the state is unconstitutional as to non-resident persons, but is constitutional as to foreign corporations, which are creditors of the insolvent corporation.<sup>4</sup>

*Quo warranto—Expulsion—Anti-trust statutes.*—*Quo warranto* lies against foreign corporations doing business in a state contrary to its statutes.<sup>5</sup> Ordinarily a state may withdraw from a foreign corporation a privilege which the state has already granted to do business in the state,<sup>6</sup> but not where to do so would deprive it of its property.<sup>7</sup> Certain it is, however, that a state may drive out any foreign corporation that has formed an illegal combination in restraint of trade. A state may not only prohibit a foreign corporation from doing business in the state on account of acts done by it out of the state, but a state

<sup>1</sup> *State v. Insurance Co. etc.*, 71 Neb. 320 (1904).

<sup>2</sup> *Walker v. Rein*, 14 N. Dak. 608 (1905).

<sup>3</sup> *New York, etc. Co. v. Bradley*, 83 S. C. 418 (1909).

<sup>4</sup> *McClung v. Embreeville, etc. Ry.*, 103 Tenn. 399 (1899), following *Blake v. McClung*, 172 U. S. 239, 259 (1898). A state may prescribe that resident creditors of a foreign corporation doing business in the state, shall, to the extent of its property in the state, have payment of their debts before other foreign corporations are paid as creditors of the first named foreign corporation. *Re Standard Oak, etc. Co.*, 173 Fed. Rep. 103 (1909).

<sup>5</sup> *State v. Fidelity, etc. Co.*, 39 Minn. 538 (1888). A state by a proceeding in the nature of *quo warranto* may oust a foreign corporation from doing business in the state, no license for that purpose having been issued by the state. *State v. Kansas, etc. Co.*, 71 Kan. 785 (1905). *Mandamus* does not lie at the instance of the state to compel a foreign corporation to qualify to do business in the state. *Secretary of State v. National, etc. Co.*, 126 Mich. 644 (1901). Where a for-

eign corporation has not complied with reasonable regulations by the state as a condition of its doing business in the state, *quo warranto* lies to oust it of its claim of right to do business in the state. *State v. American, etc. Co.*, 65 Kan. 847 (1902).

<sup>6</sup> In the case *Locker v. American Tobacco Co.*, 195 N. Y. 565 (1909), the court said, "With the exception of a very limited class, such as corporations engaged in interstate transportation and the like, a foreign corporation cannot breathe or exist within the limits of a state except by the consent of the state. The state may refuse admittance to such a corporation for any reason, and unless the right has been contracted away, which is hardly possible under the Constitution of this State, it can equally unceremoniously, turn it out." Even though foreign insurance companies have been authorized to do business in the state, yet such permit may be revoked by a statute providing that any company paying its officers more than \$50,000 salary shall not do business in the state. *State v. Vandiver*, 222 Mo. 206 (1909).

<sup>7</sup> See cases, *supra*.



after authorizing a foreign corporation to do business in the state may exclude it, especially where the state reserves the right to repeal or amend charters granted by it.<sup>1</sup> A statute of a state prohibiting a foreign corporation from doing business in the state, if such corporation is connected with a trust, is constitutional.<sup>2</sup>

<sup>1</sup> *Hammond, etc. Co. v. Arkansas*, 212 U. S. 322 (1909); *State v. Standard Oil Co.*, 120 Tenn. 86 (1908). A state may cancel the license granted to a foreign corporation to do business in the state where the company is violating the anti-trust act, or the state may prohibit it from doing certain specific acts and retain the case for further orders from time to time. *State v. International, etc. Co.*, 81 Kan. 610 (1910). A state may cancel a permit to a foreign corporation to do business in the state where it, being in the churn manufacturing business, has bought out its competitors, even though the combination consisted largely of patents issued by the United States government. *State v. Creamery, etc. Co.*, 110 Minn. 415 (1910). The Missouri Anti-Trust Act was applied in *State v. Standard Oil Co.*, 318 Mo. 1 (1909); *aff'd*, 224 U. S. 270, which was a proceeding to forfeit the charter of a local company and at the same time revoke the licenses of two foreign companies doing business

in the state, and the court held that the fact that a holding company owned a majority of the stock of the defendants does not prove absolutely an unlawful combination but tends to prove that fact. Under the Nebraska statute, in a suit instituted by the state to enjoin a foreign corporation from doing business in the state on the ground that it is violating an anti-trust statute, the court may order the defendant to allow the plaintiff to examine the defendant's books and records for the purpose of obtaining evidence in the case. *State v. Standard Oil Co.*, 61 Neb. 28 (1900).

<sup>2</sup> *Waters-Pierce, etc. Co. v. Texas*, 177 U. S. 28 (1900). The Tennessee statute prohibiting foreign corporations from doing business in the state where they have combined to lessen competition and influence prices is legal, and the state may file a bill to restrain foreign corporations from doing business in the state where they have violated such statute. *State v. Schlitz, etc. Co.*, 104 Tenn. 715 (1900).



## CHAPTER XLII.

### STOCKHOLDERS' ACTIONS TO HOLD THE DIRECTORS LIABLE FOR NEGLIGENCE IN THE DISCHARGE OF THEIR DUTIES.

<p>§ 701. Remedy of the stockholder herein.</p> <p>702. Instances of negligence of directors in the performance of their duties.</p>	<p>§ 703. Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.</p>
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§ 701. *Remedy of the stockholder herein.* — Where, by reason of the negligence of the directors or other officers, the corporate funds, property, or rights have been lost, the injury is practically and ultimately an injury to the stockholders. But, in the eye of the law, the injury is to the corporation itself. The loss has depleted its treasury. Moreover, the negligent act was in reference to the affairs of the corporation. Accordingly, it is for the corporation to call the directors to an account for their negligence. The action is not one which the stockholder is to bring. The negligence affects him, not directly, but indirectly. Hence, the law is well settled that a stockholder cannot bring the ordinary action at law for damages against the corporate directors for their negligence in the management of the corporate affairs.<sup>1</sup> It is clear also that the stockholder cannot hold the corporation itself liable for the negligence herein of its directors. To allow such an action would be to make part of the stockholders liable to other stockholders for the loss, when all are equally injured, equally innocent, and equally in position to complain.<sup>2</sup> The usual and proper remedy is for the corporation itself to institute a suit at law against the guilty directors.<sup>3</sup> If, however, the corporation is under the control of the guilty parties, or if it refuses to sue when requested by stockholders to do so, then the stockholder himself may bring a suit in equity in his own behalf, and in behalf of all other stockholders who may wish to come in, making the corporation and the guilty parties the defendants, and compel them to make good to the corporation the corporate money or prop-

<sup>1</sup> See § 734, *infra*.

<sup>2</sup> *Oliphant v. Woodburn, etc. Co.*, 63 Iowa, 332 (1884).

<sup>3</sup> *Empire State Sav. Bank v. Beard*, 151 N. Y. 638 (1896), rev'g 81 Hun, 184. In Wisconsin it is held that the

remedy of the corporation may be in equity. *North Hudson, etc. Assoc. v. Childs*, 82 Wis. 460 (1892). See also *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889), and § 734, *infra*.



erty lost by their negligence.<sup>1</sup> The money or property recovered in such an action belongs to the corporation, and not to the stockholder who brings the suit.<sup>2</sup> In a stockholder's suit to hold the directors liable for negligence, the acts of negligence need not be set out with great particularity. The suit is in a court of equity, and the court decides the questions of fact, since the suit is in the nature of an accounting.<sup>3</sup> A general allegation, however, that the board of directors were negligent does not render a particular director liable.<sup>4</sup> A receiver's suit in equity against directors to hold them liable for negligence is not multifarious nor indefinite, where it charges that they failed to attend meetings and to use due diligence in selecting subordinates and to watch the acts of the subordinates, and charged them with making loans in violation of the charter and by-laws.<sup>5</sup> It has been held that a suit by the corporation against the directors for

<sup>1</sup> See §§ 734, 740, *infra*.

<sup>2</sup> *Evans v. Brandon*, 53 Tex. 56 (1880); *Dewing v. Perdicaries*, 96 U. S. 193, 198 (1877); *Smith v. Poor*, 40 Me. 415 (1855); *Carter v. Ford*, etc. Co., 85 Ind. 180 (1882). See also § 734, *infra*.

<sup>3</sup> *Halsey v. Ackerman*, 38 N. J. Eq. 501 (1884), *aff'g Ackerman v. Halsey*, 37 N. J. Eq. 356. This case holds also that the stockholder's action lies even after the corporation has become insolvent. See also *Smith v. Poor*, 3 Ware, 148 (1858); s. c., 22 Fed. Cas. 627; *Gardiner v. Pollard*, 10 Bosw. 674 (1863); and § 734, *infra*. A receiver of a national bank may file a bill in equity against the directors to hold them liable for misconduct or negligence and the bill need not allege in detail the transactions complained of. *Allen v. Luke*, 141 Fed. Rep. 694 (1906); s. c., 163 Fed. Rep. 1018. Where a stockholder brings a suit at law against a board of directors for negligence in allowing the cashier to wreck the bank, the directors having been such for different periods of time, there is a misjoinder of causes of action. *Sayles v. White*, 18 N. Y. App. Div. 590 (1897). Where the stock which a person holds in a national bank has been sold for non-payment of an assessment, rendered necessary by negligence of the directors, he cannot maintain a bill in equity to hold them personally liable

for his loss. *Hanna v. People's*, etc. Bank, 76 N. Y. App. Div. 224, *rev'g* 35 N. Y. Misc. Rep. 517 (1901).

<sup>4</sup> *Fisher v. Graves*, 80 Fed. Rep. 590 (1897).

<sup>5</sup> A director who is not present at a meeting, however, cannot be charged for an illegal loan authorized at such meeting. Directors who continue an officer in office after he has squandered the assets are liable for further losses by him, and they are liable for failure to renew his bond when it ran out. *Murphy v. Penniman*, 105 Md. 452 (1907). In a suit brought by the attorney-general under the statutes of New York to hold directors liable for waste or neglect, several directors cannot be joined where the cause of action against one is not the same cause of action as against another. Each director is liable only for his own acts or omissions, unless he had knowledge from which he might reasonably have prevented a loss. An allegation in the alternative that a director participated in an act or was negligent in not ascertaining it will not save such a complaint. Moreover the remedy against some of the directors may be in equity while as against others it may be at law. If there is a concurrent remedy at law and in equity the statute of limitations will be applied by a court of equity. *People v. Equitable*, etc. Soc., 124 N. Y. App. Div. 714 (1908).



negligence may be in equity;<sup>1</sup> but the prevailing rule is that its remedy is at law alone.<sup>2</sup>

A receiver may institute the suit.<sup>3</sup> An action by the receiver against

<sup>1</sup> *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. *National Bank, etc. v. Wade*, 84 Fed. Rep. 10 (1897). The remedy of a corporation against its manager for mismanagement, fraud, neglect, and wrongful acts may be in equity for an accounting, even though an action at law for tort would lie. *Empire State Tel. Co. v. Bickford*, 72 Hun, 580 (1893), reversed on another point in 142 N. Y. 224. The decision in *American, etc. Co. v. Easton*, 120 Fed. Rep. 440 (1903), that a suit by the corporation itself to recover secret profits made by a director in purchasing property for the corporation could not be maintained in equity, the remedy at law being sufficient, was reversed in 129 Fed. Rep. 1004.

<sup>2</sup> *Empire State Sav. Bank v. Beard*, 151 N. Y. 638 (1896), reversing 81 Hun, 184 (1894), holding also that all the guilty parties should be joined as defendants.

<sup>3</sup> *Robinson v. Hall*, 59 Fed. Rep. 648 (1894); *O'Brien v. Fitzgerald*, 143 N. Y. 377 (1894). A suit against directors to hold them liable for negligence and mismanagement may be in equity and may be filed by the receiver. *Fisher v. Parr*, 92 Md. 245 (1901). A receiver of a national bank may sue the directors for negligence and fraud on their part. *Cockrill v. Abeles*, 86 Fed. Rep. 505 (1898). A receiver may sue them for negligence, as the corporation might have done. *Movius v. Lee*, 30 Fed. Rep. 298 (1887); *aff'd*, 141 U. S. 132. As to the right of corporate creditors to sue for negligence, and an action by a

receiver or assignee in behalf of them, see *Warner v. Hopkins*, 111 Pa. St. 328 (1886). Where a receiver sues directors for negligence, stockholders are not proper parties. *Kimball v. Ives*, 30 Hun, 568 (1883). Where a receiver has been appointed it is for him and not for a stockholder to hold the directors responsible for mismanagement of a bank. *Howe v. Barney*, 45 Fed. Rep. 668 (1891). A stockholder or creditor may hold a director liable for negligence where a receiver cannot. *Briggs v. Spaulding*, 141 U. S. 132, 150 (1891). A receiver of a national bank may hold the directors personally liable for losses where they left the entire management in the hands of the officers and made no inquiries. The court held them liable from the time when, dividends having ceased, they were bound to investigate. *Gibbons v. Anderson*, 80 Fed. Rep. 345 (1897). A creditor of an insolvent bank may hold the directors liable for allowing the president to borrow an unreasonably large sum without good security, and for allowing him to purchase stock of the bank with bank funds. Such suit must be for the benefit of all creditors and the results of the suit will be administered by the court. *Gores v. Day*, 99 Wis. 276 (1898). A receiver of an insolvent bank may sue the directors for damages for their negligence, and it is not necessary to join as defendants all the directors. *Coddington v. Canaday*, 157 Ind. 243 (1901), holding also that even though the stockholders of a bank assent to the notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor. A receiver of an insolvent bank may, in behalf of creditors, hold the directors personally liable for negligence leading to a defalcation by the cashier. *Campbell v. Watson*, 62 N. J. Eq. 396 (1901). Under the statutes of Wisconsin the affairs of an insolvent corporation may be wound up and the directors



directors for negligence should be at law, and there must be a separate suit against each director.<sup>1</sup> The acts of negligence must be clearly set forth in the complaint.<sup>2</sup> An action by the receiver to hold a director liable for negligence does not abate by the death of such director.<sup>3</sup> The court may authorize the receiver to compromise claims against directors for negligence.<sup>4</sup> The receiver of a bank may by suit in equity hold the directors liable for gross negligence, but if some of the defendant directors had nothing to do with some of the acts complained of, the

held liable for fraud or negligence and stockholders held liable under statutory liability, all in one suit. *Gager v. Marsden*, 101 Wis. 598 (1899). A stockholder in a national bank who has been subjected to a statutory liability may sue the directors in behalf of the corporation, to render them liable for their gross negligence, the receiver having neglected to sue. *Nelson v. Burrows*, 9 Abb. N. Cas. 280 (1881), giving the complaint in full. After a receiver has been appointed the remedy of the stockholder to hold the directors liable for negligence is by petition to the receiver to institute a suit. *Cunningham v. Wechselberg*, 105 Wis. 359 (1900). In a stockholder's suit to hold directors in a national bank liable for negligence, a request to the receiver to bring the suit is unnecessary where the receiver was one of the directors. *Flynn v. Third Nat. Bank*, 122 Mich. 642 (1900).

<sup>1</sup> *O'Brien v. Fitzgerald*, 143 N. Y. 377 (1894); s. c., 150 N. Y. 572; *Higgins v. Tefft*, 4 N. Y. App. Div. 62 (1896); *Dykman v. Keeney*, 154 N. Y. 483 (1897). In *Stearns v. Lawrence*, 83 Fed. Rep. 738 (1897), the receiver held the president liable for negligence in the management of a bank by a suit in equity. A receiver of a national bank may file a bill in equity against the directors to hold them liable for misconduct or negligence and the bill need not allege in detail the transactions complained of. *Allen v. Luke*, 141 Fed. Rep. 694 (1906); s. c., 163 Fed. Rep. 1018. A court of equity is the proper forum for a receiver to bring suit against directors for negligence and loss. *Buist v. Melchers*, 44 S. C. 46 (1895).

If the receiver refuses to sue, a stockholder may sue. See § 740, *infra*. A suit against directors to hold them liable for negligence and mismanagement may be in equity and may be filed by the receiver. *Fisher v. Parr*, 92 Md. 245 (1901). A receiver may bring a suit in equity to hold a director liable for misconduct where particular property or the proceeds thereof are involved; otherwise his remedy is at law. *Mabon v. Miller*, 81 N. Y. App. Div. 10 (1903).

<sup>2</sup> *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).

<sup>3</sup> *O'Brien v. Blaut*, 17 N. Y. App. Div. 288 (1897).

<sup>4</sup> The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders where such contract is a fair one, even though some of the stockholders dissent. *People v. Anglo-American, etc. Assoc.*, 66 N. Y. App. Div. 9 (1901); s. c., 169 N. Y. 606. In the case *Woerz v. Schumacher*, 37 N. Y. App. Div. 374 (1899); *aff'd*, 161 N. Y. 530, a suit by a receiver of an insolvent bank against the directors was compromised by the directors paying thirty-five per cent. of the liabilities of the bank and taking all the assets and agreeing to pay to the receiver anything realized by them over and above such thirty-five per cent. Where the court has ordered the receiver to sue the directors for negligence, the court has no power to authorize a settlement with one director under seal, especially where the effect would be to discharge the others. *Murphy v. Peniman*, 105 Md. 452 (1907).



bill is multifarious as to them.<sup>1</sup> Where a receiver is in charge he only can hold the directors liable for negligence, and if he refuses a stockholder will not be allowed to bring suit if the court thinks that no case has been made out.<sup>2</sup> Corporate creditors cannot hold directors liable for mere non-feasance, but a receiver may hold them liable.<sup>3</sup> Depositors in a national bank may join in maintaining a single suit against directors for negligence in conducting the affairs of the bank, it having become insolvent thereby.<sup>4</sup> In a stockholder's suit against the executive committee of a bank for negligence in managing the business of the bank, a settlement with one of the defendants and a release to him releases the others.<sup>5</sup> Where directors and officers of an insolvent bank are also creditors, their liability for negligence may be offset against their claims as creditors.<sup>6</sup>

§ 702. *Instances of negligence of directors in the performance of their duties.* — It is difficult to lay down any rules as to what acts will constitute negligence on the part of corporate officers. Each case is to be determined largely on its own facts. Thus, where the directors kept no accounts, paid no calls, and collected no subscriptions, they were quite properly held guilty of negligence and were made liable therefor.<sup>7</sup> So also the directors of a national bank are liable when they loan money to irresponsible persons, allow overdrafts, employ dishonest, unfaithful, and incompetent clerks, and neglect to take security from the cashier, president, and other officers for good conduct and the performance of duties.<sup>8</sup> Directors of a bank who knowingly allow the president to speculate with the bank's money, are liable for the losses.<sup>9</sup> Directors are not personally liable for error of judgment in declaring dividends unless they were culpably

<sup>1</sup> *Emerson v. Gaither*, 103 Md. 564 (1906).

<sup>2</sup> *Du Pont v. Standard Arms Co.*, 82 Atl. Rep. 692 (Del. 1912). Corporate creditors cannot sue the directors for illegal payment of dividends and negligence where a receiver is in charge. The proper remedy is for the receiver to sue or for a creditor to sue to the court to compel him to sue. *McTamany v. Day*, 128 Pac. Rep. 563 (Idaho, 1912).

<sup>3</sup> *Stone v. Rottman*, 183 Mo. 552 (1904). Directors of a bank are not liable for negligence in their management of the bank to a bank creditor suing in his own right and for his own benefit. *United States, etc. Co. v. Corning, etc. Bank*, 134 N. W. Rep. 857 (Iowa, 1912).

<sup>4</sup> *Boyd v. Schneider*, 131 Fed. Rep. 223 (1904). Depositors in an insolvent bank may join in a suit to hold the directors liable for negligence where the receiver refuses to sue. *Saunders v. Bank of Mecklenburg*, 75 S. E. Rep. 94 (Va. 1912).

<sup>5</sup> *Chetwood v. California Nat. Bank*, 113 Cal. 414, 649 (1896).

<sup>6</sup> *Elliott v. Farmers' Bank, etc.*, 61 W. Va. 641 (1907).

<sup>7</sup> *Neall v. Hill*, 16 Cal. 145 (1860).

<sup>8</sup> *Brinekerhoff v. Bostwick*, 88 N. Y. 52 (1882). See s. c., 105 N. Y. 567. See also *Smith v. Rathbun*, 22 Hun, 150 (1880). As to the liability of a cashier, see *Commercial Bank v. Ten Eyck*, 48 N. Y. 305 (1872).

<sup>9</sup> *M'Kinnon v. Morse*, 177 Fed. Rep. 576 (1910).



or grossly negligent in the matter.<sup>1</sup> Where the president of a corporation sells large quantities of coal to a firm which his sons control, and allows the debt to increase when he could easily have collected it, and ultimately the debt is lost, he is liable for negligence and must make good the loss.<sup>2</sup> The president of a bank may be held personally liable to the bank for negligence in permitting the cashier to loan bank funds on inadequate security and concealing the facts from the board of directors.<sup>3</sup> The business usages of the community enter into the question of whether a director was negligent in making loans. The directors may commit the business to the officers, but must give reasonable supervision and not be guilty of gross inattention. Thus, the loan of one third of the capital stock to one person is not necessarily negligent.<sup>4</sup> Where for three years the directors turn the management over to the cashier, of no responsibility, and know of illegal loans and neglect to record mortgages, they are liable for losses incurred thereby.<sup>5</sup> Directors

<sup>1</sup> Even though a director knew his name was signed to a report to the stockholders after he resigned, yet he is not liable for negligence where he took no part in drawing the report or in recommending the dividends based thereon. *Re National Bank of Wales* (1899), 2 Ch. 629, rev'g 79 L. T. Rep. 667. The receivers of an insolvent savings association cannot hold the directors liable for negligence on the ground that the secretary sent out misleading circulars, the directors having no knowledge of the same. *Foutz v. Miller*, 112 Md. 458 (1910). The pledgee of a majority of the stock of a corporation may take control of its board of directors and cause it to bring suit against the directors to hold them personally responsible for aiding the insolvent pledgor to fraudulently borrow the money of the corporation. *Cream City, etc. Co. v. Donahue*, 142 Wis. 651 (1910). Directors are not liable to corporate creditors either at common law or under a statute for paying dividends when they supposed, and the books showed, that the company was prosperous and had profits for distribution, but it subsequently turned out that the president had embezzled the funds and substituted fictitious notes of customers and had falsified the books in omitting debts for material, there being no proof that the directors even in the exercise of ordi-

nary diligence would have discovered that the company was insolvent. *Chick v. Fuller*, 114 Fed. Rep. 22 (1902).

<sup>2</sup> *Doe v. Northwestern, etc. Co.*, 78 Fed. Rep. 62 (1896).

<sup>3</sup> *Commercial Bank v. Chatfield*, 127 Mich. 407 (1901). The president of a bank is personally liable to the bank if he permits the cashier to borrow a large sum on inadequate security. He is bound to exercise that degree of care that a careful man would exercise in his own affairs of like importance. A director, however, who takes no part in the transaction is not liable for the negligence of other directors. *Commercial Bank v. Chatfield*, 121 Mich. 641 (1899).

<sup>4</sup> *Wheeler v. Aiken County, etc. Bank*, 75 Fed. Rep. 781 (1896). Directors who knowingly allow the cashier to lend more than the entire capital stock to one man and his enterprises without proper security, are liable to bank creditors, under the Arkansas statute. *Bailey v. O'Neal*, 92 Ark. 327 (1909).

<sup>5</sup> *Robinson v. Hall*, 63 Fed. Rep. 222 (1894), rev'g 59 Fed. Rep. 648. Bank directors are liable for defalcations of the cashier where the by-laws requiring them to examine the accounts were not complied with by them, and overdrafts were continued on insufficient security, after the bank examiner had called their attention to



in a national bank are not liable for the misconduct of the cashier in making excessive loans to a particular corporation where such directors have no reason to suspect such loans; but an examining committee of directors whose duty it is to examine the securities are liable, where such committee knew of such loan.<sup>1</sup> Directors of a trust company may delegate the details of the business to an executive committee and are not liable for the failure of the executive committee to properly pass upon various transactions.<sup>2</sup> Where the president of a bank cancels a debt of the bank against one of his relatives in exchange for securities which ultimately become worthless, he is liable for the loss.<sup>3</sup> It is negligence for directors to build a hotel before they have provided funds therefor and before they have the title to the land.<sup>4</sup> Directors of a bank are not liable in an action for deceit brought by a purchaser of stock, although they signed the cashier's annual statement which was false, there being proof that they believed it to be true.<sup>5</sup> But a director in a national bank may be liable to a person purchasing the stock on the faith of a bank report authorized by such director where worthless paper has not been charged off.<sup>6</sup> A director is not liable for a deposit made in a bank after it was insolvent, where there was no fraud on his part inducing the deposit.<sup>7</sup> But a director in a bank is personally liable to persons who deposit their money in the bank after he knows that it is hopelessly insolvent, where he fails to initiate measures to

them; and it is no defense that the directors did not know that the accounts were incorrect and relied upon the reports of the officers and the examinations of the state officials. *Campbell v. Watson*, 62 N. J. Eq. 396 (1901). A bill by a stockholder in a national bank to hold directors liable for negligence in making illegal loans was sustained in *Allen v. Luke*, 163 Fed. Rep. 1018 (1908).

<sup>1</sup> *Warner v. Penoyer*, 91 Fed. Rep. 587 (1899). Where the directors of a national bank know that excessive loans are being made to its president and others and they take no steps to reduce the loans or prevent their increase, and the bank becomes insolvent, they are liable for losses thereby incurred, and such liability may be enforced by a suit in equity, even though a suit at law will be barred by the statute of limitations. The fact that such a director could not attend to his duties by reason of ill health is no excuse. *Rankin v. Cooper*, 149 Fed. Rep. 1010 (1906).

<sup>2</sup> *Kavanaugh v. Gould*, 147 N. Y. App. Div. 281 (1911).

<sup>3</sup> *Lawrence v. Stearns*, 79 Fed. Rep. 878 (1897). Where the president, who is also a director, of an investment company waives security for a loan and takes securities of small value in exchange therefor, causing the loss of the loan, he may be held personally liable at the instance of a stockholder, and if the doubtful securities cannot be returned their value may be ascertained. The statute of limitations and laches do not commence to run until the stockholder has discovered the facts. *Brinckerhoff v. Roosevelt*, 143 Fed. Rep. 478 (1906).

<sup>4</sup> *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895).

<sup>5</sup> *Foster v. Gibson*, 38 S. W. Rep. 144 (Ky. 1896).

<sup>6</sup> *Chesbrough v. Woodworth*, 195 Fed. Rep. 875 (1912).

<sup>7</sup> *Minton v. Stahlman*, 96 Tenn. 98 (1896). For a case of negligent representations see *Ayers v. Bailey*, 78 S. E. Rep. 66 (N. C. 1913).



close the business of the bank. It is his duty to call a meeting of the directors, or report the condition of things to the state authorities, or instruct the cashier to stop taking deposits, or to warn individual depositors, or, if necessary, make public announcement of the condition of things.<sup>1</sup> A depositor in a bank may sue the directors for gross negligence leading to the loss of his money, and may join also a cause of action against them for false statements as to the condition of the bank.<sup>2</sup> The president is negligent and is liable if he does not require the secretary to give a bond for his good conduct, as required by the by-laws of the corporation.<sup>3</sup> But it has been held that the directors are not liable for a failure to have the secretary's bond renewed, they supposing that it did not expire at the end of the year.<sup>4</sup> The law is well established that the corporate officers are not liable on the ground of negligence for *ultra vires* acts which they have done or sanctioned, but in good faith and without knowledge of their *ultra vires* character. The act itself may be impeached and set aside, and property transferred thereunder may be recovered back; but if the directors have made an honest mistake, and it was a mistake which a man of usual intelligence might make, they are not personally liable therefor. The law does not require them to be learned in the law.<sup>5</sup> A director is not liable to the company for negligence even though he undertook the directorship without knowing anything about the business.<sup>6</sup> But directors of a bank are liable for wrongful diversion of its funds by making illegal loans, this not being ordinary negligence, but an *ultra vires* act in violation of law.<sup>7</sup> Bank directors who meet but once or twice during the year and do not examine the books, and have no knowledge of affairs, are liable for losses resulting from long-continued overdrafts by insolvent parties.<sup>8</sup> A bank has no power to accept notes in payment of a subscription to its stock, and the directors are personally liable for so doing, unless the notes were good or the directors had reasonable cause to believe they were good.<sup>9</sup> Managers of a building-loan corporation are liable for loans made to a firm in excess of the amount allowed by a by-law; but are not liable for a

<sup>1</sup> Cassidy v. Uhlmann, 170 N. Y. 505 (1902).

<sup>2</sup> Solomon v. Bates, 118 N. C. 311 (1896). Such a suit is in tort. Tate v. Bates, 118 N. C. 287 (1896).

<sup>3</sup> Pontchartrain R. R. v. Paulding, 11 La. 41 (1837).

<sup>4</sup> Vance v. Phoenix Ins. Co., 4 Lea (Tenn.), 385 (1880).

<sup>5</sup> Watts's Appeal, 78 Pa. St. 370 (1875); Hodges v. New England Screw Co., 1 R. I. 312, 348 (1850); Sperring's Appeal, 71 Pa. St. 11, 24 (1872); Williams v. McDonald, 37

N. J. Eq. 409 (1883). Cf. s. c., 42 N. J. Eq. 392 (1886); Joint Stock Discount Co. v. Brown, L. R. 3 Eq. 139; s. c., L. R. 8 Eq. 381 (1869). See also § 682, *supra*.

<sup>6</sup> Re Brazilian, etc. Estates, Ltd., [1911] 2 Ch. 425.

<sup>7</sup> Greenfield Sav. Bank v. Abercrombie, 211 Mass. 252 (1912).

<sup>8</sup> Marshall v. Farmers', etc. Bank, 85 Va. 676 (1889).

<sup>9</sup> Coddington v. Canaday, 157 Ind. 243 (1901).



mistaken estimate of value of the security taken, nor for a defect in the acknowledgment of the security — a mortgage.<sup>1</sup> A director has been held not liable for negligence in failing to sue for a debt due to the corporation.<sup>2</sup> Directors are not liable for money lost by an overdrawn account.<sup>3</sup> A director of a loaning company is not liable for an unsecured loan merely because it appeared on the books and turns out to be uncollectible. Proof is necessary that he knew of the loan.<sup>4</sup> One director is not liable for the acts or omissions of another unless he knew thereof or participated therein or failed in his duty to object to them.<sup>5</sup> Bank directors are not liable for negligence merely because the cashier has for years been embezzling the funds and making false entries.<sup>6</sup> A treasurer is not liable for depositing funds in his name as treasurer of the corporation, in a private bank, which is reasonably considered solvent, even though it turns out to have been insolvent.<sup>7</sup> The directors, however, are liable for allowing the treasurer to use corporate funds for lobbying purposes;<sup>8</sup> but not for allowing one of their number to manage the business, though he appropriate its property to himself.<sup>9</sup>

<sup>1</sup> *Citizens' Bldg. etc. Assoc. v. Coriell*, 34 N. J. Eq. 383 (1881).

<sup>2</sup> *Re Forest, etc. Min. Co.*, L. R. 10 Ch. D. 450 (1878).

<sup>3</sup> *Turquand v. Marshall*, L. R. 4 Ch. App. 376 (1869).

<sup>4</sup> *Couper v. Whitson*, 9 Ct. of Sess. Cas. (4th ser.) 1115 (1882).

<sup>5</sup> *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).

<sup>6</sup> *Louisville Sav. Bank v. Caperton*, 8 S. W. Rep. 885 (Ky. 1888). The directors of a bank are not bound to know of the cashier's mismanagement and are not liable therefor. *Clews v. Bardon*, 36 Fed. Rep. 617 (1888). Directors in a bank may be liable to its stockholders and creditors for not using ordinary care in discovering the condition of the bank and the defalcation of its cashier. *Ellis v. Gates, etc. Co.*, 60 S. Rep. 649 (Miss. 1913). For an English case holding the trustees and managers of a savings bank liable for a defalcation of the actuary, see *Re Cardiff Sav. Bank*, L. R. 45 Ch. D. 537 (1890). Where the president of a bank purchases a note which contains a guarantee on the part of the payee, which guarantee subsequently reduces the amount of the note, the president may be guilty of negligence in purchasing the note.

*Stearns v. Lawrence*, 83 Fed. Rep. 738 (1897).

<sup>7</sup> *Booth v. Dexter, etc. Co.*, 118 Ala. 369 (1898). A treasurer is not liable for loss of funds by the failure of a bank, where he deposited such funds in the bank as treasurer and with the consent of the company, nor is he liable for interest on money which he keeps in the bank by order of the court, unless it is shown that he received a profit therefrom. *Laurel Springs Land Co. v. Fougerey*, 57 N. J. Eq. 318 (1898). The treasurer may be liable for a deficit, even though the cause of the deficit cannot be ascertained. *Equitable, etc. Assoc. v. Roland*, 198 Pa. St. 643 (1901). The treasurer is not liable for losses by deposits made by him, where the corporation acquiesced in the deposits. *New York, etc. R. R. v. Dixon*, 114 N. Y. 80 (1889). A treasurer of an association who receives no compensation is a gratuitous bailee, and is only liable for gross negligence in paying out funds. *Hibernia Bldg. Assoc. v. McGrath*, 154 Pa. St. 296 (1893).

<sup>8</sup> *Shea v. Mabry*, 1 Lea (Tenn.), 319 (1878). See also § 682, *supra*.

<sup>9</sup> A director is not liable to a creditor of the bank for negligence in allowing the president to gradually



A president is not liable for losses due to mismanagement unless it amounted to fraud.<sup>1</sup> Where a corporation authorizes the issue and sale of bonds, without specifying any officer to make the sale, the president is not personally liable for such bonds, even though he turned them over to the vice-president to sell and the vice-president kept the proceeds.<sup>2</sup> Directors are liable for making investments contrary to the charter.<sup>3</sup> Directors who waste the funds of the company in purchasing the worthless stock of another corporation are personally liable to a receiver for the amount so expended.<sup>4</sup> Where a bank holds stock as collateral, and on sale purchases the same, the stock being in a coal company, it should sell the stock within a reasonable time. If it continues to hold it and a large loss results, the president is personally liable.<sup>5</sup> Directors are not liable for errors of themselves or the cashier in making loans.<sup>6</sup> Inasmuch as directors serve in nearly all cases without pay, the law is not exacting in its requirements of them. But a director may be liable even though he served without

embezzle all its assets, where such director received no pay, and once or twice a week he attended to the discounts, saw how much money was on hand, and once a year counted the cash and securities. *Swentzel v. Penn Bank*, 147 Pa. St. 140 (1892), holding also that the plaintiff was not entitled to costs, having failed to prove his case. *Contra* in New Jersey. The corporation should be a party defendant. Creditors also may be made parties defendant. *Camp v. Taylor*, 19 Atl. Rep. 968 (N. J. 1890).

<sup>1</sup> *David Reus, etc. Co. v. Conrad*, 101 Md. 224 (1905), holding that the president was not liable for accepting as security for a loan certain real estate subject to a *lis pendens*.

<sup>2</sup> *Owego, etc. Co. v. Boyer*, 111 N. Y. App. Div. 140 (1906).

<sup>3</sup> The case of *Williams v. McKay*, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers, etc., had made investments contrary to the by-laws, charter, and statutes.

<sup>4</sup> *Bowers v. Male*, 186 N. Y. 28 (1906).

<sup>5</sup> *Stone v. Rottman*, 183 Mo. 552 (1904).

<sup>6</sup> The directors of a building corporation may not be liable for investing in second mortgages, although it was *ultra vires*. *Sheffield, etc. Soc. v. Aizlewood*, L. R. 44 Ch. D. 142 (1889). Directors are not liable for a negligent or *ultra vires* act in lending the funds without taking proper security, unless it is shown that they failed to really exercise in good faith their discretion and judgment as directors. *Re New Mashonaland, etc. Co.*, [1892] 3 Ch. 577. Negligence is not proved by the facts that the bank's capital is gone; that large dividends were declared based on large amounts of assets that turned out to be worthless; that real estate taken for debts depreciated in value; that real estate was bought in on foreclosure sales by the bank; that the directors did not closely watch the cashier, there being no proof of lack of reasonable skill, etc., on his part; that they intrusted the management to the cashier, a man of experience and ability; that overdrafts were allowed to responsible parties; and that there was delay in suing on notes. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). Various acts of mismanagement were considered in *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890).



pay.<sup>1</sup> Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown.<sup>2</sup>

It is not actionable negligence in directors to proceed to business where only a small part of the capital is subscribed.<sup>3</sup> They are not liable for special deposits where there was no negligence on their part.<sup>4</sup>

Directors are not bound to make a thorough examination of the books and papers of a bank.<sup>5</sup>

The measure of damages for negligence cannot be the entire capital stock which was paid in in cash, and also the debts which the stockholders may have to pay.<sup>6</sup> Various instances relative to the liability of directors are given in the notes below.<sup>7</sup> Where a cashier has been allowed for seven years to conduct the whole bank, the bank cannot

<sup>1</sup> *Michleson v. Pierce*, 107 Wis. 85 (1900).

<sup>2</sup> *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901).

<sup>3</sup> *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890).

<sup>4</sup> An officer of a corporation is not liable for the loss of corporate securities without negligence on his part, though intrusted with their care. *Mowbray v. Antrim*, 123 Ind. 24 (1890).

<sup>5</sup> *Briggs v. Spaulding*, 141 U. S. 132 (1891). Although the directors trust the management of the bank entirely to the cashier, and do not examine the books, they are not liable to the creditors of the bank, even though the cashier, by dishonesty and reckless management, wrecks the bank. *Warner v. Penoyer*, 82 Fed. Rep. 181 (1897).

<sup>6</sup> *Bloom v. National, etc. Loan Co.*, 152 N. Y. 114 (1897), aff'g 81 Hun, 120.

<sup>7</sup> A director of an insolvent corporation who stands by and allows the treasurer to draw checks payable to the president to be used by him for his personal debts is personally liable to corporate creditors to the amount of such checks. *Bird v. Magowan*, 43 Atl. Rep. 278 (N. J. 1898). Directors are not personally liable because they make a mistake in the price paid for property, even though they knew all about the property, nor are they liable because they pay the purchase price after discovering de-

fects in the property, time being given to the vendors to remedy the defects. *Lagunas, etc. Co., Ltd. v. Lagunas Syndicate, Ltd.*, [1899] 2 Ch. 392. A committee to which the board refers, as auditors, the reports of the secretary, are not liable for embezzlement of the secretary not discovered by them, it appearing that such committee were not directors or officers and that the items appearing in the statements corresponded with the items upon the books of the company. *Alpena, etc. Assoc. v. Denison*, 121 Mich. 159 (1899). In the case *San Pedro, etc. Co. v. Reynolds*, 121 Cal. 74 (1898), a general manager was held liable for negligence leading to embezzlement on the part of the bookkeeper. Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and, even though one of them resigns, the liability continues for the benefit of past as well as future creditors. *Nix v. Miller*, 26 Colo. 203 (1899). Where a lease of a street railway has been made, in accordance with the vote of the stockholders and directors, a stockholder cannot hold the directors personally liable for not informing the stockholders of an offer to purchase the property, it not being shown that the offer was from a responsible party or that it would have made any difference in the stockholders' action. *Strunk v. Owen*, 199 Pa. St. 78 (1901).



hold him liable for losses on loans made without consulting the directors as required by the by-laws.<sup>1</sup>

§ 703. *Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.* — The directors of a corporation are not guarantors that no mistakes will be made in the management of the corporate business, nor do they insure the corporation against loss from the frauds or embezzlement of subordinate officers and agents. They are required to exercise reasonable care and sound business judgment, but nothing further than this. They generally serve without pay, and usually by reason of their own interest in the stock of the company are directly interested in the welfare of the corporation. But, though this is the case, they must use ordinary diligence in ascertaining the condition of things, and ordinary intelligence in their action as directors.<sup>2</sup> They are liable

<sup>1</sup> Wynn v. Tallapoosa County Bank, 168 Ala. 469 (1910).

<sup>2</sup> The leading case on the liability of directors for negligence is *Charitable Corp. v. Sutton*, 2 Atk. 400 (1742). The most important, clear, and fully considered case, however, is *Briggs v. Spaulding*, 141 U. S. 132 (1891), where the supreme court of the United States laid down rules (pp. 147, 151, 152) which very largely exempt directors in national banks from any liability whatsoever. Directors are required to exercise only diligence, intelligence, and judgment in the management of the corporate business. They are not liable for honest mistakes made in the exercise of their authority. *Braswell v. Pamlico, etc. Co.*, 75 S. E. Rep. 813 (N. C. 1912). In *North Hudson, etc. Assoc. v. Childs*, 82 Wis. 460, 476, 477 (1892), the court said that an officer is "responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of the business." The court also said: "Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use,

courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions." In *Percy v. Millaudon*, 8 Mart (La.) 68 (1829); s. c., 3 La. 568, the court said: "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." This case also holds that directors are not liable for errors of judgment unless they are grossly wrong. *United Society, etc. v. Underwood*, 9 Bush (Ky.), 609 (1873), holding that the director must use ordinary diligence; *Williams v. Gregg*, 2 Strohh. Eq. (S. C.) 297 (1848). In *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263 (1861), the court said: "The rule is a just one that an agent is bound to apply the same diligence to obtain payment of debts in his care that he does to recover his own." In *Land Credit Co. v. Fermoy*, L. R. 5 Ch. App. 763 (1870), rev'g L. R. 8 Eq. 7, an attempt was made to hold liable, for negligence, directors who innocently approved of a loan which in reality had



for losses if they pay no attention to business at meetings of the directors, or if they regularly fail to attend such meetings. They must ex-

not been made, but the money had been used by other directors for speculative purposes. See also *Re Railway Imp. Co.*, 42 L. T. Rep. 206 (1880); *Scholefield's Case*, 17 W. N. 22 (1882); *British, etc. Ass. Co.*, L. R. 14 Ch. D. 335 (1880). In *Dunn v. Kyle*, 14 Bush (Ky.), 134 (1878), where a cashier had embezzled the funds of the bank, the court said: "Bad faith or gross negligence is certainly necessary to render the director liable to a stockholder in a case like this." The court also approved of the rule given in *Morse on Banking*, p. 117, to the effect that, "for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable. Though in cases in which their action has been so grossly ill-advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible." The mere fact that loans by a bank turn out to have been unwise and hazardous does not render the director liable therefor. *Witters v. Sowles*, 31 Fed. Rep. 1 (1887). Bank directors cannot be held liable for negligence in loans, etc., at the suit of a stockholder, where they have used ordinary care and acted in good faith. *Jones v. Johnson*, 86 Ky. 531 (1888). In order to render bank directors liable, in an action of deceit, for a false statement as to the condition of the bank, thereby inducing deposits, it must be shown that they knew the statement to be false and not merely that they should have known it. *Pieratt v. Young*, 49 S. W. Rep. 964 (Ky. 1899). In a suit by a receiver to hold officers liable for negligence it is no defense that the directors knew of the mode in which the business was transacted. *New Haven T. Co. v. Doherty*, 74 Conn. 353 (1902). Under the Indiana statute directors in a bank are liable for gross inattention to business. *Coddingon v. Canaday*, 157 Ind. 243 (1901). The fact that a by-law of a bank requiring the directors to examine the bank every three months has been long disregarded does not raise a presumption of repeal and does not release the directors from liability for negligence leading to a defalcation. *Campbell v. Watson*, 62 N. J. Eq. 396 (1901). For the mere failure of bank directors to exercise ordinary diligence in the management of the bank they cannot be held liable by general creditors. *Union Nat. Bank, etc. v. Hill*, 148 Mo. 380 (1899). The directors of a bank are entitled to accept statements made by discount or examining committees. *Stone v. Rottman*, 183 Mo. 552 (1904). The directors of a banking corporation are not liable to its creditors for violation or neglect of duty, there being no deceit. *Hart v. Hanson*, 14 N. Dak. 570 (1905). Where the statutes render directors liable for intentional neglect, it is no defense that they believed the president to be honest and competent and left the management to him. *Fletcher v. Eagle*, 74 Ark. 585 (1905). Directors in a bank are liable for losses due to the carelessness and mismanagement of the executive officers to whom the directors turned over the management, without exercising ordinary care and prudence in supervising their action. *Warren v. Robison*, 19 Utah, 289 (1899); s. c., 70 Pac. Rep. 989 (1902). The case *Re Cardiff Sav. Bank*, [1892] 2 Ch. 100, is an example of one mode of doing business. The Marquis of Bute was made president of a savings bank at the age of six months. He continued to be president from 1848 until 1886. During this time he attended one meeting, in 1869. His name, however, always appeared in the pass-books, annual reports, and circulars. He paid no attention whatsoever to the bank. It transpired in 1886 that the deceased actuary of the bank had defrauded it of a great deal of money. The court held that the marquis was not liable. The duty of an auditor is to examine the books,



ercise a reasonable amount of diligence and care. A director who is not present at a meeting cannot be charged for an illegal loan authorized at such meeting. Directors who continue an officer in office after he

ascertain their correctness, and prepare a balance sheet showing the company's financial position at the time he is appointed, but he is bound to use only a reasonable amount of care and skill, varying according to the case. *Re Cotton Kingston Mill Co.*, [1896] 2 Ch. 279. A director who is habitually absent from meetings of the board may be liable for the acts of the board. *Schout v. Conkey, etc. Assoc.*, 87 Hun, 568 (1895); *aff'd*, 156 N. Y. 668.

The law on this subject is ably and clearly set forth by Mr. Justice Earl, in *Hun v. Cary*, 82 N. Y. 65 (1880). *Cf. Van Dyck v. McQuade*, 86 N. Y. 38 (1881). See also *Scott v. Depeyster*, 1 Edw. Ch. 513 (1832); *Litchfield v. White*, 3 Sandf. Super. 545 (1850); *Liquidators, etc. v. Douglas*, 32 Scot. Jur. 212 (1860); *Spering's Appeal*, 71 Pa. St. 11 (1872), an important case, and one which is frequently spoken of as the leading case herein. A director who trusts everything to the other directors, or who performs all acts as a mere man of straw, is liable. *Joint-Stock Discount Co. v. Brown*, L. R. 8 Eq. 404, 405 (1869). See also *Williams v. McKay*, 40 N. J. Eq. 189 (1885); *Ackerman v. Halsey*, 37 N. J. Eq. 356 (1883); *aff'd*, *Halsey v. Ackerman*, 38 N. J. Eq. 501; *Mutual, etc. Bank v. Bosseux*, 3 Fed. Rep. 817 (1880). That directors are not liable for the fraud or misconduct of co-directors, see *Movius v. Lee*, 30 Fed. Rep. 298 (1887); *aff'd*, 141 U. S. 132. Directors are not liable for gross negligence in buying out a business where the corporation was organized for the express purpose of buying out that business. *Overend, etc. Co. v. Gibb*, L. R. 5 H. L. 480 (1872). Where loans without securities are improperly made, and the guilty directors are liable therefor, a director who did not participate is nevertheless liable, if he does not take steps to remedy the matter as soon as he learns of it. *Jackson v. Munster Bank*, 15 L. R.

Ir. 356 (1885). After a director sends in a letter of resignation he is not liable for the wrongful acts of the directors, even though no attention is paid to his letter. *Perry's Case*, 34 L. T. Rep. 716 (1876). In the case of *Movius v. Lee*, 30 Fed. Rep. 298, 307 (1887); *aff'd*, 141 U. S. 132, the court held, reviewing the cases, that "there is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. . . . It is nowhere adjudged that all must always act, or that they must not trust one another to act, or that they are liable for the mere omission to watch and restrain the others, without wrong intention on their own part, or actual knowledge of the wrong on the part of the others." Directors are required to use such care and diligence as a prudent man exercises in his own affairs. If he utterly neglects his duties he is liable. *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889). Misfeasance is such non-feasance as is negligence amounting to a breach of trust. Liability for negligence cannot be imputed to directors unless it is gross negligence resulting in loss. To constitute gross negligence there must be, first, a plain duty to do or abstain from a particular thing; secondly, such abstention or such action as the court would be justified in holding to be mischievous or reckless. When a duty incumbent on the directors has not been performed, the burden of proving gross negligence is on those who allege that conclusion; but where the facts establish gross negligence, but at the same time show that it is possible or likely that a satisfactory explanation ought to be forthcoming, the burden of proof is shifted. *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890).



has squandered the assets are liable for further losses by him, and they are liable for failure to renew his bond when it ran out.<sup>1</sup>

The directors are not bound to examine the books of the company, nor to investigate the mode of living of their employees. But they are required to attend the directors' meetings with reasonable regularity; to have statements of the business made to them; to object to the transaction of important business without the knowledge and consent of the board of directors; to examine with reasonable care the reports and matters of business brought before them; and not to shut their eyes to obvious objections to the business transactions and general condition of the corporation, or to the character and well-known reputation of the employees.<sup>2</sup> A director who is absent on leave of absence is not liable for losses occurring during that time,<sup>3</sup> nor for losses occurring shortly after he becomes a director.<sup>4</sup> The failure of a national bank director to perform his duty, as required by the act of Congress, subjects him to damages only when he knowingly violated the national banking act as specified in the act, and there is no common law liability.<sup>5</sup> In England it is held that a salaried bank president is not liable, even though he publishes accounts which do not correctly state the actual condition of the bank, it being shown that the account was prepared by the cashier and audited by independent auditors, and that the president acted in good faith.<sup>6</sup> The New York court of appeals has

<sup>1</sup> *Murphy v. Penniman*, 105 Md. 452 (1907).

<sup>2</sup> In a stockholder's suit to hold the directors of a trust company liable for negligence in regard to its loans, it may be shown that loans were made without being reported and approved at the next meeting of the executive committee or directors, as required by the by-laws, and that the directors did not examine the loans and the makers and indorsers and the collateral and general condition of the company from time to time, and it is no defense to the directors that they relied on the officers and executive committee, and they were away on their vacations and that a quorum was not present when they did attend. *Kavanaugh v. Commonwealth, etc. Co.*, 64 N. Y. Misc. Rep. 303 (1908).

<sup>3</sup> *Briggs v. Spaulding*, 141 U. S. 132 (1891).

<sup>4</sup> A bank director is not liable for negligence where the bank becomes insolvent within a short time after he became a director. *Briggs v. Spaulding*, 141 U. S. 132 (1891).

<sup>5</sup> *Yates v. Jones Nat. Bank*, 206 U. S. 158 (1907), rev'g 74 Neb. 734 (1905). The decision in *Yates v. Jones Nat. Bank*, 206 U. S. 158 (1907) was applied to an amended complaint in that case in *Jones Nat. Bank v. Yates*, 139 N. W. Rep. 844 (Neb. 1913). Even though a director does not attend meetings he is not liable for acts which would not have come before the meetings even if he had attended. *Kavanaugh v. Gould*, 147 N. Y. App. Div. 281 (1911). The ordinary care required of bank directors is the care

<sup>6</sup> *Prefontaine v. Grenier*, [1907] App. Cas. 101. A director and officer of a bank cannot avoid liability for negligence on the ground that he did not

know of matters which it was his duty to know. *Elliott v. Farmers' Bank, etc.*, 61 W. Va. 641 (1907).



said: "The law is settled in this state that directors of monetary corporations are held to the same degree of care that men of ordinary prudence exercise in regard to their own affairs."<sup>1</sup> On the other hand, in Missouri it is held that a director is not bound to exercise the care he exercises in his own business, but only such care as a reasonably prudent man would exercise under the same circumstances.<sup>2</sup> When a director has knowledge that an unauthorized act is being done, he cannot escape liability, however innocent he may be, unless he prevents the act by his protest, or files a bill in equity to remedy the wrong.<sup>3</sup> Even though certain directors are a building committee and sign certificates for the issue of bonds purporting to repay money which has gone into construction in accordance with the mortgage, and it turns out that the money was misapplied, they are not personally liable, being guilty of only ordinary negligence, but if one of them knew the facts he is personally liable.<sup>4</sup>

which a diligent, and prudent person would exercise under the same circumstances, and includes causing an examination of the resources of the bank to be made from time to time, but a director is not liable if he performs his duties the same as other bankers in the same city perform them. *Devlin v. Moore*, 130 Pac. Rep. 35 (Oreg. 1913).

<sup>1</sup> *Hanna v. Lyon*, 179 N. Y. 107 (1904). Directors in a bank cannot be held liable for loss made by the cashier where they have exercised reasonable supervision and the same degree of care which is used by ordinarily careful and prudent men under the same circumstances. *Mason v. Moore*, 73 Ohio St. 275 (1906).

<sup>2</sup> *Stone v. Rottman*, 183 Mo. 552 (1904).

<sup>3</sup> *Cassidy v. Uhlmann*, 170 N. Y. 505 (1902); *Joint-Stock Discount Co. v. Brown*, L. R. 8 Eq. 381, 402 (1869); *Ashhurst v. Mason*, L. R. 20 Eq. 225 (1875). That a director is not in general liable for misdeeds of subordinate corporate agents, see *Bath v. Caton*, 37 Mich. 199 (1877); *Bachelor v. Pinkham*, 68 Me. 253 (1878); *Nicholson v. Mounsey*, 15 East, 384 (1812); *Stone v. Cartwright*, 6 T. R. 411 (1795); *Hewett v. Swift*, 85 Mass. 420 (1862). Cf. *Weir v. Barnett*, L. R. 3 Exch. D. 32, 238 (1878). But knowledge obtained by the director previous to becoming such does not compel him to act. *Re Forest, etc. Co.*, L. R. 10 Ch. D. 450 (1878).

<sup>4</sup> *Carrington v. Basshor Co.*, 84 Atl. Rep. 746 (Md. 1912).



## CHAPTER XLIII.

### THE POWER OF VARIOUS OFFICERS AND AGENTS TO CONTRACT FOR A CORPORATION, AND THE MODE OF DRAWING AND EXECUTING CORPORATE CONTRACTS—ADMISSIONS AND NOTICE.

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| <p>§ 704. Under what circumstances is a corporation bound by a contract made in its name.</p> <p><b>A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COMMITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER, AND MISCELLANEOUS AGENTS TO CONTRACT FOR A CORPORATION.</b></p> <p>705-707. Promoters — Their liability and the liability of the corporation and subscribers.</p> <p>708-711. Stockholders — Their power to make by-laws and contracts, expel members and remove directors.</p> <p>712-714. Directors:<br/>         Their power to contract.<br/>         Ratification by directors.<br/> <i>De facto</i> directors.<br/>         Directors' meetings, call quorum.<br/>         Their minute-book as evidence.</p> <p>715. Executive committee.</p> <p>716. President.</p> <p>717. Secretary and treasurer.</p> <p>718. Cashier.</p> <p>719. General manager and superintendent.</p> <p>720. Subordinate agents.</p> <p><b>B. THE FORM OF CORPORATE CONTRACTS — CORPORATE SEAL — DRAFTING, SIGNING, AND SEALING — LIABILITY OF OFFICERS ON CONTRACTS IRREGULARLY EXECUTED.</b></p> | <p>§ 721. Ordinary corporate contracts, by the modern rule, need not be under seal.</p> <p>722. Method of drafting, signing, sealing, and acknowledging a corporate contract — Proof of seal and authority to attach it.</p> <p>723. Corporate instruments made out in the name of an officer or agent instead of in the name of the corporation may be enforced by or against the corporation.</p> <p>724. Liability of officers on irregularly executed instruments.</p> <p>725. Charter and by-law requirements as to manner of executing corporate contracts — Right of party, contracting with corporation, to rely on proper corporate action having been taken.</p> <p><b>C. ADMISSIONS OF OFFICERS AND NOTICE TO OFFICERS.</b></p> <p>726. When is the corporation bound by its officers' or agents' admissions?</p> <p>727. Notice to the corporation by notice to the officers — Corporate books as evidence against directors and stockholders — Notice of fraud perpetrated on the corporation.</p> |
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§ 704. *Under what circumstances is a corporation bound by a contract made in its name. — The three tests for determining whether a contract may be enforced against a corporation. —* In determining whether a contract may be enforced against a corporation, three things are to be considered. First, did the corporation have the power to



enter into such a contract? Second, was the contract entered into by a duly-authorized agent of the corporation? Third, was the contract drawn, signed, and sealed in a form which binds the corporation?

The first of these questions has been already treated in the preceding chapters of this book.<sup>1</sup>

There is an infinite variety of contracts which the corporation may enter into, and the great mass of law on this subject is constantly being increased by new decisions. A corporation may enter into any contract which is within its express or implied powers. And even a contract which is not within the express or implied powers of the corporation is sometimes enforced against it or in its behalf when one party to the contract has already performed, or when the parties cannot be restored to their original positions.<sup>2</sup>

The second and third tests of whether a contract is enforceable against a corporation are considered in this chapter.

A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COMMITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER, AND MISCELLANEOUS AGENTS TO CONTRACT FOR A CORPORATION, AND CONTRACTS BINDING ON THE CORPORATION BY RATIFICATION.

§ 705. *Promoters — Liability to strangers, to the corporation, and to subscribers for stock — Liability to subscribers herein — Contribution — Liability of the corporation herein to strangers and to promoters.* — A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.<sup>3</sup> The "flotation" of a property means a sale thereof at a profit to a substantial company.<sup>4</sup>

<sup>1</sup> See particularly chs. XL and XLI, *supra*.

<sup>2</sup> See ch. XL, *supra*.

<sup>3</sup> Quoted and approved in *Dickerman v. Northern T. Co.*, 176 U. S. 181, 203 (1900), and *Burbank v. Dennis*, 101 Cal. 90 (1894). An interesting description of the "promoter" is given by Judge Lurton, in *McMullen v. Ritchie*, 64 Fed. Rep. 253, 260 (1894), as follows: "He was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or 'boomer' he seems to be unrivaled; a man of large general information and robust constitution,

extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions." Promoters are "the persons who undertake to form and set going a company with reference to a given project." *First, etc. Co. v. Hildebrand*, 103 Wis. 530 (1899). A trust company receiving subscriptions to the stock of a corporation and issuing receipts therefor, to the effect that upon payment the party should receive from the trust company a certificate for the stock in the proposed corporation, may be liable for mis-

<sup>4</sup> *Torva, etc. Syndicate v. Kelly*, [1900] A. C. 612.



There has been great difficulty in determining who is to be considered a promoter and who is not. As regards the liability to strangers, however, it seems that every one is liable herein as a promoter who induces such stranger to act in expectation of payment from the prospective corporation. Having induced the party to act, the promoter must see that he is paid.

In America the question of the liability of promoters to persons who have performed services or entered into contracts relative to a prospective corporation has rarely arisen. But in England this question has frequently been passed upon. In general the promoter of a prospective corporation is liable for services rendered by others who are employed as clerks, engineers, or in a similar capacity in the work of promoting the enterprise.<sup>1</sup>

statements in the prospectus which had been issued by the promoters. *McClure v. Central Trust Co.*, 165 N. Y. 108 (1900). In England the word "promoters" is often used in special acts of incorporation in place of the word "incorporators." *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36. For definitions of a promoter, in reference to his liability to the corporation itself, see § 651, *supra*. It has recently been well said: "The business promoter seems temporarily to have fallen into disrepute. He is regarded with the same surferance and suspicion as was the financier in the fifteenth century. There may be some ground for this suspicion. In itself, however, the task of a promoter is not only essential for industrial progress, but it demands for its successful exercise a high grade of intelligence and judgment. It is he who seeks out new opportunities for investment, who formulates plans for working those opportunities, and who so organizes the conditions and forces at his disposal as to give market value to an enterprise which first existed as an idea in his mind."

<sup>1</sup> Promoters of a corporation organized but not used may be liable on a debt incurred by one of them, with the knowledge of the others, in connection with the enterprise. *Ijams v. Andrews*, 151 Fed. Rep. 725 (1907). The promoters may be liable for royalties according to contract, even

though they organized a corporation which did all the business. *American Paper Bag Co. v. Van Nortwick*, 52 Fed. Rep. 752 (1892). Promoters are liable for goods ordered and delivered for a corporation that is never organized. *Hub Pub. Co. v. Richardson*, 13 N. Y. Supp. 665 (1891). Contracts made before the corporation is organized may be enforced against the promoters as partners. *Rosenheim Shoe Co. v. Horne*, 10 Ga. App. 582 (1912). A promoter who is assistant manager of work done by a proposed corporation is personally liable for injury to an employee. *Farmers', etc. Co. v. Jones*, 147 S. W. Rep. 668 (Tex. 1912). A person acting as manager of a corporation to be organized cannot hold the parties liable for money borrowed by him without authority from them. *Farmers' State Bank v. Kuchs*, 147 S. W. Rep. 862 (Mo. 1912). Where the individuals who intend to incorporate a company employ an attorney and authorize him to contract for printing, they are personally liable for the printing bill. *Hersey v. Tully*, 8 Colo. App. 110 (1896). Promoters may be liable on a contract to pay a commission to a person obtaining subscriptions to the stock of the company. *Pratt v. Finkle*, 99 Ga. 616 (1896). A promoter is liable for preliminary debts incurred. *Sandusky Coal Co. v. Walker*, 27 Ont. (Can.) 677 (1896). Where the promoters after incurring debts abandoned the enterprise, each one of them is liable



Where, however, the owner of land, with knowledge that several parties contemplate forming a corporation, makes a lease to one of

for at least his proportionate part of such debts. *Roberts Mfg. Co. v. Wright*, 62 Minn. 337 (1895). The secretary of a prospective company ordering advertisements is liable for the same, though he orders as "secretary *pro tem.*" *Hopcroft v. Parker*, 16 L. T. Rep. 561 (1867). An architect employed by one of the promoters may hold the promoters liable, the scheme having been abandoned, and he may file a *lis pendens* on land which the promoter intended to turn into the corporation for stock. *Friedman v. Janssen*, 66 S. W. Rep. 752 (Ky. 1902). A committee appointed at a public meeting of mechanics to carry out certain things are personally liable for the wages of workmen employed by them. *McCartee v. Chambers*, 6 Wend. 649 (1831). The chairman of the promoters who signs the prospectus may by the jury be held to have authorized the expense of printing, and is liable personally. *Riley v. Packington*, L. R. 2 C. P. 536 (1867). In *Collingwood v. Berkeley*, 15 C. B. (N. S.) 145 (1863), a director who allowed his name to be used as such for a proposed company was held liable for a passage ticket which was purchased on a representation of the secretary that the company would be organized. That the interested parties may be liable to the attorney of the provisional committee of a company which is abandoned before incorporation, see *Parsons v. Spooner*, 5 Hare, 102 (1846). A promoter who employs a person in behalf of a proposed company is liable. *Bell v. Francis*, 9 Car. & P. 66 (1839). A local committee to form a company are liable to their secretary. They are not allowed to say that he must look to the corporation for pay. *Kerridge v. Hesse*, 9 Car. & P. 200 (1839). A promoter is liable personally on contracts made by him in behalf of the company with third persons, and his liability is not released by the subsequent adoption of the contract by the company. *Kilner v. Baxter*, L. R. 2 C. P. 174 (1866); *Scott v. Embury*,

L. R. 2 C. P. 255 (1867). The question of whether a surveyor employed by promoters can look to them for compensation, the company not having been formed, is for the jury, considering all the facts of the employment. *Higgins v. Hopkins*, 3 Exch. 163 (1848). If he was present when the promoters resolved that they should not be liable he cannot recover from them. *Laudman v. Entwistle*, 7 Exch. 632 (1852). In *Lake v. Argyle*, 6 Q. B. 477 (1844), it was left to the jury to decide whether the president of a proposed corporation thereby held himself out as liable on a contract made by an agent of the proposed company. It is a question for the jury whether the president of a proposed corporation is liable. *Wood v. Argyle*, 6 M. & Gr. 928 (1844). Persons induced to subscribe for bonds on misrepresentations are not liable to advertisers, even though from the former's subscriptions the advertising expense was to be paid. *Barron v. International T. Co.*, 184 Mass. 440 (1903). Allowing one's name to be used as a director and suggesting that advertising be done does not render a person liable for the advertising. *Burbridge v. Morris*, 3 H. & C. 664 (1865). A promoter is not liable on a contract made before he joined in the enterprise, though the contract is performed afterwards. *Newton v. Belcher*, 12 Q. B. 921 (1848). A promoter is not liable on contracts made in writing before he became such. *Beale v. Moulds*, 5 Ry. & Can. Cas. 105 (1847). Where after adopting articles of incorporation some of the parties withdraw and take no further part, they are not liable for the expense of the subsequent incorporation. *Middle Branch, etc. Co. v. Jones*, 137 Iowa, 396 (1908). 62 S. Rep. 287.

A person contracting with a partnership may hold the partners liable, although he knew that their articles provided for incorporation and they afterwards did incorporate. *Witmer v. Schlatter*, 2 Rawle (Pa.), 359 (1830). But the rule is otherwise



such promoters, the intent being that the lease shall be assumed by the corporation, he cannot hold the individual taking the lease person-

where the party allows the account to be transferred to the corporation and then carries on a long running account. *Whitwell v. Warner*, 20 Vt. 425 (1848). Or where the party knew that he was contracting with the other as an agent of an unincorporated association. *Abbott v. Cobb*, 17 Vt. 593 (1845). As to this subject of liability, see also §§ 245, 503c, *supra*, on the liability of trustees; § 508, *supra*, on the liability of officers of unincorporated associations; § 888, *infra*, on the liability of committee-men, and § 724, *infra*, on the liability of persons who sign their names and add an official title. Managers of a syndicate are not personally liable on their contracts as managers if the syndicate itself is known, because an agent of a disclosed principal is not so liable. *Jones v. Gould*, 123 N. Y. App. Div. 236 (1908), *rev'd* on other grounds in 200 N. Y. 18. In England a provisional committee is generally appointed by the subscribers. This committee is generally held not liable. But a committee of management is usually appointed subsequently, and this committee is generally held liable. That a provisional committee is not liable, see *Nevins v. Henderson*, 5 Railw. & Can. Cas. 684 (1848); *Dawson v. Morrison*, 5 Railw. & Can. Cas. 62 (1847); *Ex parte Roberts*, 2 Maen. & G. 192 (1850); *Carmichael's Case*, 17 Sim. 163 (1850); *Ex parte Clarke*, 20 L. J. (Ch.) 14 (1851); *Maitland's Case*, 3 Giff. 28 (1861); *Hall's Case*, 3 De G. & S. 214 (1850); *Ex parte Stocks*, 22 L. J. (Ch.) 218 (1853); *Tanner's Case*, 5 De G. & S. 182 (1852); *Forrester v. Bill*, 10 Ir. L. Rep. 555 (1847); *Ex parte Osborne*, 15 Jur. 72 (1851); *Burnside v. Dayrell*, 3 Exch. 224 (1849); *McEwan v. Campbell*, 2 Macq. 499 (1857). *Contra*, *Lefroy v. Gore*, 1 Jo. & Lat. 571 (1844). It is for the jury to say whether a provisional director is liable for advertisements which he authorized the secretary to publish at the secretary's expense. *Maddick v. Marshall*, 17 C. B. 829

(1864), affirming 16 C. B. 387. As to a provisional committee-man, see also *Williams v. Pigott*, 2 Exch. 201 (1848). Merely allowing one's name to be used as a member of a provisional committee does not render a person liable on contracts made. *Barker v. Stead*, 3 C. B. 946 (1847); *Patrick v. Reynolds*, 1 C. B. (N. S.) 727 (1857). Nor is he liable to an engineer, although the former took part in meetings. *Rennie v. Wynn*, 4 Exch. 691 (1849). Moreover, the person sued may show that no personal liability was to be incurred and that the plaintiff knew it. *Rennie v. Clarke*, 5 Exch. 292 (1850). It is a question for the jury whether the provisional committee authorized and became liable on contracts made by the managing committee. *Williams v. Pigott*, 5 Ry. & Can. Cas. 544 (1848). For a case where the provisional committee were held not to have so authorized, see *Dawson v. Morrison*, 5 Ry. & Can. Cas. 62 (1847). But *Barrett v. Blunt*, 2 Car. & K. 271 (1846), made it a question for the jury. *Barker v. Lyndon*, 2 Car. & K. 651 (1847), held the committee not liable. So also *Giles v. Cornfoot*, 2 Car. & K. 653 (1847); *Griffin v. Beverley*, 2 Car. & K. 648 (1847). In *Bailey v. McCauley*, 13 Q. B. 815 (1849), the court said that it was a question for the jury whether a committee-man, i.e. a promoter, allowed himself to be held out as liable, and that if the debt incurred was a necessary and usual one he is liable. In *Ex parte Cottle*, 2 Maen. & G. 185 (1850), affirmed *sub nom.* *Norris v. Cottle*, 2 H. L. Cas. 647 (1850), it was held that the mere fact of allowing one's name to appear as a member of the provisional committee does not render a person liable at law for the debts. To same effect, *Ex parte Roberts*, 2 Maen. & G. 192 (1850).

A person who consents to the use of his name as a provisional committee to promote and organize a company is liable, as a partner, for the debt of the committee for stationery.



ally liable, the lease having been assigned by such individual to such corporation after it was formed.<sup>1</sup> The promise of promoters that the

*Barnett v. Lambert*, 15 M. & W. 489 (1846). But not where a board of managers afterwards takes charge and incurs the expense. *Bright v. Hutton*, 3 H. L. Cas. 341 (1852), rev'g 1 Sim. (N. S.) 602, and substantially overruling *Hutton v. Upfill*, 2 H. L. Cas. 674 (1850). To same effect, *Reynell v. Lewis*, 15 M. & W. 517 (1846). As to the matters to be proved in rendering a promoter liable, see *Carrick's Case*, 1 Sim. (N. S.) 505 (1851). *Lindley, Partn.* (see *Thompson, Liability of Officers*, p. 202), says of *Bright v. Hutton*, 3 H. L. Cas. 341 (1852), that it overruled directly or indirectly the following cases: "*Upfill's Case*, 2 H. L. Cas. 674 (1850); *Ex parte Besley*, 2 Macn. & G. 176 (1850). This case occurs three times in the books. It was first decided by Vice-Chancellor Knight-Bruce (3 De G. & S. 224), who held that Besley was not a contributory. This decision was appealed against and reversed by Lord Cottenham (2 Macn. & G. 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the vice-chancellor (3 Macn. & G. 287). The case as reported in 3 De G. & S. 224, and 3 Macn. & G. 287, is still law. *Bright's Case*, 1 Sim. (N. S.) 602 (1851). This was reversed on

appeal (3 H. L. Cas. 341). *Ex parte Brittain*, 1 Sim. (N. S.) 281 (1851), decided reluctantly on the authority of *Upfill's Case*. *Hole's Case*, 3 De G. & S. 241 (1850), decided on the authority of *Ex parte Besley*, 2 Macn. & G. 176 (1850). *Markwell's Case*, 5 De G. & S. 528 (1852), decided on the authority of *Upfill's Case*, but after the decision of *Bright v. Hutton*. It cannot, however, be considered law. See *Ex parte Capper*, 1 Sim. (N. S.) 178 (1851) and *Carrick's Case*, 1 Sim. (N. S.) 505 (1851). *Ex parte Morrison*, 15 Jur. 346, and 20 L. J. (Ch.) 296 (1851), decided on the authority of *Upfill's Case*, and in effect overruled by *Sharp and James's Case*, 1 De G., M. & G. 565 (1852). *Nicholay's Case*, 15 Jur. 420 (1851), decided on the authority of *Upfill's Case*. *Ex parte Siehell*, 1 Sim. (N. S.) 187 (1851), decided reluctantly on the authority of *Upfill's Case*. *Ex parte Studley*, 14 Jur. 539 (1850). This case is very briefly reported, but it seems inconsistent with such cases as *Hall's* (3 De G. & S. 214—1850), *Stocks's* (22 L. J. [Ch.] 218—1852), and *Carrick's* (1 Sim. (N. S.) 505—1851)."

A member of the managing committee is liable where he attended a

<sup>1</sup> *Re Heckman's Estate*, 172 Pa. St. 185 (1896). An agreement of subscribers with promoters cannot be enforced by the promoters after the promoters have accepted a substitute agreement from the corporation. *Milddenberg v. James*, 31 N. Y. Misc. Rep. 607 (1900); aff'd, 175 N. Y. 494. The promoters of and subscribers to a corporation are not personally liable on a land contract made before incorporation by an agent, but the corporation itself is liable if it has taken an assignment of the contract. *Esper v. Miller*, 131 Mich. 334 (1902). Persons who lease premises in behalf of a proposed corporation are liable for the rent if the corporation is not formed, but persons who subsequently subscribe for

stock in the proposed corporation are not liable on such lease. *Kennedy v. Fulton, etc. Co.*, 108 S. W. Rep. 948 (Ky. 1908). A promoter cannot be held liable on a contract to purchase goods, where he clearly dealt in behalf of a company to be formed. *Strause v. Richmond, etc. Co.*, 109 Va. 724 (1909). Where the agreement of the chief promoter previous to incorporation that a bond selling agent should have certain stock and bonds for selling the securities of the proposed corporation is followed by a written contract between the agent and the corporation itself thereafter organized, the chief promoter is not personally liable. *Donaldson, etc. Co. v. Houck*, 213 Mo. 416 (1908). 157 S. W. Rep. 400.



corporation will make certain payments does not render them personally liable if such payments are not made.<sup>1</sup> A loan of money for use in a business which was to be turned into a corporation and stock issued for such money does not entitle the loaner to an interest in the business if the corporation is not formed, but merely to a return of the money.<sup>2</sup> But a promoter, who makes a contract to purchase, and gives a mortgage in his own name, is personally liable thereon, even though he was acting as agent for a corporation, the stockholders of the vendor and mortgagee not knowing that he was acting as agent.<sup>3</sup> But a person who of his own accord goes to an office of a corporation, having its name on the door, and sells goods cannot hold the agent liable therefor on the ground that he had not disclosed his principal.<sup>4</sup> A promoter who makes a contract in behalf of the corporation to be organized, is personally liable on such contract, where there is no provision exempting him from liability.<sup>5</sup> Where parties commence business before

meeting and knew of the employment. *Norbury's Case*, 5 De G. & S. 423 (1852); *Pearson's Case*, 3 De G., M. & G. 241 (1852). *Cf.* *Sharp & James's Case*, 1 De G., M. & G. 565 (1852). But not if he is unaware of his being on the committee. *Ex parte Haight*, 1 Drew. 484 (1853). For a case where promoters were held liable on a contract that the company would pay certain damages to a land-owner, see *Bland v. Crowley*, 6 Exch. 522 (1851). In *Webb v. London, etc. Ry.*, 1 De G., M. & G. 521 (1852), reversing 9 Hare, 129, the company was held not liable on such a contract. A promoter who promises that an existing railway company will pay the parliamentary expense of a contemplated new railway is not liable on such promise, the same being illegal and contrary to public policy. *MacGregor v. Dover, etc. Ry.*, 18 Q. B. 618 (1852). Where no stock is subscribed for, but an organization meeting is held and officers elected and debts incurred, the officers are liable for such debts. *Whetstone v. Crane, etc. Co.*, 1 Kan. App. 320 (1895), the ground of the decision being that such officers are merely promoters. In *Nova Scotia*, where a subscriber sues a promoter for damages for fraud in obtaining for himself stock and bonds illegally, the suit must be by the corporation, or by the stockholder if the corpora-

tion refuses to sue. *Weatherbe v. Whitney*, 30 Nova Scotia Rep. 49 (1897). Such claim cannot be joined with a personal claim for services rendered, etc. *Weatherbe v. Whitney*, 30 Nova Scotia Rep. 104 (1897).

<sup>1</sup> *Hogadone v. Grange, etc. Co.*, 133 Mich. 339 (1903).

<sup>2</sup> *Fouchy v. Ellis*, 140 Fed. Rep. 149 (1905).

<sup>3</sup> *Lewis v. Weidenfeld*, 114 Mich. 581 (1897). A committee of a corporation may be personally liable for a banquet where the party with whom they dealt was not aware that they represented a corporation. *Osborne v. Dickey*, 9 Ga. App. 649 (1911).

<sup>4</sup> *Donohue v. Watson*, 72 N. Y. Misc. Rep. 56 (1911).

<sup>5</sup> *O'Rourke v. Geary*, 207 Pa. St. 240 (1903). Where a promoter agrees that a bill will be paid by the corporation when organized and the corporation has no power to pay it, the promoter is personally liable. *First Nat. Bank v. Church, etc.*, 129 Iowa, 268 (1906). The promoters are not liable personally for goods purchased for and in the name of the corporation before the final incorporation papers were filed. *Western, etc. Co. v. Davis*, 7 Ind. T. 152 (1907). The promoters and originators of a corporation are personally liable for debts created in behalf of the proposed corporation prior to the time of incorporation, even



attempting to incorporate, they are liable for debts incurred up to the date of incorporation, even though all parties treated them as a corporation in the meantime.<sup>1</sup> Even though promoters send to a person a printed form of application for stock, and he signs and returns the same, this does not obligate them to allot to him such stock or any part thereof.<sup>2</sup> Where promoters transfer an option to a corporation for stock, if the corporation does not exercise the option, any one of them may then purchase the property on his own account.<sup>3</sup> Even though a national bank transacts business before it is authorized to do so by the comptroller, the officers and stockholders are not liable therefor as partners, but the officers may be liable on an implied warranty of their authority to act for the corporation.<sup>4</sup>

The subject of the liability of persons who sell a business to a corporation for stocks, bonds, or cash is considered elsewhere.<sup>5</sup>

Where a promoter has been held liable to strangers he may have contribution from his fellow promoters.<sup>6</sup> Where the secretary was the original promoter and persuaded the others to go in, he cannot recover from them for his services.<sup>7</sup> They are not liable to each other for services.<sup>8</sup> A person may collect on a surveying contract from co-promoters though he was also a promoter.<sup>9</sup> But not for services as secretary.<sup>10</sup>

though a corporate name was used. *Meinhard, etc. Co. v. Bedingfield & Co.*, 4 Ga. App. 176 (1908). A person purchasing machinery is liable for the price, even though he states he is purchasing it for a company to be organized. *Fentress v. Steele & Sons*, 110 Va. 578 (1910). Where a property owner sells a right of way for a railroad to its agent personally, and to others whom he might authorize, the latter is personally liable for the price. *Polk v. Haworth*, 95 N. E. Rep. 332 (Ind. 1911). A person who makes a contract even for a company to be organized is liable personally on the contract. *Lewis v. Fisher*, 151 S. W. Rep. 172 (Mo. 1912). A contract to assist in the organization of a corporation and subscribing for a certain number of its shares is not a complete contract the breach of which gives rise to damages, where the amount of capital stock and number of shares and other essentials prescribed for incorporation are not specified. *Watson v. Bayliss*, 128 Pac. Rep. 1061 (Wash. 1913).

<sup>1</sup> *Harrill v. Davis*, 168 Fed. Rep. (1874).

187 (1909); reversing 7 Ind. T. 152.

<sup>2</sup> *Feitel v. Dreyfous*, 117 La. 756 (1906).

<sup>3</sup> *Gillet v. Dodge*, 50 Ore. 552 (1907).

<sup>4</sup> *Seeberger v. McCormick*, 178 Ill. 404 (1899).

<sup>5</sup> See chs. III and XLVI.

<sup>6</sup> *Boulter v. Peplow*, 9 C. B. 493 (1850); *Batard v. Hawes*, 2 El. & B. 287 (1853); *Edgar v. Knapp*, 7 Jur. 583 (1843); *Spottiswoode's Case*, 6 De G., M. & G. 345 (1855); *Lefroy v. Gore*, 1 Jo. & Lat. 571 (1844). A promoter who has advanced money may have contribution. *Hamilton v. Smith*, 5 Jur. (N. S.) 32 (1859). An action at law lies for contribution between promoters. *Batard v. Hawes*, 2 El. & B. 287 (1853).

<sup>7</sup> *Parkin v. Fry*, 2 Car. & P. 311 (1826). The promoters are not partners. *Lindley, Companies*, p. 143.

<sup>8</sup> *Holmes v. Higgins*, 1 B. & C. 74 (1822). 157 S. W. Rep. 400.

<sup>9</sup> *Lucas v. Beach*, 1 Man. & Gr. 417 (1840).

<sup>10</sup> *Wilson v. Curzon*, 15 M. & W. 532



Another difficult question connected with this subject is the liability of one promoter to another for failure to proceed with the promotion. The general rule is that where the contract is definite and the obligations are clear, an action at law for damages will lie by one promoter against another for such a breach thereof.<sup>1</sup> In a suit by one promoter

<sup>1</sup> Where parties intending to incorporate a company contract in behalf of that company to purchase certain property, and the parties selling refuse to fulfill, the parties purchasing may sue in their own names for breach of contract. They may recover damages, not as members of the company, but "which they suffered, if any, by reason of the defendants preventing them from successfully establishing and fitting out a business to be conducted by them as a" company. *Abbott v. Hapgood*, 150 Mass. 248 (1889). Where a person owning certain property agrees with others that a corporation shall be formed and he shall receive pay for the property in cash and stock on a certain basis, and he turns over his property to the others for that purpose and they fail to form the corporation, he may hold them liable in damages. *Mosier v. Parry*, 60 Ohio St. 388 (1899). A party who has invested \$15,000 in obtaining a bridge franchise and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former \$15,000 out of \$80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue \$95,000 in bonds, \$80,000 in preferred stock and \$60,000 in common stock for building the bridge at a cost of \$71,000; but if the former takes his \$15,000 preferred stock and keeps it for six years, he cannot then complain. *Jutte v. Hutchinson*, 189 Pa. St. 218 (1899). An agreement between promoters that one of them should buy certain real estate and turn it over to the corporation must be in writing to satisfy the statute of frauds. *McLennan v. Boutell*, 117 Mich. 544 (1898). Where two pro-

motors agree that a Minnesota corporation shall issue \$75,000,000 full-paid stock to one of them, \$50,000,000 of which was to be sold to retail grocers at twenty cents on the dollar to obtain their patronage, and \$25,000,000 was to be divided between the promoters, one of whom was to advance \$100,000, of which amount he does advance only \$12,000 and then cancels grocers' subscriptions to the amount of \$148,400, he may be liable in damages to the other promoter for breach of contract, and the contract itself may not be void under the laws of Minnesota or at common law. *Holman v. Thomas*, 178 Fed. Rep. 675 (1910), rev'g 171 Fed. Rep. 219. One promoter, suing another for damages for breach of contract by which a company was to be organized to take over mineral rights, and the former was to be repaid his disbursements and to be given one half the stock in addition, cannot recover the value of such stock unless he proves the value of the mineral rights. *Eisleben v. Brooks*, 179 Fed. Rep. 86 (1910). A suit against a committee of bondholders for failure to sell bonds as agreed should be at law. *Sweeney v. Foster*, 112 Va. 499 (1911). Where a promoter contracts with the owners of patent rights to form a corporation and issue a certain part of its stock for the patents, and to sell the remainder at a certain price, the money to be divided in a certain way, and they refuse to proceed, and he sues for damages, he must prove complete performance on his part, or that he was ready and able to perform and did not do so on account of the acts of the other parties. If he alleges full performance he must prove it, and a charter with \$500 capital, with the right to increase to \$300,000, may not be such performance. *Stern v. McKee*, 70 N. Y. App. Div. 142 (1902). The statement of certain parties to a promoter



against another for breach of contract for failing to organize a corporation and issue to the plaintiff certain paid-up stock, the possible value

that in case they organized a company proposed by him he would be made general agent, does not sustain a suit by him on a *quantum meruit*. *Flaherty v. Murray*, 60 N. Y. App. Div. 92 (1901). The owner of stock may pledge it to secure his agreement that he will form a corporation to take over certain property, and he may agree that the stock shall be forfeited to the pledgee if the agreement is not carried out. *Electric, etc. Co. v. Smith*, 113 N. Y. App. Div. 615 (1906). Where several owners of riparian rights and lands agree to organize a company and transfer their property to it for stock, and a few of them make such transfer and the others refuse to do so, the former may have the transfers made by them canceled. *Mack v. Consolidated, etc. Co.*, 101 Fed. Rep. 869 (1900). Where a promoter induces an owner of timber land to convey it to a corporation for stock, one quarter to go to the owner and three quarters to the promoter, for which the promoter pays nothing, the owner may cause the whole transaction to be set aside. *Cranor Co. v. Miller*, 147 Ala. 268 (1906). A person who loans money to a corporation organized to bring about a consolidation of other corporations cannot complain that stock issued in exchange for stock of other corporations was returned upon the failure of the plan, and he cannot hold the directors liable under a statute making them liable for distributing the capital stock, where it appears that he was partially responsible for the failure. *Audenreid v. East, etc. Co.*, 68 N. J. Eq. 450 (1904). For the allegations in a complaint by one promoter against another for breach of contract in selling the stock for the benefit of the enterprise and for mismanaging the corporation, see *Woolf v. Barnes*, 46 N. Y. Misc. Rep. 169 (1905). Where a person has turned in securities under a plan of consolidation, which states the aggregate capacity of properties which it is proposed to acquire, or so many of

them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet, if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. *Jewell v. McIntyre*, 62 N. Y. App. Div. 396 (1901); *aff'd*, 172 N. Y. 638. Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for dividends paid after the time when he would have been entitled to the stock, if he had fully complied with his contract. *Beaty v. Johnson*, 66 Ark. 529 (1899). Where promoters agree to construct a railroad and to give a part of the stock to parties who furnish valuable privileges, right of way, grants, etc., but instead of doing so sell out the affair to a competing railroad company, which buys with notice and does not go on with the enterprise, the parties who are injured may sue the purchasing railroad company for an accounting, etc. The promoters are not necessary parties defendant. *Hamilton v. Savannah, etc. Ry.*, 49 Fed. Rep. 412 (1892). As to the remedy at law, see *Crow v. Green*, 111 Pa. St. 637 (1886); *Hudson v. Spaulding*, 6 N. Y. Supp. 877 (1889). For the measure of damages for the breach of a contract of defendants to organize a company and pay to plaintiff for his patents certain stock and cash, see *Kirschmann v. Lediard*, 61 Barb. 573 (1872). As to the measure of damages in a suit by a vendor of property to the corporation for damages against it and its promoters for breach of the contract to employ him as manager, see *Marston v. Singapore Rattan Co.*, 163 Mass. 296 (1895).



of the stock, which was never issued, is no basis for the measure of damages.<sup>1</sup> Where the owner of a patent and another person agree that the patent shall be assigned to the latter to hold in trust, and that the latter shall assign it to a corporation to be organized whenever the parties deem it advisable, the latter person agreeing also to furnish the capital needed, and for all this he was to have a half-interest in the enterprise, the patentee, after making the assignment, cannot revoke it, unless the other party has delayed an unreasonable time in proceeding after being requested so to do.<sup>2</sup>

Where a promoting scheme is abandoned any one of the promoters may proceed to carry out a similar scheme without being under obligations to his first associates.<sup>3</sup> But where a promoter agrees to pay a certain compensation to a person for services to be performed by the

Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. *Baumgarten v. Nichols*, 69 Hun, 216 (1893). Where all the stockholders and directors of a planing mill corporation turn its property over to a person to operate and give him an option on their stock, the fact that he failed in the management does not render him liable in damages, no fraud being proved. *Ring v. Brown*, 84 Neb. 589 (1909).

<sup>1</sup> *Eisenmayer v. Leonardt*, 148 Cal. 596 (1906). Where by contract between promoters one was to give the other a certain amount of preferred stock in a company to be organized, and he fails to do so because he has not caused the corporation to issue any preferred stock, the former is liable in damages for such value as the preferred stock would have had if it had been issued. *Crichfield v. Julia*, 147 Fed. Rep. 65 (1906). Where by a promoter's contract one of them was to construct a pipe line for water for a city and for irrigation, and the stock was to be divided between them, and he does not proceed, the measure of

damages will include the amount expended by the other after the contract was made and in reliance upon it, but not damages for the stock, because that would be for anticipated profits, which are uncertain, speculative and doubtful, especially where the cost of the line would have been largely in excess of the estimates. *Curran v. Smith*, 149 Fed. Rep. 945 (1906).

<sup>2</sup> *Niles v. Graham*, 181 Mass. 41 (1902). Where a vendor contracts with a person to transfer his patents to a corporation for stock and cash, and such person agrees to furnish the money to carry on the business, but fails to do so, in a suit by the vendor, if he asks for rescission and also for damages, he should separately state these two causes of action. *De Lery v. Rogers*, 71 N. Y. App. Div. 99 (1902). An agreement to incorporate will not be specifically enforced by the court when some of the parties are insolvent. *Hernreich v. Sidberg*, 105 Ill. App. Rep. 495 (1903).

<sup>3</sup> *Parks v. Gates*, 84 N. Y. App. Div. 534 (1903). Where a promoter sues for damages, for breach of a contract by another promoter, whereby the latter agreed that he would not go into the enterprise unless he went in with the former, the plaintiff cannot sustain the suit by proving that he was to be paid a certain sum if certain information was furnished and that he furnished the same. *Mengis v. Fitzgerald*, 108 N. Y. App. Div. 24 (1905).



latter in connection with a reorganization, the promoter must pay such compensation, even though he changes his reorganization agreement and carries out the reorganization with parties other than those originally contemplated.<sup>1</sup> And an agreement of various stockholders in several street railway companies to form a new corporation and transfer their interest thereto and divide the new stock in a certain proportion does not constitute such a partnership as to entitle one to sue the others for an accounting of profits where the others had formed such a corporation with other parties, leaving out the first-named party.<sup>2</sup> A pro-

<sup>1</sup> *Babbitt v. Gibbs*, 150 N. Y. 281 (1896). Where a promoter is by contract to have certain pay for assisting in a water-works scheme, and it fails because the proposed source of water supply is not good, he cannot recover if a new scheme is taken up with a different source. *Orcutt v. Pasadena, etc. Co.*, 152 Cal. 599 (1908).

<sup>2</sup> *Schantz v. Oakman*, 163 N. Y. 148 (1900). Where defendant employed plaintiff to assist in building up a business, the plaintiff to be paid necessary expenses, and the balance of his pay to be determined at a future time, and plaintiff to have half the business, and eleven years thereafter the defendant organizes a corporation and turns over the business to the latter, the defendant becoming the owner of the stock, the plaintiff may hold him liable, not only for services before the corporation was organized, but for those rendered afterwards. *Bonsell v. Platt*, 153 Fed. Rep. 126 (1907). A contract between a stockholder and a third person by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors, it was illegal. *Kountze v. Flannagan*, 19 N. Y. Supp. 33 (1892). Where a promoter buys property for the corpora-

tion before it is formed, and the seller supposes he is selling to a corporation, but the latter is never formed, the seller may recover back the property, even from one who bought the property from the promoter in good faith. *Wyckoff v. Vicary*, 75 Hun, 409 (1894). In *Angle v. Chicago, etc. Ry.*, 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the decision below, held that a demurrer to the bill was not good. Where the vendor of a majority of the stock of a corporation guarantees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. *Chicago, etc. Ry. v. Hoyt*, 89 Wis. 314 (1895). A promoter who does not complete the transaction or consummate an enforceable contract cannot recover commissions. *Hammond v. Crawford*, 66 Fed. Rep. 425 (1895). Where one of the promoters



moter may not by a bill in equity compel other promoters to organize a corporation and distribute stock in accordance with the agreement, and he cannot enjoin them from organizing a different corporation in violation of the agreement where there are no negative covenants in the agreement, but he may maintain a suit at law for damages.<sup>1</sup> Where one promoter, in accordance with his contract with another promoter, transfers his property to a corporation, and the other promoter then fails to advance capital as agreed, the former may rescind and have the property retransferred.<sup>2</sup>

Where a party agrees with a promoter and constructor of water-works that he, the former, will take a certain amount of water from the corporation for ten years, and he fails to do so, the former may hold him liable. It is immaterial that no formal contract was made with the company. The contractor, owning practically all the stock of the company, may sue and collect for himself the price of the water less the cost.<sup>3</sup> A promise and contract of promoters to subscribers to certain bonds may give the latter an equitable lien on the bonds enforceable in equity.<sup>4</sup>

On the other hand, even though an inventor is persuaded to turn in his inventions to a corporation for stock on an oral assurance that plenty of money would be forthcoming to take the stock of the company and make the business successful, and even though the parties making such representations do not advance the money, but allow the company

agrees with others that he will purchase property and turn it in to the company, the price to apply on his subscription for stock, and he does purchase, and the company takes possession of the property and builds thereon, he will be compelled to transfer title to the company. *Nester v. Gross*, 66 Minn. 371 (1896). Sometimes, where the corporation cannot enforce the contract, the promoters may. *Carmody v. Powers*, 60 Mich. 26 (1886). Where one promoter sues another for failure to form the corporation, and obtains a verdict for the par value of the stock which plaintiff was to receive, there being no proof as to what the value would have been if issued, nor whether the company would be successful, the verdict will be set aside as excessive. *Pitt v. Kellogg*, 11 N. Y. Supp. 526 (1890). A contract between promoters by which one agrees to assist in the building of a road is too indefinite to sustain an

action for breach thereof. *Porter v. Blair*, 83 Fed. Rep. 104 (1897). Where competing applicants for a street-railway franchise agree to act together, whereby one is to withdraw and the other is to obtain the grant, and the benefits are to be divided equally, which is done with the full knowledge of the municipal authorities, and then the one who secured the grant refuses to divide with the other, the remedy of the latter is at law, and not in equity, even if the agreement should be held to be valid. *Hyer v. Richmond Traction Co.*, 168 U. S. 471 (1897), modifying 80 Fed. Rep. 839.

<sup>1</sup> *Perrin v. Smith*, 135 N. Y. App. Div. 127 (1909).

<sup>2</sup> *Schneider v. Miller*, 129 N. Y. App. Div. 197 (1908).

<sup>3</sup> *Drummond v. Crane*, 159 Mass. 577 (1893).

<sup>4</sup> *Badgerow v. Manhattan Trust Co.*, 64 Fed. Rep. 931 (1894).



to become insolvent, and buy in the assets, including the patents, yet the inventor cannot maintain an action for fraud in failing to furnish money according to promise.<sup>1</sup> A promoter who has taken a contract to purchase a property at a certain price based upon reports and representations that the business had not decreased since the reports, may, upon discovering that the business has largely decreased, refuse to carry out the contract, and may hold the party liable for his disbursements, but not for profits which he would have made if his plans had been carried out.<sup>2</sup> A loan of money to a promoter on full rates of interest with a stock bonus may be usurious.<sup>3</sup> Where one promoter, under threat of destroying the value of the stock, compels another promoter to give up a large part of his rights, a court of equity may set the contract aside.<sup>4</sup> In England by statute money loaners will be compelled by the courts to return harsh and unconscionable interest or bonuses and this applies to a person who loans money to a promoter and takes excessive bonuses of stock in payment.<sup>5</sup> Where two promoters pledge their stock to secure a corporate loan and one of them pays the loan and takes the stock, the other promoter cannot transfer his interest except subject to contribution towards the loan.<sup>6</sup>

Another class of cases arises where the enterprise is carried to a successful conclusion, but one promoter refuses to divide the profits in accordance with the contract. In such cases a suit at law for damages is always a proper remedy if the damages can be proven.<sup>7</sup> One promo-

<sup>1</sup> *Smith v. Parker*, 148 Ind. 127 (1897).

<sup>2</sup> *Loewer v. Harris*, 57 Fed. Rep. 368 (1893).

<sup>3</sup> *Laws v. Fleming*, 177 Fed. Rep. 450 (1910); s. c., 191 Fed. Rep. 283.

<sup>4</sup> *Harris v. Cary*, 112 Va. 362 (1911).

<sup>5</sup> *Bonnard v. Dott*, [1906] 1 Ch. 740.

<sup>6</sup> *Soderberg v. McRae*, 126 Pac. Rep. 538 (Wash. 1912).

<sup>7</sup> One promoter may maintain a suit at law against another for the former's part of the profits and need not resort to equity, inasmuch as the relationship is not that of a partnership, there being no agreement to pay losses as well as profits. *Miller v. Baker*, 140 N. W. Rep. 407 (Iowa, 1913). Where by a contract between promoters of a street railway one of them was to have one fourth of all the profits and the others proceed with the enterprise and transfer the franchise to a corporation and afterwards fraudulently cause the corporation to

be sold out to a new corporation, the first-named party may hold the other promoters and the two corporations personally liable for one fourth of the value of the property, less the amount which has been expended, and it is no defense that the original plan contemplated issuing stock without paying the full par value thereof. *Mulvihill v. Vicksburg, etc. Co.*, 88 Miss. 689 (1906). Where a broker has a contract with the owner of a mine for the sale thereof or the organization of a company, and the broker introduces a party with whom the promoter subsequently organizes a company, it may be a question for the jury as to whether such organization was substantially within the meaning of the contract. *West v. Demme*, 128 Mich. 11 (1901). Where two promoters agree to purchase certain property and organize a corporation to take it over, and one of them purchases it himself and organizes the company and takes all the stock, the other pro-



ter may sue another at law for damages for fraud inducing the former to enter into the contract, he having offered to rescind.<sup>1</sup> In some cases the courts may compel an accounting and distribution according to the contract.<sup>2</sup>

promoter may hold both him and the corporation liable for that portion of the stock which he was to have, it being shown that the corporation knew of the contract. *Sun, etc. Co. v. Frost*, 7 Ariz. 289 (1901). In a promoter's suit the contract may be proved by parol where only a part of it was in the correspondence. *Locke v. Wilson*, 135 Mich. 593 (1904). A contract between promoters, by which one of them is to be employed by a proposed insurance company on a salary and a percentage of premiums, is too indefinite to be enforced, even though some of the promoters proceeded to form the company. It seems also that such a contract is contrary to public policy. *Flaherty v. Cary*, 62 N. Y. App. Div. 116 (1901); *aff'd*, 174 N. Y. 550. Where two parties contribute to locating and developing mines for their equal benefit, but not to working them, and one of them in whose name the mines are taken sells the mines for stock, the remedy of the other is at law for conversion of the bailment, there being neither a partnership nor a trust. *Doyle v. Burns*, 123 Iowa, 488 (1904). A promoter who contracts to bring in fresh capital on a commission cannot recover his commission for inducing another corporation to issue its stock in exchange for the stock of the company with which he has the contract. *Farjeon v. Indian Territory, etc. Co.*, 146 N. Y. App. Div. 23 (1911). In a suit by one promoter against another for failure to deliver stock the damage is the actual value of the stock. *Peek v. Steinberg*, 124 Pac. Rep. 834 (Cal. 1912).

<sup>1</sup> *O'Shea v. Vaughn*, 201 Mass. 412 (1909).

<sup>2</sup> A contract between two promoters by which one advanced a sum of money to the other, and was to receive a proportion of stock therefor, was construed in *Donner v. Donner*, 211 Pa. St. 409 (1905) as entitling the

former to such part of the other's holdings of stock as the sum so paid bore to the amount of investment by the other promoter. A promoter who is to have five per cent. of the stock may have specific performance where there is no stock on the market and its value cannot be ascertained. *Dennison v. Keasbey*, 200 Mo. 408 (1906). A promoter may file a bill in equity to compel the corporation and two of the other promoters to transfer to him certain stock which he claims he is entitled to, but such relief is granted only when a clear case is made out. *Ryan v. Martin*, 165 Fed. Rep. 765 (1908). One promoter may maintain a bill in equity against another to carry out the agreement by which the stock was to be divided or to obtain damages in lieu thereof. *Bannen v. Kindling*, 142 Wis. 613 (1910). An agreement of a stockholder to give promoters a certain amount of stock for their best efforts to sell treasury stock, may be enforced where they have sold all the treasury stock contemplated at that time, and the remedy may be specific performance if the stock has no market value, and the damages cannot be fixed in money. *Turley v. Thomas*, 31 Nev. 181 (1909). A depository of stock maintained a suit in equity to have determined the title thereto as between various claimants in the case *Miner v. Paulson*, 60 Wash. 150 (1910). In the case *Wait v. Kern River, etc. Co.*, 157 Cal. 16 (1909), it was held that a promoter who is entitled to a portion of certain unissued stock in an Arizona mining company, which did all its business in California, which company had contracted to issue such stock to another promoter, who had not yet actually issued it, might by a bill in equity in California against the corporation and the other promoter obtain a decree that the corporation issue to him the stock to which he is entitled, even though jurisdiction of the other pro-



Thus a court may grant specific performance of a promoters' contract by which some of them were to pay to the corporation a certain

moter was obtained only by publication. The court held also that the remedy at law was insufficient when the stock had no market value, and the property of the company consisted merely of mining claims of unknown value. A citizen of Idaho may bring suit in Washington to compel a North Dakota corporation to issue original stock to him although the company has already issued it to another promoter, it appearing that the president and secretary reside in Washington, and that a money judgment may be entered if the stock is not transferred as required by the decree. *Lively v. Husebye*, 60 Wash. 47 (1910). A promoter may maintain a suit against other promoters to obtain his share of the profits. *Botsford v. Van Riper*, 33 Nev. 156 (1910). A promoter may by a bill in equity enjoin a corporation from issuing to another promoter all the stock which represents their profits and may compel a delivery of his part to him, and it is no defense that they had an option on the property at a certain price and then sold the property to a corporation at a much larger price payable in stock, it appearing that the property was worth more than the larger price. The constitutional prohibition in South Dakota against fictitious stock does not apply to such a transaction. *Chambers v. Mittnacht*, 23 S. Dak. 449 (1909). A promoter entitled by contract to a part of stock issued for property may maintain a bill in equity to obtain his part. *Rogers v. Penobscot Min. Co.*, 132 N. W. Rep. 792 (S. Dak. 1911). Where one promoter represents he is paying \$8,000 for mining claims, whereas he is paying but \$2,000, and causes another promoter to advance the \$2,000, and they transfer the property to the corporation for stock, the second promoter may claim all the stock. *Mattern v. Canavan*, 3 Cal. App. 493 (1906). A promoter may maintain a bill in equity against another promoter to compel the latter to deliver stock due by contract to the former, in connection with the organ-

ization of the company, and the corporation is a proper party defendant in order to obtain a transfer. *Howison v. Baird*, 145 Ala. 683 (1905). A suit by a promoter to compel the delivery of stock to him on the ground that without his consent and knowledge an incorporation made in accordance with his contract had been abandoned and a new one adopted from which he had been excluded, is not for fraud, and hence the statute of limitations applicable to the latter is not a bar. *Farris v. Wirt*, 16 Col. App. 1 (1901). Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract, the court will decree a proper division of the stock, all parties being allowed the amounts invested by them in forwarding the enterprise. *Bates v. Wilson*, 14 Colo. 140 (1890). One of the promoters suing for his interest according to the contract cannot hold any of them liable where he has released some. *Burgess v. Sherman*, 147 Pa. St. 254 (1892). Several persons defrauded as to their contract, whereby they were to receive stock, cannot sue jointly. Each must sue separately. *Summerlin v. Front-eriza, etc. Co.*, 41 Fed. Rep. 249 (1890). As to promoters' suits to enforce their right to stock, see also §§ 320, 334, *supra*. For an agreement to take effect when a certain corporation should be formed, see *Childs v. Smith*, 46 N. Y. 34 (1871). Where for \$1,300 a person was to have a ten per cent. commission on the price for which a mine is sold, and is to have all stock received over and above the sum of \$225,000 net to the vendor, and the mine is sold by the vendor, a complaint by the holder of the contract is subject to demurrer where the negotiations and agreements are not fully set forth. *Sipes v. Seymour*, 44 Fed. Rep. 326 (1890). Where a promoter conveys property to a different corporation from the one agreed upon by him with a co-promoter, the latter may make the former account for the consideration on the basis of the



sum of money and were to receive certain stock of the corporation therefor, the stock not having been issued and the money not having been paid in full.<sup>1</sup> Where one promoter claims an interest in stock

contract. *Sims v. Tyrer*, 96 Va. 5 (1897). A promoter's contract that he should receive a certain percentage of all stock received by the interested parties was enforced in the case *Hix v. Edison, etc. Co.*, 10 N. Y. App. Div. 75 (1896), and 27 N. Y. App. Div. 248; *aff'd*, 163 N. Y. 573. Where two persons, each being interested in different street railways, make a contract to form a new corporation to which such street railways are to be transferred, and one of the parties afterwards turns his street railways over to a different corporation, the other party cannot hold him liable in an action for an accounting for profits. A breach of contract must be set up. *Schantz v. Oakman*, 10 N. Y. App. Div. 151 (1896); *aff'd*, 163 N. Y. 148. Where the statute authorizes incorporation for producing and selling electricity, and the certificate of incorporation includes this as well as manufacturing and selling electrical appliances, apparatus, and supplies, the corporation is not a *de jure* corporation, and hence insufficient to support an action by one promoter against another on a contract of the latter to convey land to a corporation to be formed and to take stock in payment, especially where the full capital stock of such corporation had not been subscribed for. *Burk v. Mead*, 159 Ind. 252 (1902). A person who pays for stock by transferring worthless mining stock is not a *bona fide* purchaser. *Sewell v. Nelson*, 113 Ky. 171 (1902). A suit to obtain stock, which the defendant had contracted to obtain and deliver, does not fail, even though it appears that the defendant has not obtained it, inasmuch as the complaint would sustain a judgment for damages for breach of contract. *Grant v. Walsh*, 36 Wash. 190 (1904). An oral agreement between parties, to locate and develop mining claims, was sustained in a suit by one against the other for stock received for a mining claim,

which the latter transferred, and the statute of frauds was held to be no bar. *Mack v. Mack*, 39 Wash. 190 (1905). A mining expert who was to select properties to be paid for by his associate, two thirds of the profit to go to the latter and one third to the former, may maintain a suit in equity for one third of the capital stock of a company organized to take over the property so purchased, less the cost thereof. *Rutan v. Huck*, 30 Utah, 217 (1906). A promoter who is entitled to a part of the stock may have specific performance and an injunction where the defendant is not responsible and there have not been enough sales of stock to fix its value sufficient to constitute a market value. *Rau v. Seidenberg*, 53 N. Y. Misc. Rep. 386 (1907). A suit between promoters relative to the division of stock received for promoting, was sustained in *Boice v. McCormick*, 106 N. Y. App. Div. 539 (1905). A promoter may have specific performance of a contract by which he interested capital in a company formed to take over and work a patent, for which he was to receive one half the stock. *Butler v. Murphy*, 106 Mo. App. 287 (1904).

<sup>1</sup> *Macklem v. Fales*, 130 Mich. 66 (1902). Where a promoters' contract is personally carried out by the parties and the corporation becomes insolvent, the court has power to compel complete performance in a suit by one promoter against the other. *Hunt v. Davis*, 135 Cal. 31 (1901). Where by contract between two persons one was to convey mining claims to a corporation for stock, part of which was to go to the second person, and the stock is issued to the first person for the mining claims, but he does not convey the same to the corporation, an assignee of a part of the stock to which the second party is entitled may bring suit to compel the first-named party to convey the mining claims to the corporation. *Rogers v. Penobscot, etc. Co.*, 154 Fed. Rep. 606 (1907).



which his co-promoter has placed in the name of a third person, and the latter is aware of the claim, the latter is liable if he turns over the stock to the co-promoter after suit has been brought for a specific performance.<sup>1</sup> The oral agreement of one promoter that he would pay certain liens on property to be transferred by another promoter to a corporation, may be enforced if the transfer is made.<sup>2</sup> But specific performance is not readily granted, especially where the remedy at law is adequate or the contract itself difficult of performance.<sup>3</sup> An agree-

<sup>1</sup> Warner v. Wood, 200 Fed. Rep. 542 (1912).

<sup>2</sup> Maxey v. Rideout, 173 Fed. Rep. 172 (1909).

<sup>3</sup> A contract between the owner of patents and a promoter by which the latter was to furnish the capital and the former the patents, and the latter was to have three fourths of the stock, will not be specifically enforced by a court of equity where no company has been formed and there is no provision for determining how much capital would be required. Brown v. Swarthout, 134 Mich. 585 (1903). A contract giving a person one third of the profits of a mining venture does not give him one third of stock in a corporation to which the mine was transferred, but does give him the right to one third of the profits from such stock. Simmons v. Lima Oil Co., 71 N. J. Eq. 174 (1906). An oral proposition made by a promoter to a capitalist and accepted by the latter, if on examination the facts were as stated, cannot be enforced in equity where the latter utilizes the information, but does not carry out the agreement, there being but a mere agreement to enter into a definite agreement. The remedy is at law for wrongful appropriation of the plan. Haskins v. Ryan, 71 N. J. Eq. 575 (1906). A person having an option on bonds, which the vendor is to use in foreclosing and buying in and reorganizing the property, cannot maintain a suit against the vendor for stock issued by the reorganized company to represent such bonds, where the agreement is not sufficiently explicit for specific performance. Patterson v. Farmington, etc. Ry., 76 Conn. 628 (1904). Delay in instituting a suit to compel the delivery of stock which parties had earned in

common, is not fatal, short of the statute of limitations. Eno v. Sanders, 39 Wash. 238 (1905). A mere statement by an owner of mining claims that he will give to another person a half interest, does not sustain an action for one half of stock issued for such claims, even though such other person contributed money and services. Griffin v. Knoblock, 20 Colo. App. 153 (1904). An agreement transferring a portion of the stock in a mining corporation cannot be enforced in a court of equity eight years after the complainant had made a demand for the stock, the statute of limitations at law being a bar. Moore v. Nickey, 133 Fed. Rep. 289 (1904). A promoter cannot maintain a suit in equity to have specific performance of an agreement to deliver to him certain stock, the complaint asking for the par value of the stock if specific performance is not granted, unless it is alleged that the stock had a peculiar value or that it was difficult or impossible to ascertain the value of the stock or other facts are alleged showing that there is no adequate remedy at law. Bateman v. Straus, 86 N. Y. App. Div. 540 (1903). A promoter who has brought about the sale of a large plant to new parties, who have agreed to organize a new corporation and give the promoter a certain amount of stock therein, cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he get specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties. The value of the stock can be estimated in damages. There was no



ment between a promoter and a patentee by which the promoter is to have one third of cash, stock, or other profits obtained from the patent rights may create a trust relationship entitling the promoter to file a bill in equity to obtain his one third.<sup>1</sup> Where the owner of patents agrees with a person to give him a certain amount of stock and interest in certain profits, if he would sell certain other stock in a corporation to be organized to take over the patents, and the second person arranges to do so, and then the inventor transfers the patent to another corporation, a court of equity may compel the vendor to carry out his agreement.<sup>2</sup> The ordinary promoter's contract does not create a copart-

allegation of defendant's insolvency. The promoter has ample remedy at law for damages. *Avery v. Ryan*, 74 Wis. 591 (1889). Specific performance of a contract to form a corporation will not be granted. *Avery v. Ryan*, 74 Wis. 591 (1889). An agreement of several parties to sell their property to a corporation in exchange for stock of the latter, the amount of stock going to each to be determined by arbitrators, will not be specifically enforced where the arbitrators have fixed the value in an illegal way. Any party may withdraw from such a contract prior to the time when it has been signed by all. *Consolidated, etc. Co. v. Nash*, 109 Wis. 490 (1901). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. *Brehm v. Sperry*, 92 Md. 378 (1901). A bill in equity does not lie to compel an underwriting syndicate to assign to plaintiff an interest therein, which they had contracted to sell to him, even though he alleges that the value is uncertain and that specific performance is the only full and adequate relief. *Gilbert v.*

*Bunnell*, 92 N. Y. App. Div. 284 (1904). An agreement of a stockholder to divide his profits on a very liberal basis is too vague and uncertain to be enforced. *Butler v. Kemmerer*, 218 Pa. St. 242 (1907).

<sup>1</sup> *Harvey v. Sellers*, 115 Fed. Rep. 757 (1902). A bill in equity for an accounting does not lie at the instance of a party who claims that in consideration of newspaper work the defendants agreed to carry five hundred shares of stock for him in connection with a pool which had been formed. *Black v. Vanderbilt*, 70 N. Y. App. Div. 16 (1902). A promoter cannot maintain a suit in equity to collect from an inventor one half of what the latter received in stock and cash, even though the contract between the two gave the former such one half. His remedy is at law. *Everett v. De Fontaine*, 78 N. Y. App. Div. 219 (1903). A contract whereby a party who is about to sell his business to a corporation to be organized agrees secretly to give \$5,000 of stock to a party who agrees to subscribe openly for \$5,000 of the stock is not enforceable, it appearing that the party who was thus to get the extra stock objected to the amount of stock to be issued to the vendor, and withdrew his objection only upon this agreement, and it appearing also that he afterwards became a director and voted to purchase the property at the price demanded by the vendor. *Koster v. Pain*, 41 N. Y. App. Div. 443 (1899).

<sup>2</sup> *Hills v. McMunn*, 232 Ill. 488 (1908). A promoter who is to have a part of the stock of a corporation to be issued to another promoter for



nership.<sup>1</sup> Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company.<sup>2</sup> And where the promoters, who are also stockholders, agree that the profits are to be divided in a certain way under a construction contract, and a part of them make a secret profit, the others may compel a complete division.<sup>3</sup> Where two promoters form a partnership

patents cannot claim any interest in the patents themselves and cannot prevent the corporation selling the patents. *Butterfield v. Harris*, 129 Pac. Rep. 614 (Cal. 1912).

<sup>1</sup> A contract between a patentee and a person by which the latter puts money into a corporation and receives stock in payment, and thereafter the corporation is sold to another corporation, each party turning in individual property in addition, does not constitute a partnership entitling one to claim a part of the price received by the other. *Volney v. Nixon*, 67 N. J. Eq. 457 (1904). An agreement between promoters by which one person was to have thirty per cent. of the profits does not make him a partner or joint adventurer. It was merely an agreement to pay a compensation. *Boice v. Jones*, 106 N. Y. App. Div. 547 (1905). Where one promoter sues another on the theory of partnership, he cannot on the trial prove a joint adventure instead of partnership. *Boice v. Jones*, 106 N. Y. App. Div. 547 (1905). Where a person who obtains options and purchases stock for another is to have an interest in the profits on the sale of the same, it is immaterial whether it is a technical partnership or a mere joint venture, inasmuch as the same legal rules apply, in a suit by the former for an accounting by the latter. *Spier v. Hyde*, 92 N. Y. App. Div. 467 (1904). Where on a consolidation the president of a constituent company receives for the benefit of all the stockholders the stock in the new company and also certain assets of the old company, a stockholder in a suit to compel him to account must join the constituent company and also other stockholders. *Kniekerbocker v. Conger*, 110 N. Y. App. Div. 125 (1905). A

promoter who has merely an option to purchase stock which he then sells to a new corporation is merely an agent of the vendor and a dividend declared on the stock of the new corporation before the option is exercised belongs to the vendor. *Rowe v. White*, 112 N. Y. App. Div. 688 (1906); aff'd, 189 N. Y. 523. Where in a partnership dissolution it is adjudged that one of the partners is entitled to certain stock, and in the event of the others failing to transfer it, he shall have its value, he is entitled to a transfer unless the others are unable to transfer it. *Reilly v. Freeman*, 109 N. Y. App. Div. 4 (1905); aff'd, 184 N. Y. 610. A contributor to a fund to be invested by syndicate managers in stocks and other property has not such an interest in the stocks as enables him to maintain a suit in the state where the corporations are organized, as against the non-resident syndicate managers. *Jones v. Gould*, 141 Fed. Rep. 698 (1905); aff'd, 149 Fed. Rep. 153. Even though an agent has a half interest in the profits of the sale of stock, this is not a copartnership, and the owner may sell at private sale and without notifying the agent. *Hays v. Colonial Trust Co.*, 217 Pa. St. 53 (1907).

<sup>2</sup> *Dennison v. Chapman*, 105 Cal. 447 (1895).

<sup>3</sup> *Krohn v. Williamson*, 62 Fed. Rep. 869 (1894); affirmed in *Williamson v. Krohn*, 66 Fed. Rep. 655 (1895). One of the vendors who was secretly to have a higher price than the others may recover the higher price, even though he may possibly be under legal obligation to divide it with the other vendors. *Boice v. Jones*, 106 N. Y. App. Div. 547 (1905). Where a promoter organizes a syndicate to buy the stock of a company to be organized to



and acquire stocks and bonds, one cannot deny the rights of the other on the ground that the stock and bonds were issued by a railroad company in excess of the cost of construction.<sup>1</sup> One promoter cannot hold another one liable for an accounting where the transactions were to defraud the public by the sale of mining stocks.<sup>2</sup> One promoter cannot maintain a suit against another promoter for his share of stock obtained by misrepresentations to the corporation as to the price paid for property.<sup>3</sup> Where the owner of a mill and of grain agrees with a promoter to sell them to a corporation to be formed and to take pay for the mill in stock and cash for the grain, he cannot after receiving the stock and cash maintain a suit for the supposed value of the stock when he accepted it, even though he claims that the promoter did not carry out all of his promises.<sup>4</sup> Where in a special act of incorporation thirteen incorporators are named and they organize and elect directors, and the latter accept subscriptions, and all the incorporators are given opportunity to subscribe, those who do subscribe may sell all their stock and thereby transfer the entire corporation, and those incorporators who do not subscribe are not entitled to any part of the price.<sup>5</sup>

The liability of promoters to persons who have been induced by fraudulent prospectuses to subscribe for stock,<sup>6</sup> and the liability of promoters to the corporation itself to account for fraudulent profits which the promoter has secretly made out of contracts which he caused the corporation to enter into,<sup>7</sup> have already been considered. The subject of the character, rights, and liabilities of an underwriter is considered elsewhere.<sup>8</sup>

take over certain properties, and conceals the fact that he is interested in the selling company, and in fact intends to pay his subscription from his interest in the selling company, the other members of the syndicate may rescind and on tendering to him their stock in the new company recover back the moneys they have paid. *Heckscher v. Edenborn*, 203 N. Y. 210 (1911). Where in a contract between a number of manufacturers and bankers as promoters for the organization of a corporation to take over the plants, the bankers secretly gave a larger price to some of the vendors than was specified in the agreement, one of the vendors who did not receive such secret price may file a bill for an accounting of the secret profits, and may join as parties defendant the corporation, and the parties taking the secret profit, and the promoters.

*Shutts v. United, etc. Co.*, 67 N. J. Eq. 225 (1904). See also § 320, *supra*.

<sup>1</sup> *Leeds v. Townsend*, 228 Ill. 451 (1907).

<sup>2</sup> *Primeau v. Granfield*, 193 Fed. Rep. 911 (1911), rev'g 184 Fed. Rep. 480.

<sup>3</sup> *Travis v. Travis*, 140 N. Y. App. Div. 191 (1910).

<sup>4</sup> *Gochnauer v. Union Trust Co.*, 225 Pa. St. 503 (1909). Money paid by the corporation to one of the promoters for his services need not be divided with the other promoters. *Carter v. Tucker*, 138 Ky. 34 (1910).

<sup>5</sup> *Roosevelt v. Hamblin*, 199 Mass. 127 (1908). The same rule applies to promoters who assist in obtaining the charter. *Dobbins v. Peabody*, 199 Mass. 141 (1908).

<sup>6</sup> See chs. IX and XX, *supra*.

<sup>7</sup> See § 651, *supra*.

<sup>8</sup> See § 14, *supra*. An underwriter



§ 706. The question sometimes arises whether a subscriber for stock in a projected corporation is liable to its creditors in case the enterprise is abandoned before incorporation; and also whether the promoters of the abortive corporation are liable to the subscribers for deposits made by the latter. The former question is decided in the negative. "The subscribers to the stock or articles of association are not partners with those who assume the risk of acting for a corporation not yet legally established."<sup>1</sup> As to the latter question the rule has become well established in England that a subscriber for stock in a corporation that never comes into existence, who has

is a guarantor, and if the agreement which he underwrites is modified without his consent he is thereby released. *Guardian T. Co. v. Peabody*, 122 N. Y. App. Div. 648 (1907); *aff'd*, 195 N. Y. 544.

<sup>1</sup> *Ward v. Brigham*, 127 Mass. 24 (1879), the court saying also: "Those who acted as agents for the inchoate corporation acted without a principal behind them, because there was no body corporate capable of appointing agents, and so became principals in the transaction." See also *Duke v. Andrews*, 2 Exch. 290 (1848); *Hutton v. Thompson*, 3 H. L. Cas. 161 (1857); *Duke v. Diver*, 1 Exch. 36 (1847), where the stockholder had promised to pay on a certain day, and was held to his promise. To same effect, *Duke v. Forbes*, 1 Exch. 356 (1847); *Aldham v. Brown*, 7 El. & Bl. 164 (1857); 2 El. & El. 398, on appeal; *Woolmer v. Toby*, 10 Q. B. 691 (1847). However, in the case *Lake v. Duke of Argyle*, 6 Q. B. 477 (1844), the court held that attendance at a meeting, announcement of intention of being president and of taking stock, and concurrence in measures for incorporation, may be strong evidence that defendant "held himself out as a paymaster to all who executed the orders." The question, then, is for the jury. Subscriptions paid in and partly consumed by losses before the incorporation was completed are not to be credited on the subscription itself as against corporate creditors. *Bank of De Soto v. Reed*, 50 Tex. Civ. App. 102 (1908). Where promoters promise a subscriber that he should have his money returned

if the corporation did not do things within a year, he may recover from them if that event happens, even though he refused to pay some installments. *Broadus v. Russell*, 160 Ala. 353 (1909). Persons who lease premises in behalf of a proposed corporation are liable for the rent if the corporation is not formed, but persons who subsequently subscribe for stock in the proposed corporation are not liable on such lease. *Kennedy v. Fulton, etc. Co.*, 108 S. W. Rep. 948 (Ky. 1908). Where a proposed corporation, never incorporated, contracts to purchase certain property of a subscriber, he cannot bring a suit *at law* against other subscribers for damage caused by non-fulfillment of contract. *Crow v. Green*, 111 Pa. St. 637 (1886). Subscribers are not liable. *Bourne v. Freeth*, 9 B. & C. 632 (1829). Unless they allow themselves to be held out as partners in the enterprise. *Fox v. Clifton*, 9 Bing. 115 (1832), granting a new trial in 6 Bing. 776. *Cf. Heraud v. Leaf*, 5 C. & B. 157 (1847); *Dickinson v. Valpy*, 10 B. & C. 128 (1829). *Ex parte Hirschel*, 15 Jur. 924 (1851), held that a subscriber for stock in an abortive company was not liable for debts incurred. The vice-chancellor said: "Where courts have been contradicting each other for years, this court can do no otherwise than follow the last decision." A note given to pay for stock in a corporation to be organized cannot be enforced by the payee where the corporation has not been formed. *Northwestern, etc. Co. v. Lanning*, 83 Minn. 19 (1901).



paid a part of his subscription, may recover back from the promoters of the enterprise the amount so paid, and is not liable even for the preliminary expenses.<sup>1</sup> His remedy may be by bill in equity.<sup>2</sup> If, however, the subscriber expressly or by implication authorizes expenditures, he cannot recover back his deposit.<sup>3</sup> The subscriber need not submit

<sup>1</sup> *Ashpittel v. Serecombe*, 5 Exch. 147 (1850), where the court said: "There seems to be no doubt that the plaintiff, having paid his money for shares in the concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to its use, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made." See also *Thompson, Liabilities of Officers*, 210; *Noekels v. Crosby*, 3 B. & C. 814 (1825), the leading case; 1 *Lindley, Companies*, p. 31, citing *Walstab v. Spottiswoode*, 15 M. & W. 501 (1846); *Moore v. Garwood*, 4 Exch. 681 (1849); *Coupland v. Challis*, 2 Exch. 682 (1848); *Owen v. Challis*, 5 C. B. 115 (1848); *Ward v. Londesborough*, 12 C. B. 252 (1852); *Mowatt v. Londesborough*, 3 El. & Bl. 307 (1854), and 4 El. & Bl. 1. See also *Vollans v. Fletcher*, 1 Exch. 20 (1847); *Chaplin v. Clarke*, 4 Exch. 402 (1849). Where railroad bonds are guaranteed by the government and the scheme is abandoned, the government cannot impound the money but the purchaser of the bonds is entitled to repayment upon delivering up the bonds themselves. *Royal Bank of Canada v. The King*, 108 L. T. Rep. 129 (1913). Where a contract is made in the corporate name after the articles have been filed, but before any subscriptions have been obtained, and before an organization meeting has been held or officers elected, the incorporators are liable on the contract as partners. *McVicker v. Cone*, 21 Oreg. 353 (1891). A purchaser of stock to be issued by a corporation may recover back the money if the vendor cannot deliver the stock. *Lieb v. Painter*, 42 Pa. Sup. Ct. 399 (1910). A subscription agreement prior to incorpo-

ration, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription, if he would pay that, is without consideration and void. Any subscriber could expressly limit his liability to his subscription. *Davis v. Shafer*, 50 Fed. Rep. 764 (1892). See also § 76, *supra*.

<sup>2</sup> 2 *Lindley, Companies*, p. 568. "A bill in equity lies to recover back money paid in a bubble." *Colt v. Woollaston*, 2 P. Wms. 154 (1723), where there was fraud; *Green v. Barrett*, 1 Sim. 45 (1826); *Blain v. Agar*, 1 Sim. 37 (1826); s. c., 2 Sim. 289 (1828); *Cridland v. DeMauley*, 1 De G. & S. 459 (1847), before the Judicature Acts; and *Cooper v. Webb*, 15 Sim. 454 (1846); *Wilson v. Stanhope*, 2 Coll. 627 (1846); *Apperly v. Page*, 1 Phillips, 775 (1847); *Clements v. Bowes*, 17 Sim. 167 (1852); s. c., 1 Drew. 684; *Sheppard v. Oxenford*, 1 K. & J. 491 (1855); *Butt v. Monteaux*, 1 K. & J. 98 (1854), since such acts. In these latter cases the demurrers were overruled. See also *Williams v. Page*, 24 Beav. 654 (1857), and "The Bubble Act," 9 Geo. I. ch. 18.

<sup>3</sup> 1 *Lindley, Companies*, p. 33, citing *Baird v. Ross*, 2 Macq. 61, 68 (1856); *Garwood v. Ede*, 1 Exch. 264 (1847); *Watts v. Salter*, 10 C. B. 477 (1850); *Vane v. Cobbold*, 1 Exch. 798 (1848); *Atkinson v. Pocock*, 1 Exch. 796 (1848); *Willey v. Parratt*, 3 Exch. 211 (1848); *Clements v. Todd*, 1 Exch. 268 (1847); *Jones v. Harrison*, 2 Exch. 52



to the deduction of any part of his subscriptions to be applied to the payment of the expenses incurred by the promoters in attempting the incorporation.<sup>1</sup> An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred stock issued also.<sup>2</sup> Money paid for an option on stock in a company to be organized, cannot be recovered on the ground of fraud on the part of other parties which prevented the corporation ever being formed.<sup>3</sup>

§ 707. Great difficulty has arisen in determining whether a corporation is liable on contracts made in its behalf by its promoters before the incorporation took place. The decided weight of authority holds that the corporation is not bound thereby.<sup>4</sup>

(1848); *Aldham v. Brown*, 7 El. & B. 164 (1857); s. c., 2 El. & El. 398 (1859); *Burnside v. Dayrell*, 3 Exch. 224 (1849).

<sup>1</sup> *Nockels v. Crosby*, 3 B. & C. 814 (1825). *Contra*, *Williams v. Salmond*, 2 Kay & J. 463 (1856).

<sup>2</sup> *McIlquham v. Taylor*, [1895] 1 Ch. 53.

<sup>3</sup> *Clark v. McManus*, 105 Minn. 111 (1908).

<sup>4</sup> *Munson v. Syracuse, etc. R. R.*, 103 N. Y. 58, 75 (1886). The agreement of the promoters of a bank that a person will be paid for obtaining subscriptions to its stock does not bind the bank itself. *Tift v. Quaker City Nat. Bank*, 141 Pa. St. 550 (1891). The contract of the directors of a mutual life insurance association that it will locate the chief office in a certain city, if the city will pay certain expenses, is not binding on the society after incorporation unless ratified by it. *Park v. Modern, etc. of America*, 181 Ill. 214 (1899). A corporation is not liable on a contract of its promoters to pay for drawings, plans, etc. Hence, although by statute stockholders are personally liable on corporate contracts, if the corporation commences business before one half of its capital is subscribed and twenty per cent. paid in, they are not liable on such a contract made before incorporation. *Buffington v. Bardon*, 80 Wis. 635 (1891). The company is not bound to issue stock in payment for services of a claim which the promoters agreed should be paid for by the company. *Carey v. Des Moines, etc. Co.*,

81 Iowa, 674 (1891). The corporation is not liable for the breach of an agreement among its organizers as to the distribution of stock. *Summerlin v. Fronteriza, etc. Co.*, 41 Fed. Rep. 249 (1890). An agreement that one promoter will give the other a certain part of the capital stock, cannot be enforced against the corporation itself. *Dickinson v. Matheson, etc. Co.*, 171 Fed. Rep. 646 (1909). Even though an agreement for organizing a company to take over the property of several companies, provides for twelve directors, this does not prevent the corporation reducing the number of directors as allowed by statute, especially where the corporation has not ratified the agreement. Moreover a stockholder's injunction against the reduction is not sufficient if it is against the corporation only. *Bond v. Atlantic, etc. Co.*, 137 N. Y. App. Div. 671 (1910). A corporation is not bound by the contracts of its promoters, where it has not ratified the same nor accepted the benefit of the same. *Moore, etc. Co. v. Towers Hardware Co.*, 87 Ala. 206 (1889). The correspondence of one who afterwards becomes president of a corporation which is subsequently incorporated does not bind such corporation. *First Nat. Bank v. Armstrong*, 42 Fed. Rep. 193 (1890). A corporation is not liable for the contracts of its promoters unless it clearly ratifies or adopts the same by express resolution or some act showing such intent. *Tuttle v. Tuttle Co.*, 101 Me. 287 (1906). Even though applica-



Any other rule would be dangerous in the extreme, inasmuch as promoters are proverbially profuse in their promises, and if the corpo-

tions for a certain amount of insurance must be obtained before organizing a corporation, yet the promoters have no power to agree that the corporation will accept the insurance. *Montgomery v. Whitbeck*, 12 N. Dak. 385 (1903). A corporation is not liable for purchases of one of its promoters in its behalf where it never accepted the articles and the promoter canceled the order. *Bank of Forest v. Orgill Bros. & Co.*, 82 Miss. 81 (1903). A promoter cannot enjoin the corporation from increasing its stock, even though he claims that such increase will defeat a contract made prior to incorporation, by which he was to have a one-sixth interest, the corporation not having ratified such contract. *Martin v. Remington, etc. Co.*, 95 N. Y. App. Div. 18 (1904). An agreement of the promoters that one of them should have lumber from the company at cost, is not binding on the company. *Shreveport Nat. Bank v. Maples*, 119 La. 41 (1907). A subscription for stock before incorporation, payment to be in property, need not be accepted by the corporation. *Merriek v. Consumers', etc. Co.*, 111 Ill. App. 153 (1902). A promoter's contract is not binding on the company, even though it obtains the benefits thereof. *Wilbur v. New York, etc. Co.*, 58 N. Y. Super. Ct. 539 (1891). The parliamentary agent was held bound to look to the promoters for his pay, and not to the company, in *Re Skegness, etc. Co.*, L. R. 41 Ch. D. 215 (1888). Promoters have no power to bind the corporation, even though they afterwards become trustees. *Berridge v. Abernethy*, 24 N. Y. Week. Dig. 513 (1886). An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It was not a party to the agreement. *Thompson Co. v. Brook*, 14 N. Y. Supp. 370 (1891). A contract of promoters to sell to a corporation to be formed cannot be enforced by a stockholder suing in behalf of himself and other stockholders, when the company has not performed or endeavored to perform

its part of the agreement. *Negley v. McWood*, N. Y. L. J., May 2, 1890. An assignment of patents by one of several parties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked, even though the party was by agreement to have a salary of \$6,000 per year, and this salary has not been paid. *Bracher v. Hat Sweat Mfg. Co.*, 49 Fed. Rep. 921 (1892). The company is not liable for goods ordered and received before it was incorporated, even though it used them. *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. Supp. 587 (1892). An agreement of promoters that a corporation should be formed to pay \$5,000 to a factory does not bind such corporation. *Davis, etc. Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 42 (1894). A corporation is not bound by a contract made in its name before it was organized. *Winters v. Hub Min. Co.*, 57 Fed. Rep. 287 (1893). An agreement by promoters that certain stock need not be paid for is not binding on the corporation, and it may collect. *York, etc. Assoc. v. Barnes*, 39 Neb. 834 (1894). The corporation is not liable for moneys expended by its promoters in developing or purchasing property, nor is it liable on their contracts. *Bash v. Culver Gold Min. Co.*, 7 Wash. 122 (1893). A corporation may be liable on a contract made before incorporation by a party who afterwards becomes a director and president, even though the contract was to perform services after incorporation. *Oaks v. Cattaraugus Water Co.*, 143 N. Y. 430 (1894). The corporation is not liable for the services and expenses of its promoters. *Security Co. v. Bennington, etc. Assoc.*, 70 Vt. 201 (1897). The agreement of the promoters of a corporation that a certain claim of a person would be paid, provided he gave to the corporation certain business, may be binding upon the corporation. *Durgin v. Smith*, 115 Mich. 239 (1897). An insurance company may refuse to pay a loss incurred after its incorporation, but growing



ration were to be bound by them, it would be subject to many unknown, unjust, and heavy obligations. The only protection of the stockholders

out of a policy taken by its promoters before incorporation. *Gent v. Manufacturers', etc. Ins. Co.*, 107 Ill. 652 (1883); s. c., 106 Ill. 252. The corporation is not liable for the debts of an old partnership, and not even the parol promise of its president makes it liable. *Georgia Co. v. Castleberry*, 43 Ga. 187 (1871). An agreement among the donors to an academy that the money should be repaid does not bind the academy after incorporation. *Bluehill Academy v. Witham*, 13 Me. 403 (1836). An agreement of promoters to pay a person for obtaining subscriptions is not binding on the corporation. *New York, etc. R.R. v. Ketchum*, 27 Conn. 169 (1858), the court saying: "Can a few persons combine for their own interest to get up a railroad—agree with one of their number to give him a large commission or bonus for every stockholder he can allure into the company—and privately make this commission or bonus a charge on the corporation when formed? This would be a breach of faith towards the honest and unsuspecting stockholders who pay the charter price for their stock, and expect to take it clear of all incumbrance." In Illinois the rule is favored that the corporation is never liable on contracts made by its promoters, unless it expressly agreed to perform. So held as regards preliminary surveys. *Rockford, etc. R.R. v. Sage*, 65 Ill. 328 (1872); and book-keeping for one of the promoters. *Safety, etc. Co. v. Smith*, 65 Ill. 309 (1872); and the liability of a new company for the services of the superintendent of an abortive company by the same parties. *Western, etc. Co. v. Cousley*, 72 Ill. 531 (1874).

An agreement of promoters that a certain person shall have a certain part of the stock upon incorporation, upon his paying therefor, does not bind the corporation. *Morrison v. Gold, etc. Co.*, 52 Cal. 306 (1877). An agreement with a vendor before formation of the company provided that he should not be removed from the

directorship until a certain date. The memorandum and articles provided that this agreement should be adopted, and the articles "confirmed" and incorporated it. The agreement was acted on, but no contract was made between the vendor and the company. *Held*, the articles did not form a contract between them, and the vendor could be removed. *Eley v. Positive, etc. Co.*, L. R. 1 Exch. D. 88 (1876), followed; *Browne v. La Trinidad*, L. R. 37 Ch. D. 1 (1886). See *Lindley, Companies*, p. 146, etc.; *Chadwyck, Healey*, 36. Where the bondholders, in order to procure a government land grant, contracted with plaintiff to complete the road, and subsequently the bondholders foreclosed and reorganized, the court held that the new company was not liable on such contract merely from having accepted the complete road. The court said: "From all the authorities it seems clear that, in order to recover in an action at law, the plaintiff must show either an express promise of the new company, or that the contract was made with persons then engaged in its formation and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of the plaintiff and with the assurance on the part of the projectors that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it." *Little Rock, etc. R.R. v. Perry*, 37 Ark. 164, 191 (1881); *aff'd in Perry v. Little Rock, etc. R.R.*, 44 Ark. 383 (1884). See also *Re Empress, etc. Co.*, L. R. 16 Ch. D. 125 (1881), where the agreement of the promoters on behalf of the company, that it would pay the costs and charges of the solicitors, for services and disbursements in perfecting the organization thereof, was dismissed, but without prejudice to any equitable claim on a *quantum meruit*; *Sully's Case*, L. R. 33 Ch. D. 16 (1886), holding that, in the absence of a new



and of subsequent corporate creditors against such a result lies in the rule that the corporation is not bound by the contracts of its promoters.

contract made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract as trustee for the company is not binding on the company, though the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. A provision in the by-laws, which in England are filed, that a certain person shall be the attorney for the company, is not binding on the company. *Eley v. Positive, etc. Co.*, L. R. 1 Exch. D. 20, 88 (1876). See also *Re Skegness, etc. Co.*, L. R. 41 Ch. D. 215 (1888), holding that a parliamentary agent or lobbyist could not hold the company liable. An agreement of promoters with a turnpike company that the proposed railway company will make a certain grade crossing with the former is not binding on the railway company. *Aldred v. North Midland Ry.*, 1 Ry. Cas. 404 (1839). An attorney cannot collect his fees from the corporation for services previous to incorporation, even though the by-laws provided for payment, and the directors in meeting assembled said that he would be paid. *Re Rotherham, etc. Co.*, L. R. 25 Ch. D. 103 (1883). The corporation is not liable for services in obtaining street permits and franchises prior to its incorporation. *Hutchinson v. Surrey, etc. Assoc.*, 11 C. B. 689 (1851). A railway company is not bound by the agreement of its promoters that it will purchase the canal of a canal company if the latter will not oppose the grant of its charter. *Leominster, etc. Co. v. Shrewsbury, etc. Ry.*, 3 K. & J. 654 (1857). A railway company is not bound by the contract of its promoters for it with a town that the company would build certain wharves, etc. "If such secret or unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation." *Caledonian, etc. Ry. v. Magistrates, etc.*, 2 Macq. 391

(1855), questioning *Edwards v. Grand Junction Ry.*, 1 Myl. & C. 650 (1836); *Stanley v. Chester, etc. Ry.*, 1 Ry. Cas. 58; s. c., 9 Sim. 264; aff'd, in 3 Myl. & C. 773 (1838), and *Petre v. Eastern, etc. Ry.*, 1 Ry. Cas. 462 (1838). Where, by the articles of incorporation, the subscribers are not to be bound until a certain amount of the stock is subscribed, the corporation is not liable for the salary of an engineer employed before such full subscription. *Pierce v. Jersey, etc. Co.*, L. R. 5 Exch. 209 (1870). See 61 S. Rep. 839.

A corporation is not liable on the contracts of its promoters to employ plaintiff as a broker, nor does an express ratification of the contract bind it unless a consideration is alleged. *Payne v. New South, etc. Co.*, 10 Exch. 283 (1854). An agreement of promoters that the company shall pay an attorney a certain sum for services is not binding on the company — not even by ratification and agreement between the company and the promoters. *Re Empress, etc. Co.*, L. R. 16 Ch. D. 125 (1880). It has been held that equity will enforce an agreement of the promoters that, if opposition to the grant of its charter is withdrawn, the company will contract to do certain things which the opposition desired to put into the charter. *Edwards v. Grand, etc. Ry.*, 1 Myl. & Cr. 650 (1836), aff'g 7 Sim. 337; questioned in *Caledonian, etc. Ry. v. Helensburg, etc.*, 2 Macq. 391 (1855), and held overruled in *Earl of Shrewsbury v. North, etc. Ry.*, L. R. 1 Eq. 593 (1865). An agreement to pay a large price for land owned by the opposition party is not so enforceable. *Preston v. Liverpool, etc. Ry.*, 5 H. L. Cas. 605 (1856), aff'g 17 Beav. 114; s. c., before amendment of the bill, 1 Sim. (N. S.) 586 (1851). Cf. *Stanley v. Chester, etc. Ry.*, 3 Myl. & C. 773 (1838); and *Eastern, etc. Ry. v. Hawkes*, 5 H. L. Cas. 331 (1855); *Earl of Lindsey v. Great Northern Ry.*, 10 Hare, 664 (1853), in an inferior court. This doctrine is sustained in *Earl of Shrewsbury v. North, etc. Ry.*, L. R. 1 Eq.



The rule is just and should not be weakened.<sup>1</sup> Thus, even though a corporation transfers all its property to another corporation on a contract made prior to incorporation of the latter, yet the latter is not liable unless it accepted the property with knowledge of the contract and upon express or implied undertaking to carry it out.<sup>2</sup> A secret agreement that a subscriber for stock prior to incorporation shall not be required to take the stock is no defense as against the corporation.<sup>3</sup> A license granted to a person with the right to him to assign it to a corporation does not create any contract between the licensor and the corporation, no assignment having been made, even though the corporation has acted upon it.<sup>4</sup>

It is entirely legal, however, for the corporation to ratify, confirm, or adopt the contracts of its promoters. A promoter's contract may be adopted by the corporation in any way in which a contract may be made by the corporation.<sup>5</sup> A corporation may assume an obligation

593 (1865), disapproving *Edwards v. Grand, etc. Ry.*, 1 Myl. & Cr. 650 (1836), and *Petre v. Eastern, etc. Co.*, 1 Ry. Cas. 462 (1838), and is sustained also in *Gooday v. Colchester, etc. Ry.*, 17 Beav. 135 (1852). The articles of association may provide for the payment of promoters' contracts. *Terrell v. Hutton*, 4 H. L. Cas. 1091 (1854). *Cf. Gunn v. London, etc. Ins. Co.*, 12 C. B. (N. S.) 694 (1862). *Contra, Mulhado v. Porto, etc. Ry.*, L. R. 9 C. P. 503 (1874); *Re Empress, etc. Co.*, L. R. 16 Ch. D. 125 (1880). Under a charter provision that the company shall be liable, see *Re Brampton, etc. Ry.*, L. R. 10 Ch. App. 177 (1875), where an attorney was allowed to collect, although he had assured subscribers that they would not be liable; distinguishing *Savin v. Hoyalake Ry.*, L. R. 1 Exch. 9 (1865). Where the articles of incorporation expressly provide for the payment of a specified amount to a person who had contracted with the promoters to sell the company certain facilities for business, the company is liable. *Touche v. Metropolitan, etc. Co.*, L. R. 6 Ch. 671 (1871), rev'g 4 De G., M. & G. 465. A judgment against the company, entered by consent on a claim of a land-owner that the promoters agreed that the company would take his land at a certain price, is binding. *Williams v. St. George, etc. Co.*, 2 De G. & J. 547 (1858).

<sup>1</sup> Quoted and approved in *Park v. Modern, etc. of America*, 181 Ill. 214 (1899).

<sup>2</sup> *Holyoke, etc. Co. v. United States, etc. Co.*, 182 Mass. 171 (1902).

<sup>3</sup> *Greater, etc. Co. v. Riley*, 210 Pa. St. 283 (1904). A corporation is not liable on the agreement of two of its promoters that in case a certain plant was not built within a certain time a subscription would be repaid, even though the promoters were also commissioners to open books and take subscriptions. *Russell v. Broadus, etc. Mills*, 39 S. Rep. 712 (Ala. 1905). See also § 191, *supra*.

<sup>4</sup> *Bagot, etc. Co. v. Clipper, etc. Co.*, [1902] 1 Ch. 146.

<sup>5</sup> *McArthur v. Times Printing Co.*, 48 Minn. 319 (1892), the court holding also that the contract begins only from its adoption, and on that basis the statute of frauds is applicable. A corporation may adopt the contract of its promoters in any way in which it could make such a contract originally, namely, by the express act of its board of directors or by acquiescing in the carrying out of such a contract. *Bond v. Pike*, 101 Minn. 127 (1907). Where the charter authorizes the company to pay liabilities incurred for property before incorporation, such payment may legally be made. *Hawkeye, etc. Co. v. State Bank, etc.*, 157 Fed. Rep. 253 (1907), rev'd on another point in 177 Fed. Rep. 164. Under



made before its organization or may make a new contract with the same parties to the same effect.<sup>1</sup>

A corporation accepting the benefits of the contract of its incorporators must accept the burden, and a promoter's contract which has been ratified or adopted by the corporation, or the benefits of which have been accepted by the corporation with knowledge of such contract, may be enforced against it.<sup>2</sup> Thus a promoter's contract that a

the California statute a person holding the obligation of promoters may hold the company liable therefor if the company has assumed it. *Northrup v. Altadena, etc.*, 6 Cal. App. 101 (1907).

<sup>1</sup> *Wasser v. Western, etc. Co.*, 97 Minn. 460 (1906). Certificates of stock issued in contemplation of incorporation may be accepted and adopted by the corporation after organization and will be good. *Thorpe v. Pennock, etc. Co.*, 99 Minn. 22 (1906). Policies of an insurance company issued before its incorporation but expressly adopted by it are binding on it. *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. Rep. 378 (1911), rev'd on another point in 198 Fed. Rep. 468.

<sup>2</sup> *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333 (1895); s.c., 157 N. Y. 697; *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197, 211 (1892), the court saying: "While it could have refused, when it came into existence, to accept the one or to be bound by the other, it could not accept the advantages and then refuse to assume the obligations." In *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430 (1894), prior to incorporation a written agreement was made in the name of the company with a party who agreed to secure the right of way, hydrant rental, and to place investments, etc. and was to receive pay from the corporation. He was also to abandon a rival water-works scheme and to aid generally. The president and general manager of the corporation after the incorporation acknowledged the debt and contract, and promised payment. The court held that the fact that the president called upon the party for performance constituted ratification. The whole question was for the jury. Although the

promoters have no authority to bind the company by their agreement as to the construction contract, yet where the company receives a benefit from such agreement, and in its records and minutes recognizes it, the company will be liable in damages for letting the contract to others. *Wilson v. King's, etc. R. R.*, 114 N. Y. 487 (1889). A promoter's agreement with a subscriber that a plant will be maintained at a certain location for five years is binding on the company if the company accepts payment of the subscription with knowledge of that condition. *Bobzin v. Gould, etc. Co.*, 140 Iowa, 744 (1908). Where a person selling practically the entire capital stock of an irrigation company makes a contract with the purchaser by which the corporation is to furnish certain water to the seller, and the corporation carries out such a contract for two years, it is bound thereby. *Ulrich v. Pateros, etc. Co.*, 67 Wash. 328 (1912).

"A corporation has power, when fully organized, to ratify a contract made by the promoters when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes." *Stanton v. New York, etc. R. R.*, 59 Conn. 272 (1891). A company by adopting and receiving the benefit of a contract made for it by its promoter is bound thereby. *Chilcott v. Washington, etc. Co.*, 45 Wash. 148 (1906). Even though a promoter by agreement made with a foreign corporation, before the incorporation of a mining company, was to have one share of stock for his services for every ten shares which he obtained subscriptions for, and the company accepted the subscriptions, yet he cannot hold



person having a valuable contract under the old companies should be employed by the new company is binding on the new company unless

it liable for the value of the stock to be received by him as commissions where he merely demanded it by letter and the company offered to deliver it after suit was brought. *Teepie v. Hawkeye, etc. Co.*, 137 Iowa, 206 (1908). The corporation may accept and ratify a contract of its promoters. *Davis v. Montgomery, etc. Co.*, 101 Ala. 127 (1890). Where promoters agree to employ a person, and the company actually does employ him afterwards, the company thereby ratifies the contract. *Pittsburg, etc. Co. v. Quintrell*, 91 Tenn. 693 (1892). Bonds and mortgages executed by corporate officers in pursuance of a resolution made by promoters, previous to incorporation, are valid where the directors ordered the issue of the bonds after their execution. *Wood v. Whelen*, 93 Ill. 153 (1879). A bank, after incorporation, may ratify and become liable on the contract of its promoters to the effect that the bank would give stock and a certain sum of money to a person for his services. *McDonough v. Bank*, 34 Tex. 309 (1870). Where a corporation is organized before its articles are filed and a contract of purchase is made, the contract price is collectible, the company having received the property after incorporation. *Paxton, etc. Co. v. First Nat. Bank*, 21 Neb. 621 (1887). A corporation is liable for machinery which is accepted by it on a contract made by its organizers for it before incorporation. *Whitney v. Wyman*, 101 U. S. 392 (1879). An agreement by corporate organizers that the corporation will pay royalties on a patent is enforceable against the corporation when it has acted on the contract and for a time paid the royalties. *Bommer v. American, etc. Co.*, 81 N. Y. 468 (1880). See also *Lorillard v. Clyde*, 86 N. Y. 384 (1881). A preliminary agreement that a person may turn in property for stock is valid where the corporation has afterwards accepted the property and issued the stock therefor. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439 (1883). A contract

made by the president, as such, after the certificate of incorporation was signed, but before it was filed, binds the corporation where it has adopted the contract by carrying it out. *Grape, etc. Co. v. Small*, 40 Md. 395 (1874). A corporation is not bound by the contracts of its promoters, but it may adopt them after incorporation. Adoption may be in any way in which it might make the contract *de novo*. *Battelle v. Northwestern, etc. Co.*, 37 Minn. 89 (1887), and note. The company may of course employ and be liable to a superintendent whom the promoters agreed should be employed. *Browning v. Great, etc. Co.*, 5 H. & N. 856 (1860). A grant of a license to use a patent made to an individual with the privilege to assign to a contemplated corporation may, as to royalties, be enforced against the corporation when the corporation expressly adopted the contract and acted on it. *Spiller v. Paris, etc. Co.*, L. R. 7 Ch. D. 368 (1878), distinguishing *Melhado v. Porto Alegre, etc. Ry.*, L. R. 9 C. P. 503 (1874), as being a case at law. Money paid by a town after its incorporation to a person for bribing the legislature to grant the charter may be recovered back by a bill in equity. *Frost v. Inhabitants, etc.*, 88 Mass. 152 (1863). Where persons who give their notes in payment for property deed the property to a corporation, the latter is not bound to reimburse them for amounts paid by them on the notes. *Ruby, etc. Co. v. Gurley*, 17 Colo. 199 (1892). The offer of a party to take such stock as may not be taken by the public when offered to the public may be accepted after the public subscriptions are closed. Especially is this the case where the underwriter afterwards practically accepted the stock. *Re Hemp, etc. Co.*, [1896] 2 Ch. 121. Where promoters are entitled to certain stock from the corporation, but such obligation is canceled by mutual agreement, one of them cannot afterwards revive the obligation on the ground that the other promoter, who domi-



renounced and disapproved by its board of directors, especially where the party has been performing the duties for the new company.<sup>1</sup>

nated the corporation, had agreed that it would all be made right. *Dillon v. Commercial Cable Co.*, 87 Hun, 444 (1895). Where a promoter agrees to pay a commission for obtaining a bonus for a corporation, the corporation is liable for the commission if it accepts the bonus with knowledge of the contract. *Weatherford, etc. R. R. v. Granger*, 86 Tex. 350 (1894). Promoters are liable on a contract made before incorporation, but are not liable on the contract if it was made for the company and the company adopts it. *Ennis, etc. Co. v. Burks*, 39 S. W. Rep. 966 (Tex. 1897).

A corporation may be liable on a contract entered into by its promoters where such contract was accepted and carried out by the corporation. *Chicago, etc. Co. v. Talbotton, etc. Co.*, 106 Ga. 84 (1898). A promoter's contract for the benefit of the company is an open offer to be accepted or rejected by the company when organized, and if the company accepts and retains the benefit thereof it is bound by the contract, and hence a corporation which accepts land and mining claims on a director's contract which called for certain payments to them in stock and cash is bound to make such payments, even though no formal action is taken by the board of directors. *Wall v. Niagara, etc. Co.*, 20 Utah, 474 (1899). An agreement between two promoters that certain stock should be assigned to them jointly for the general promotion of the interests of the company, and if not disposed of within three months to be divided between them in a certain way, does not establish a trust in favor of the corporation and does not make the stock treasury stock for the benefit of the corporation. *Brennan v. Vogler*, 174 Mass. 272 (1899). Misrepresentations made to promoters in the purchase of property by them, which property they sell to the corporation, do not give a cause of action

to the corporation against the parties selling to the promoters. *Lebanon, etc. v. Dyckman*, 57 S. W. Rep. 227 (Ky. 1900). A corporation which with knowledge uses machinery purchased for it by its promoters is liable for the price of the same. *Lancaster, etc. Co. v. Murray, etc. Co.*, 19 Tex. Civ. App. 110 (1898). In the case *Mesinger v. Mesinger, etc. Co.*, 44 N. Y. App. Div. 26 (1899), the court held that a promoter's contract that the corporation would employ a person at a certain salary was ratified by the corporation where such promoter became its president and did not as president disavow the contract. It may be for the jury to decide whether the corporation by accepting the benefit of a promoter's contract is bound by it. *McKenzie v. Poorman, etc.*, 88 Fed. Rep. 111 (1898). Where a corporation accepts lumber purchased for it before incorporation it must pay therefor. *Kaeppler v. Redfield, etc. Co.*, 12 S. Dak. 483 (1900). A promoter's contract that the corporation will pay certain back rent for premises to be occupied by it binds the corporation if the corporation has occupied the premises knowing of such agreement. The president's knowledge is notice to the corporation, even though he was the promoter. *Chase v. Redfield, etc. Co.*, 12 S. Dak. 529 (1900). Where one of the organizers of the corporation, who is also its president, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. *Wyeth v. Renz-Bowles, Co.*, 66 S. W. Rep. 835 (Ky. 1902). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies

<sup>1</sup> *Girard v. Case, etc. Co.*, 225 Pa. St. 327 (1909).



Knowledge by the promoters and all the stockholders may be sufficient notice to the corporation itself.<sup>1</sup> Where persons contracting with promoters build a telephone plant and after the company is organized turn its plant over to it, the corporation is liable for the value thereof.<sup>2</sup> The corporation alone is liable where its note is given in fulfillment of a contract entered into in its name, although such contract was prior to its incorporation.<sup>3</sup>

Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it.<sup>4</sup>

A consolidation agreement between individuals, whereby the consolidated company is to assume a lease owned by another company, cannot be enforced by such other company. It is not a party to the agreement.<sup>5</sup> A contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.<sup>6</sup> Where by agreement between

that he is a stockholder and has issued all the stock to other parties who took with notice. It is unnecessary to bring into the suit the other parties who actually have the stock, the stock having been held by the company as collateral security. *Morey v. Fish, etc. Co.*, 108 Wis. 520 (1901). See also § 58, *supra*. If the corporation accepts the benefits of the promoters' contracts in its behalf made before organization it must pay therefor. *Pitts v. Steele, etc. Co.*, 75 Mo. App. 221 (1898). See § 712, *infra*. A deed dated before incorporation, but actually delivered after incorporation, is good. *San Diego, etc. Co. v. Frame*, 137 Cal. 441 (1902). A corporation is not liable for the contracts of its promoters, even though the corporation takes property produced by such contracts, where the contracts did not contemplate corporate liability. *Tryber v. Girard, etc. Co.*, 67 Kan. 489 (1903).

<sup>1</sup> See § 727, *infra*.

<sup>2</sup> *Streator, etc. Co. v. Continental, etc. Co.*, 217 Ill. 577 (1905). Where the promoters purchase an air compressor, payment to be made thereafter, and they become directors of the company which takes over the property and uses the compressor, it

is bound to pay therefor. *Possell v. Smith*, 39 Colo. 127 (1907).

<sup>3</sup> *Case Mfg. Co. v. Soxman*, 138 U. S. 431 (1891); *Shields v. Clifton, etc. Co.*, 94 Tenn. 123 (1894).

<sup>4</sup> *Rathbun v. Snow*, 123 N. Y. 343 (1890).

<sup>5</sup> *Lorillard v. Clyde*, 122 N. Y. 498 (1890). A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence, the corporation cannot refuse to transfer the stock. *Ireland v. Globe, etc. Co.*, 20 R. I. 190 (1897); s. c., 21 R. I. 9 (1898).

<sup>6</sup> *Slide, etc. Mines v. Seymour*, 153 U. S. 509, 520 (1894). A corporation formed to take over a mining claim at a nominal price is bound by a preëxisting contract, which showed that a portion of the mine was owned by another party, the parties to such contract being incorporators and officers of the company. *Carter v. Gray*, 79 Ark. 273 (1906). A deed by one of the promoters to the corporation for stock cannot be set aside on ac-



promoters, patents are transferred to one of them to be transferred by him to a corporation for stock, the stock to be divided in a certain way, and he transfers them to the corporation without receiving the stock, the title vests in the corporation, and it cannot be sued for an infringement on the patents unless such conveyance is first set aside.<sup>1</sup> A contract by promoters to form a corporation to purchase patents and pay therefor in stock is not illegal as depriving the directors of the new corporation of their discretionary power, inasmuch as they may refuse to carry out the agreement. Neither will it be assumed that the price placed upon the patent is excessive.<sup>2</sup> A secret agreement between the promoters by which the corporation is to pay a royalty to one of the promoters is not binding upon the corporation and such agreement at the instance of a stockholder may be set aside by a court of equity.<sup>3</sup>

Not only may a ratified contract be enforced against a corporation, but it may be enforced by such a corporation.<sup>4</sup>

count of other promoters not carrying out their agreement with him. *Miser, etc. Co. v. Moody*, 37 Colo. 310 (1906).

<sup>1</sup> *Harrington v. Atlantic, etc. Co.*, 185 Fed. Rep. 493 (1911), rev'g 143 Fed. Rep. 329.

<sup>2</sup> *Electric, etc. Co. v. Smith*, 113 N. Y. App. Div. 615 (1906).

<sup>3</sup> *Fred. Macey Co. v. Macey*, 143 Mich. 138 (1906).

<sup>4</sup> Where a promoter takes a lease for the benefit of the company and it ratifies his acts, it is entitled to the lease. *Central T. Co. v. Lappe*, 216 Pa. St. 549 (1907). A corporation may hold a promoter liable for not selling its treasury stock in accordance with a contract made by the promoters. *Cummings v. Brown*, 122 N. Y. App. Div. 505 (1907). A corporation itself cannot enforce the agreement of the promoters that a certain amount of the bonds and stock should be donated to the company. *Flanagan v. Lyon*, 54 N. Y. Misc. Rep. 372 (1907). An agreement of landowners with a promoter that they will sell to the contemplated railway a right of way at a specified price may be enforced by the railway. *Bedford, etc. Ry. v. Stanley*, 2 J. & H. 746 (1862). But in Massachusetts the company cannot enforce it where no formal ratification has been made. *Penn Match Co. v. Hapgood*, 141 Mass. 145 (1886). A corporation cannot ratify a contract

made for it before it was incorporated, but it may adopt the contract expressly. See 3 Ry. & Corp., L. J. 482 (English cases). The mortgagor to a corporation cannot set up usury on the ground that the promoters required him to subscribe for stock in order to obtain the loan, *Central, etc. Ins. Co. v. Callaghan*, 41 Barb. 448 (1864). And see many cases in Ch. IV, *supra*, holding that a corporation may enforce subscriptions taken before its incorporation. Where a contract with an individual is fulfilled by a corporation, the latter cannot collect on the contract unless the other party to the contract knew or had reason to know that the corporation was fulfilling, or unless the consideration has been assigned to the corporation. *Holmes, etc. Co. v. United, etc. Co.*, 33 N. Y. App. Div. 62 (1898). Contracts running to promoters do not belong to the corporation unless assigned to it. *Florida, etc. Co. v. Ricker*, 136 Ga. 411 (1911). Contracts between landowners and promoters of a railroad for a right of way do not prevent condemnation by another railroad company. *Toledo, etc. Co. v. Indiana, etc. Ry.*, 171 Ind. 213 (1908). Where promoters agree that one of them shall assign a patent to a corporation for stock to be divided among themselves and the stock is issued, the corporation may compel him to assign the patent.



In Missouri and Massachusetts, however, it is held that a corporation is not bound by its ratification of a promoter's contract,<sup>1</sup> but that a new contract to the same effect must be made by the corporation. In Massachusetts it is held that the mere fact that a corporation takes property which was purchased by one of its promoters prior to incorporation does not render it liable for the price thereof.<sup>2</sup> In England the privy council has held that even though the board of directors adopt and confirm a contract made before incorporation by persons purporting to act for the company, yet this does not create any contractual relation between the company and the other party to the contract, or impose any obligation on the company towards that party.<sup>3</sup> The privy council has also held that even though the promoters in a contract which they make provide that they may assign the contract to a corporation to be formed, yet the company cannot claim the benefits of such contract by adoption or ratification, but the facts may show that a new contract was made on the terms of the old contract.<sup>4</sup>

The corporation is not liable to the promoters for their services and expenses.<sup>5</sup> But a contract by which a person who has promoted the

Federal, etc. Co. v. Loeb, 147 N. Y. App. Div. 737 (1911).

<sup>1</sup> There is no such thing as a "ratification" of a promoter's contract. It is the making of an original contract by the corporation and does not release the promoters. Queen City, etc. Co. v. Crawford, 127 Mo. 356 (1895). "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." Abbott v. Hapgood, 150 Mass. 248 (1889), citing cases.

<sup>2</sup> Koppel v. Massachusetts, etc. Co., 192 Mass. 223 (1906). Where promoters buy property and give their notes for the same and afterwards turn the property over to the corporation on the understanding that the corporation would pay the notes, the corporation cannot after paying the notes, enforce them against the promoters. North Anson Lumber Co. v. Smith, 95 N. E. Rep. 838 (Mass. 1911).

<sup>3</sup> North, etc. Co. v. Higgins, [1899] A. C. 263. In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract

that is made before it comes into existence." Hence, a contract as to the secretary's salary is unenforceable. He can recover only on a *quantum meruit*. Re Dale, 61 L. T. Rep. 206 (1889).

<sup>4</sup> Natal, etc. Co. v. Pauline, etc., [1904] A. C. 120.

<sup>5</sup> Promoters cannot recover on a *quantum meruit* where they have not furnished money as called for by their contract. Fry v. Miles, 71 N. J. L. 293 (1904). Advances made by one of the promoters to the company may be shown to be in performance of his contract with his associates and substantially as payments for his stock, and that the company is not liable to repay the same. Hollins v. American, etc. Co., 66 N. J. Eq. 457 (1905). The agreement of promoters and incorporators that their services shall be paid for by certain stock applies to services before incorporation and to services as directors, but not to special services after incorporation. Wiltbank v. Automatic, etc. Co., 69 N. J. L. 236 (1903). Even though promoters agree that dividends shall be paid before they receive salaries as directors, and such salaries shall be paid only from profits, and even though the cor-



organization of a company is to have a certain percentage of the capital stock and five per cent. of any increase of the capital stock, such contract

poration adopted a resolution to that effect as specified in the agreement, yet a receiver cannot recover back the salaries paid from the capital with the consent of the stockholders. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905). The company is not liable for the incorporation fees paid to the state which the promoters have paid out. *Re National, etc. Co. Ltd.*, [1908] 2 Ch. 515, overruling *Re English, etc. Produce Co.*, [1906] 2 Ch. 435. Where a subscription is canceled for fraud of promoters prior to incorporation, the corporation is not liable for money paid by the party to the promoters in excess of the amount received by the corporation. *American, etc. Co. v. Jenkins*, 138 S. W. Rep. 424 (Tex. 1911). Where promoters agree that they will not charge the corporation anything for their services, they cannot afterwards collect from the corporation. *Powell v. Georgia, etc. Ry.*, 121 Ga. 803 (1905). A promoter cannot have a receiver of the corporation appointed on the ground that the other directors have not dealt with him according to agreement, and that the company has failed to carry out its objects and that the property should be vested in the promoters. *State v. Dearing*, 184 Mo. 647 (1904). In the case *Bank of De Soto v. Reed*, 50 Tex. Civ. App. 102 (1908), it was held that the directors were liable to corporate creditors for using the corporate funds to pay losses in the business before incorporation. Where, prior to the incorporation, property is conveyed to a trustee to be conveyed by him to the corporation, he cannot claim from the corporation compensation for his services, although the promoters agreed that he should have pay. The corporation can compel a conveyance of the property without paying the compensation. *Heala, etc. Min. Co. v. O'Neil*, 19 N. Y. Supp. 592 (1892). A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret com-

mission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. *Smith v. Seattle, etc. Ry.*, 72 Hun, 202 (1893). Where two street railways are consolidated, and the stockholders in one are to receive share for share, and the stockholders in the other company are to receive fourteen shares of consolidated stock for one share of the old stock, the stockholders so turning in their stock for new stock cannot also claim from the consolidated company the amount of money which they expended in buying the stock of one of the constituent companies. *Wilson v. Trenton, etc. R. R.*, 56 N. J. Eq. 783 (1898). A person who, at the request of a minority of the promoters, attends meetings of the promoters, lobbies for the charter, makes a preliminary survey, and pays some expenses, cannot recover from the subsequently incorporated company. The court said that in all the cases to the contrary "the services were either performed after the charter had been obtained, and there was therefore an inchoate corporation, or there was an informal organization preparatory to obtaining a charter, and the employment was authorized by the organization as such, and was not the mere employment by individuals having no authority, express or implied, to contract for any one." *Bell's, etc. R. R. v. Christy*, 79 Pa. St. 54 (1875). For a case where one of the promoters of a consolidation used his stock to bring it about, but failed to hold the consolidated company liable therefor, see *Eldred v. Bell Tel. Co.*, 119 U. S. 513 (1886). The company on winding up is not liable for the promoter's expenses. *Terrell's Case*, 2 Sim. (N. S.) 126 (1851); *Ex parte Lloyd*, 1 Sim. (N. S.) 248 (1851). A promoter cannot recover from the corporation money which he expended before its incorporation in bribing the legislature to grant the charter. *Marchand v. Loan, etc. Assoc.*, 26 La. Ann. 389



being with the corporation itself, is legal and may be enforced as to such increase.<sup>1</sup> A person obtaining a loan for a corporation in accordance with an agreement between him and the promoters may recover from the corporation reasonable pay therefor, not exceeding the amount agreed upon with the promoters.<sup>2</sup> A corporation is liable for the fees and disbursements of the attorney who drew the articles of incorporation and organized it.<sup>3</sup> One promoter is not entitled to compensa-

(1874). The statute may provide that the corporation shall pay the promoters' expense of obtaining the charter. *Hitchins v. Kilkenny Ry.*, 9 C. B. 536 (1850). Where a corporation was not to exist until a certain amount of stock was subscribed, the secretary cannot recover from the corporation any compensation for his services prior to the obtaining of that amount of subscriptions. *Franklin, etc. Ins. Co. v. Hart*, 31 Md. 59 (1869).

<sup>1</sup> *Hix v. Edison El. L. Co.*, 10 N. Y. App. Div. 75 (1896), and 27 N. Y. App. Div. 248; *aff'd*, 163 N. Y. 573. A corporation may legally agree to pay to a person a commission of ten per cent. in stock on all subscriptions to stock which he obtains. *Zabel v. New State, etc. Co.*, 127 Mich. 402 (1901). A corporation may give a note in payment, for services rendered in incorporating the company even though such note is given to the president, who is also a director. *Smith v. New Hartford Waterworks*, 73 Conn. 626 (1901). Expenses and debts incurred by the promoters for and in behalf of a corporation may be collected from the corporation after it is organized, if the corporation assumes such debts. *Schreyer v. Turner Flouring Co.*, 29 Oreg. 1 (1896). Compare *Weatherford, etc. Ry. v. Granger*, 86 Tex. 350 (1894). Where a promoter contracts to obtain subscriptions and take his pay in stock, and the company, when organized, adopts the contract, and he obtains the subscription, but the company is unable to get legislative authority to cross a river, and so abandons the enterprise, he may collect damages. *Stanton v. New York, etc. R. R.*, 59 Conn. 272 (1891). A corporation is liable for the expenses of its promoters in procuring a subscription, where, after its organ-

ization, it accepts the subscription with the knowledge of such expenses. *Weatherford, etc. R. R. v. Granger*, 22 S. W. Rep. 70 (Tex. 1893). In *Low v. Connecticut, etc. R. R.*, 45 N. H. 370 (1864); *s. c.*, 46 N. H. 284, a suit at law by a promoter against the company for services rendered in procuring subscriptions was sustained on the ground that "a corporation is liable at law upon an implied assumption, for services rendered before it came *in esse*, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed." *Affirmed*, 46 N. H. 284 (1865). To same effect, *Hall v. Vermont, etc. Co.*, 28 Vt. 401 (1856). Where work has been carried on by the president for his company, he is allowed in his accounting credit for work done, materials furnished, and money advanced before as well as after the full incorporation. *Grand River Bridge Co. v. Rollins*, 13 Colo. 4 (1889). A promoter cannot enjoin the corporation from increasing its stock, even though he claims that such increase will defeat a contract made prior to incorporation, by which he was to have a one sixth interest, the corporation not having ratified such contract. *Martin v. Remington, etc. Co.*, 95 N. Y. App. Div. 18 (1904).

<sup>2</sup> *Maryland, etc. Co. v. Glenn*, 108 Md. 377 (1908).

<sup>3</sup> *Freeman, etc. Co. v. Osborn*, 14 Colo. App. 488 (1900). An attorney may recover from the corporation his fees for incorporating the company. *Taussig v. St. Louis, etc. Ry.*, 166 Mo. 28 (1901). In the case *Merchants', etc. Bank v. Eckels*, 191 Pa. St. 372 (1899), where a lawyer sued a corporation for his services in organizing the same, the court held that it was



tion for services as against the other, unless there was an agreement to that effect.<sup>1</sup>

The question whether a person who has contracted with a corporation as an existing corporation may repudiate his contract on the ground that it was never incorporated is discussed elsewhere.<sup>2</sup>

§ 708. *Acts which must be authorized by stockholders' meetings instead of by directors' meetings* — *Stockholders make the by-laws.* — The functions of stockholders are exceedingly limited. The theory of a corporation is that stockholders shall have all the profits, but shall turn over the complete management of the enterprise to their representatives and agents, called directors. Accordingly there is little for the stockholders to do beyond electing directors, making by-laws, increasing or decreasing the capital stock, authorizing amendments to the charter, and dissolving the corporation.<sup>3</sup> A board of directors has no power to postpone a stockholders' meeting by sending out notices to that effect.<sup>4</sup> Of the functions of the stockholders the most important, perhaps, is that of making by-laws. The law is clear that stockholders in meeting assembled have the power to make the by-laws of the corporation.<sup>5</sup> Where a statute provides for by-laws being adopted by directors this may take the power away from the stockholders.<sup>6</sup> A company cannot contract not to alter a by-law which provides that a certain vendor of property to the corporation shall be governing director and shall have the power to appoint other directors and to remove them at any time, even though such contract is contained in the by-laws themselves.<sup>7</sup> Where the statute authorizes the stockholders to change the number of directors by a vote of a majority in interest, a by-law requiring ninety

a case for the jury. A promoter who obtains all the subscriptions, lets the contracts, superintends the construction of the building, and draws the articles of incorporation, is entitled to pay from the corporation after it is formed, and in this case was allowed \$350. *Farmers' Bank, etc. v. Smith*, 49 S. W. Rep. 810 (Ky. 1899). A corporation is not liable for a lawyer's services in drawing the charter, by-laws, etc., even though one of the promoters agreed that the corporation would pay therefor. *Jones v. Smith*, 87 S. W. Rep. 210 (Tex. 1905). A company is not liable for the fees of the attorney who organized it. *Re English, etc. Co., Ltd.*, [1906] 2 Ch. 435; *aff'd*, 95 L. T. Rep. 580. A lawyer may recover for his services to a corporation, even though he is president

and a director thereof. *Kenner v. Whitelock*, 152 Ind. 635 (1899). See also 657, *supra*.

<sup>1</sup> *Baily v. Burgess*, 48 N. J. Eq. 411 (1891).

<sup>2</sup> See § 637, *supra*.

<sup>3</sup> See *Eidman v. Bowman*, 58 Ill. 444 (1871); *Metropolitan, etc. Ry. v. Manhattan, etc. Ry.*, 11 Daly (N. Y.), 377 (1884). As to increasing or reducing the capital stock, see § 285, *supra*; amending charter, ch. XXVIII, *supra*; dissolution, ch. XXXVIII, *supra*.

<sup>4</sup> *Paringa Mines, Ltd. v. Blair*, [1906] 2 Ch. 193.

<sup>5</sup> For a full discussion of the subject of by-laws, see § 4a, *supra*.

<sup>6</sup> *Manufacturers', etc. Co. v. Landay*, 219 Ill. 168 (1905).

<sup>7</sup> *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506.



per cent. in interest is illegal.<sup>1</sup> But a statute that the number of directors may be increased by a vote of a majority in interest of the stock does not render illegal a provision in the certificate of incorporation that the directors shall not be increased except upon the unanimous vote, the statute allowing the insertion of special provisions in the certificate of incorporation. The court held that the provision was a limitation instead of an increase of power.<sup>2</sup> Even though an agreement for organizing a company to take over the property of several companies, provides for twelve directors, this does not prevent the corporation reducing the number of directors as allowed by statute, especially where the corporation has not ratified the agreement. Moreover a stockholder's injunction against the reduction is not sufficient if it is against the corporation only.<sup>3</sup> The stockholders by their by-laws may vary the number of directors, even though by statute the number of the first directors must be stated in their certificate of incorporation.<sup>4</sup> The stockholders have the power to accept resignations of directors and fill vacancies in the board.<sup>5</sup> The stockholders and not the directors in a national bank are to decide whether the stock shall be assessed in order to restore the impaired capital stock.<sup>6</sup> Stockholders are not liable for corporate debts,<sup>7</sup> nor for their votes in authorizing corporate action,<sup>8</sup> nor for their communications with each other,<sup>9</sup>

<sup>1</sup> *Katz v. The H. & H., etc. Co.*, 183 N. Y. 578 (1905).

<sup>2</sup> *Ripin v. Atlantic Mercantile Co.*, 205 N. Y. 442 (1912).

<sup>3</sup> *Bond v. Atlantic, etc. Co.*, 137 N. Y. App. Div. 671 (1910). In the case *People v. Powell*, 201 N. Y. 194 (1911), the charter had been amended so as to authorize the directors and stockholders by a two thirds vote to remove a director from office but the decision turned on whether a *mandamus* was the proper remedy for the claimant.

<sup>4</sup> *Renn v. United States, etc. Co.*, 36 Ind. App. 149 (1905).

<sup>5</sup> See §§ 603, 624, *supra*.

<sup>6</sup> *Commercial, etc. Bank v. Weinhard*, 192 U. S. 243 (1904), the court saying: "It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corporation. . . . The origin and continuation of the association would seem to be matters in which the owners and not the managers of the bank are primarily interested. Action upon the comptroller's order involves extraordinary

action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards and not conferred by statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act."

<sup>7</sup> See § 241, *supra*.

<sup>8</sup> See § 243, *supra*.

<sup>9</sup> A stockholder in telegraphing to another stockholder, in regard to a contested corporate election, is not liable for libel, even though he reflects on the competency of the former manager. Both parties being interested in the communication, it is



neither are they bound personally by decrees against the corporation.<sup>1</sup>

§ 709. *Stockholders cannot carry on the business or enter into contracts for the corporation — These are the functions of the directors — One person owning all the stock — “Dummy” corporations.* — The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and the formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf.<sup>2</sup> The ratification by the stockholders of

privileged, where it is in good faith. *Ashcroft v. Hammond*, 197 N. Y. 488 (1910).

<sup>1</sup> A stockholder, even though he owns a majority of the stock, is not bound individually as a party or privy by a decree in a suit against the corporation where he has not intervened or controlled the defense to the suit nor made a separate defense. *Victor, etc. Co. v. American, etc. Co.*, 189 Fed. Rep. 359 (1911); s. c., 190 Fed. Rep. 1023. See also § 11, *supra*, and § 727, *infra*.

<sup>2</sup> Quoted and approved in *Sellers v. Greer*, 172 Ill. 549 (1898), rev'g *Greer v. Sellers*, 64 Ill. App. 505, and holding that the court will not grant specific performance of a contract of one of the stockholders to sell all the property of the corporation to another stockholder, even though these two stockholders owned nine hundred and ninety-eight shares of the one thousand shares of the capital stock, and even though the holders of the remaining two shares of stock were merely nominal holders thereof. Also quoted and approved in *Manufacturers', etc. Co. v. Landay*, 219 Ill. 168 (1905). “The stockholders of a corporation, as such, have no direct power of management, and even by united action they can neither bind nor loose the company by making contracts or controlling investments.” *Lord v. Equitable, etc. Soc.*, 194 N. Y. 212, 228 (1909). “When a charter invests a board with the power to

manage the concerns of a corporation the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment. The stockholders as such in their collective capacity could do no corporate act. The directors were their representatives and alone authorized to act.” *McCullough v. Moss*, 5 Denio, 567, 575 (1846). Not even in a meeting assembled can the stockholders make a contract binding on the corporation. *Denver, etc. Co. v. Elkins*, 179 Fed. Rep. 922 (1909). The stockholders do not make the contracts. *Solomon Co. v. Barber*, 58 Kan. 419 (1897). Stockholders cannot make contracts for a corporation, except, possibly, in meetings at which every stockholder is present. *Colorado, etc. Co. v. American, etc. Co.*, 97 Fed. Rep. 843 (1899). Where a corporation is authorized to issue preferred stock it may attach such conditions thereto as it deems best. One of the conditions may be that the corporation may retire the stock at par within a certain time. In retiring such preferred stock the corporation may issue additional common stock to the holders of the old common stock without giving any rights to the holders of preferred stock. Such stock may be retired by a vote of the directors without a vote of the stockholders. *Hackett v. Northern, etc. R. R.*, 36 N. Y. Misc. Rep. 583 (1901). In



an invalid mortgage made by the directors does not validate such mortgage.<sup>1</sup> The stockholders have no power to elect the president. Their action is a nullity.<sup>2</sup> Stockholders cannot elect a committee and compel the directors to act with that committee in corporate matters.<sup>3</sup> It is not for the stockholders to direct how money received on the issue of new stock shall be used.<sup>4</sup> A resolution of the stockholders fixing the rates of mileage to be paid to the directors is not binding on the directors, although if enacted into a by-law it would be binding.<sup>5</sup> A committee appointed by the stockholders to arrange to meet the obligations of the company has no power to make contracts.<sup>6</sup> An assignment for the benefit of creditors is authorized by the directors, and not the stockholders.<sup>7</sup> The stockholders have no power to sell the property of the corporation, either separately or collectively.<sup>8</sup> It is legal for the directors

*Conro v. Port Henry, etc. Co.*, 12 Barb. 27 (1851), a lease of iron works was declared void because it was the act of the stockholders and not of the directors. In *McCullough v. Moss*, 5 Denio, 567 (1846), a promissory note signed by the president and secretary of the corporation was held invalid because authorized only by the stockholders and not by the directors; *Dana v. Bank of United States*, 5 Watts & S. (Pa.) 223, 245 (1843); *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565 (1875); *aff'd*, 96 U. S. 640, holding that it is for the directors and not the stockholders to repudiate corporate contracts made by an authorized agent; *Gashwiler v. Willis*, 33 Cal. 11 (1867), holding that the stockholders have no power to authorize a sale of corporate property. Such authority must come from the directors. The stockholders do not authorize contracts. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). Where a guaranty authorized by statute is to be by the company, it may be by the directors without any action of the stockholders. *Louisville Trust Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896). The stockholders have no power to authorize a mortgage. Only the board of directors can do so. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). See also § 808, *infra*. A contract made by the executive officers and ratified by a stockholders' meeting is binding

without action by the directors, where the directors as stockholders voted for the same. *Kirwin v. Washington, etc. Co.*, 37 Wash. 285 (1905).

<sup>1</sup> *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). Resolutions passed at which a legal quorum of the directors is not present cannot be validated by action of the stockholders. *Bassett v. Fairchild*, 132 Cal. 637 (1901).

<sup>2</sup> *Walsenberg Water Co. v. Moore*, 5 Colo. App. 144 (1894).

<sup>3</sup> *Charlestown, etc. Co. v. Dunsmore*, 60 N. H. 85 (1880).

<sup>4</sup> *Jones v. Concord, etc. R. R.*, 67 N. H. 119 (1891); *s. c.*, 67 N. H. 234.

<sup>5</sup> *Mutual F. Ins. Co. v. Farquhar*, 86 Md. 668 (1898). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to an assignment for the benefit of creditors. *Goetz v. Knie*, 103 Wis. 366 (1899).

<sup>6</sup> *Augsburg Land, etc. Co. v. Pepper*, 95 Va. 92 (1897).

<sup>7</sup> *Rogers v. Pell*, 154 N. Y. 518 (1898).

<sup>8</sup> *Rough v. Breitung*, 117 Mich. 48 (1898). An assignment of all the company's property would not be within the power of the stockholders, even though all signed it, without formal action at a meeting held for that purpose. *De La Vergne, etc. Co. v. German, etc. Inst.*, 175 U. S. 40 (1899), citing the above section.



in selling property of the company to make it a condition of the sale that the stockholders shall ratify it.<sup>1</sup> Even though the stockholders in meeting assembled pass a resolution that the entire assets shall be sold to another company, the board of directors need not carry out such resolution, the management and control of the business being in their hands.<sup>2</sup> In England, on the other hand, it is held that a majority of the shareholders in meeting assembled may control the discretion of the directors, except as restrained by the charter, and hence the court will refuse to stay a suit instituted by one of the directors in the name of the company where it appeared that a majority of the shareholders favored such suit.<sup>3</sup>

The law seems to be clear that all corporate contracts are to be made by the directors. This includes the original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders nor follow their wishes, even though the latter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts. Thus, a lease of the corporate property is authorized, not by the stockholders, but by the directors.<sup>4</sup> Even

<sup>1</sup> *Kelsey v. New England, etc. Ry.*, 60 N. J. Eq. 230 (1900); s. c., 62 N. J. Eq. 742.

<sup>2</sup> *Automatic, etc. Co. v. Cunningham*, [1906] 2 Ch. 34.

<sup>3</sup> *Marshall's, etc. Co. v. Manning, etc. Co.*, [1909] 2 K. B. 89. Where, however, the act is in violation of the charter it is not legal. *Salmon v. Quin and Axtens, Ltd.*, [1909] 1 Ch. 311; aff'd, [1909] A. C. 442, the court intimating that the by-laws originally adopted, in accordance with the English statute, really constitute a contract between the shareholders and the company and also between each individual shareholder and every other shareholder. The court approved, however, the decision in *Automatic, etc. Co. v. Cunningham*, [1906] 2 Ch. 34, holding that "even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their princi-

pals. They are persons who may by the regulations be intrusted with the control of the business, and if so intrusted they can be dispossessed from that control only by the statutory majority, which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals."

<sup>4</sup> Quoted and approved in *Mosher v. Sinnott*, 20 Colo. App. 454 (1905). *Beveridge v. New York Elev. Ry.*, 112 N. Y. 1 (1889); *Flagg v. Manhattan, etc. Ry.*, 20 Blatchf. 142 (1881); *People v. Metropolitan Ry.*, 26 Hun, 82 (1881); *Nashua, etc. R. R. v. Boston, etc. R. R.*, 27 Fed. Rep. 821 (1886). *Contra*, *Metropolitan Ry. v. Manhattan Ry.*, 15 Am. & Eng. Ry. Cas. 1 (1884). Cf. *Harkness v. Manhattan Ry.*, 54 N. Y. Super. Ct. 174 (1886); *Cass v. Manchester, etc. Co.*, 9 Fed. Rep. 649 (1881); also § 712, *infra*. In the case *People v. Powell*, 201 N. Y. 194 (1911), the court said of the directors (pp. 200, 201): "They hold such office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable



though the holders of a majority of the stock are opposed to the board of directors, yet the former cannot obtain an injunction against the board of directors selling treasury stock.<sup>1</sup> Although a statute authorizing one railroad corporation to guarantee the bonds of another corpora-

exercise and performance of such duty. As a general rule the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office." In *Continental Securities Co. v. Belmont*, 206 N. Y. 7 (1912), the court said (p. 16): "The directors are not ordinary agents in the immediate control of the stockholders. The directors hold their office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. The corporation is the owner of the property, but the directors in the performance of their duty possess it and act in every way as if they owned it. (*People ex Rel. Manice v. Powell*, 210 N. Y. 194.) . . . As a general rule stockholders cannot act in relation to the ordinary business of a corporation. The body of stockholders have certain authority conferred by statute which must be exercised to enable the corporation to act in specific cases, but except for certain authority conferred by statute, which is mainly permissive or confirmatory, such as consenting to the mortgage, lease or sale of real property of the corporation, they have no express power given by statute. They are not by any statute in this state given general power of initiative in corporate affairs. Any action by them relating to the details of the corporate business is necessarily in the form of an assent, request or recommendation. Recommendations by a body of stockholders can only be enforced through the board of directors, and indirectly by the authority of the stockholders to change the personnel of the directors at a meeting for the election of directors. Such action may or may not result in securing adequate corporate action with reference to illegal or fraudulent

acts. For reasons wholly apart from the matter in dispute the stockholders may not desire to change a majority of the persons comprising its board of directors." The directors of an express company may modify an exclusive contract with a railroad without consulting the stockholders. *Trendley v. Illinois Traction Co.*, 241 Mo. 73 (1912). Where a corporation is given power to lease its property without the mode of making the lease being prescribed, it may be by a vote of the majority of the stockholders. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902); *aff'd*, 119 id. 871. A statute requiring leases by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. *Coal, etc. Co. v. Tennessee, etc. Co.*, 106 Tenn. 651 (1901). Directors are never obliged to consult the stockholders in meeting assembled, nor as a majority, as regards corporate contracts. The stockholders cannot, by suit in equity, compel the directors to enter into a contract of lease. *Ives v. Smith*, 8 N. Y. Supp. 46 (1889). Stockholders cannot control the direction of the directors when the latter direct an assignment to be made for the benefit of creditors. So held though the directors were to go out of office in four days. *Hutchinson v. Green*, 91 Mo. 367 (1886). An extension of a railway cannot be enjoined merely because a majority of stockholders oppose it. *Ultra vires* must be alleged. *Moses v. Tompkins*, 84 Ala. 613 (1888).

<sup>1</sup> *Gillette v. Noyes*, 92 N. Y. App. Div. 313 (1904).



tion provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, although a purchaser with notice cannot enforce it.<sup>1</sup> However, if the contract is beyond the express and implied powers of the corporation, then any stockholder may have the contract enjoined or set aside. He can do so even though a majority of the stockholders approve the act and ratify it in meeting assembled. He may resort to the courts.<sup>2</sup> A general resolution at a stockholders' meeting approving all acts of the directors and officers, such acts not being specified nor the minutes thereof read to the meeting, is not a ratification of the same.<sup>3</sup>

A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption by the corporation in the regular manner.<sup>4</sup> A stockholder may of course be appointed the agent of the corporation.<sup>5</sup>

<sup>1</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

<sup>2</sup> See ch. XL, *supra*, and ch. XLIV, *infra*. As regards the relation and rights of stockholders towards suits and compromises of suits by or against the corporation, see § 750, *infra*.

<sup>3</sup> *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). See also ch. XLIV, *infra*. A stockholder has no power to contract for the corporation. *Collins v. Leary*, 74 Atl. Rep. 42 (N. J. 1909).

<sup>4</sup> *Morelock v. Westminster Water Co.*, 4 Atl. Rep. 404 (Md. 1886); *Mays v. Foster*, 13 Oreg. 214 (1886); *Rice*

*v. Peninsular Club*, 52 Mich. 87 (1883); *Berford v. New York Iron Mine*, 4 N. Y. Supp. 836 (1888). See also § 625, *supra*. A stockholder cannot bind the corporation. *National, etc. Co. v. Chicago Ry., etc.*, 226 Ill. 28 (1907). A stockholder has no power to contract for the corporation. *Lawson v. Black, etc. Co.*, 44 Wash. 26 (1906). A stockholder has no authority to employ an attorney for the company. *Tabor v. Bank of Leadville*, 35 Col. 1 (1905). The misrepresentations of a stockholder inducing a person to purchase stock of the corporation are not binding on the corporation. *Burnes v. Pennell*, 2 H. L. Cas. 497, 519 (1849). The circumstances that a person is a member of an incorporated company gives him no authority to release a debt due to the corporation. *Harris v. Muskingum, etc. Co.*, 4 Blackf. (Ind.) 267 (1836). A stockholder cannot bind the corporation. *Jones v. Williams,*

<sup>5</sup> *Stoddard v. Port Tobacco Parish*, 2 Gill & J. (Md.) 227 (1830), where a religious corporation employed a member of its vestry to make sale of pews; *Spear v. Ladd*, 11 Mass. 94 (1814), where the president of a

bank was appointed its agent to indorse a note; *Northampton Bank v. Pepoon*, 11 Mass. 288 (1814); *Bank Commissioners v. Bank of Brest, Harr. Ch. (Mich.)* 106 (1840).



A company is not liable on the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation.<sup>1</sup> A deed of corporate property by a person who owns all the stock does not convey good title.<sup>2</sup> Although one person owns a majority of the stock,<sup>3</sup>

139 Mo. 1 (1897). Where all the individuals composing a corporation covenanted in behalf of such corporation for themselves and their heirs that the corporation should do certain acts, they were held to be bound personally. *Tileston v. Newell*, 13 Mass. 406 (1816). In a suit to recover damages of a corporation for flooding the plaintiff's land, it was held error to ask a witness whether individual members of the company had employed him to deprive the plaintiffs of their claim. *Shay v. Tuolumne, etc. Co.*, 6 Cal. 74 (1856). Where the plaintiff claims the amount of his disbursements for work on the defendant corporation's road, but the evidence does not prove a request to the plaintiff by the corporation, its directors, or authorized agent, or any stipulation, expressed or implied, to authorize a charge against the corporation for such disbursements, no act of an individual member can be held to bind the corporation. *Hayden v. Middlesex, etc. Corp.*, 10 Mass. 397 (1813). The intention of a corporation can only be learned by the language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation are for this purpose to be inquired after. Thus, a plaintiff resisting a tax may not establish its legality by evidence as to the intent of those voting the levy. *Bartlett v. Kingsley*, 15 Conn. 327 (1843). Stockholders' contracts do not bind the corporation. *American Preservers' Co. v. Norris*, 43 Fed. Rep. 711 (1890); *Wright v. Lee*, 2 S. Dak. 596 (1892); s. c., 4 S. Dak. 237. Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. *Grand Rapids, etc.*

*Co. v. Cincinnati, etc. Co.*, 45 Fed. Rep. 671 (1891).

<sup>1</sup> *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893).

<sup>2</sup> *Parker v. Bethel Hotel Co.*, 96 Tenn. 252 (1896). In this case some of the stock had been pledged. The stockholders, as such, cannot convey the real estate of the corporation, though they all join in the deed, unless the execution is in pursuance of some vote of the corporation. *Isham v. Bennington Iron Co.*, 19 Vt. 230 (1847); *Wheelock v. Moulton, etc.*, 15 Vt. 519 (1843). Even though a person owns all but two shares of the capital stock, yet a transfer of corporate property by him is ineffective to convey title. *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). Even though the president and a director own all the stock, yet they cannot execute a mortgage in behalf of the corporation where there are four other directors, who are nominal stockholders. *Union, etc. Bank v. State, etc. Bank*, 155 Mo. 95 (1900).

<sup>3</sup> *Hopkins v. Roseclaire Lead Co.*, 72 Ill. 373 (1874). He cannot sell the corporate property. The person owning a majority of the stock cannot contract for the corporation, and a contract in its name made by him is not binding on it. *Allemon v. Simmons*, 124 Ind. 199 (1890). Where a construction contract is signed by an individual in his own name, the corporation is not liable on it, although he owned nearly all the stock and the work was for its benefit. *Donoghue v. Indiana, etc. Ry.*, 87 Mich. 13 (1891). Where, however, a part of the stockholders contract to sell the corporate property to a third person, they are liable in damages for breach of the contract. *Curtis v. Watson*, 64 Vt. 536 (1892). A sale of all the corporate assets by the owner of sixty per cent. of the stock is not bind-



or all of it,<sup>1</sup> or all but two shares,<sup>2</sup> he does not in consequence thereof acquire the right to act for the corporation, or as the corporation,

ing on him because he has no power to make such a sale. *Bias v. Atkinson*, 64 W. Va. 486 (1909). A stockholder cannot bind the company as its agent, even though he is the principal stockholder. *McCloskey v. Goldman*, 62 N. Y. Misc. Rep. 462 (1909). A majority stockholder has no power to waive or release a corporate claim as against corporate creditors. *Pennsylvania Steel Co. v. New York City Ry.*, 194 Fed. Rep. 543 (1912); modified in 198 Fed. Rep. 756. The contract of a controlling stockholder in his own name is not binding on the corporation. *Reed v. Inhabitants, etc.*, 85 Atl. Rep. 270 (N. J. 1912).

<sup>1</sup> "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incur nor transfer that property, nor authorize others to do so. The corporation (the artificial being created) holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." *Humphreys v. McKissock*, 140 U. S. 304 (1891). On this subject, see §§ 663, 664, *supra*. A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person. *Re Goetz's Estate*, 85 Atl. Rep. 65 (Pa. 1912). Even though there are but three stockholders in a coal mining company which is suing a railroad for damages for discrimination, and they sell their stock under an agreement by which they are to have the results of the suit and are to control it, this is no defense to the suit itself. *Puritan, etc. Co. v. Pennsylvania R. R.*, 85 Atl. Rep. 426 (Pa. 1912). A railroad company owning all the stock and bonds of another company does

not own the property of the latter, and cannot sue on a cause of action belonging to the latter. *Fitzgerald v. Missouri Pac. Ry.*, 45 Fed. Rep. 812 (1891). Stockholders who transfer the corporate property are jointly and severally liable to corporate creditors. *Graham v. Hoy*, 38 N. Y. Super. Ct. 506 (1875). The fact that the manager of a corporation and his brothers own all the capital stock does not make their acts the acts of the corporation. *Bank of Monroe v. Gifford*, 72 Iowa, 750 (1887). Stockholders owning all the stock and bonds of a road cannot destroy the same and then sell the road to another company. *Gulf, etc. Ry. v. Morris*, 67 Tex. 692 (1887). See also *Button v. Hoffman*, 61 Wis. 20 (1884), where it is held that such a stockholder is not the corporation. *Contra*, *Swift v. Smith*, 65 Md. 428 (1886). A railroad company owning practically all of the stock of another company may lease the line of the latter company to another company. *Chicago, etc. Ry. v. Union Pac. Ry.*, 47 Fed. Rep. 15 (1891). A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation, and the bridge itself leased to the latter. *St. Louis, etc. Ry. v. Williams*, 53 Ark. 58 (1890). Where a corporation or person owns all the stock and bonds of another corporation, and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892). The sole owner of the entire capital stock cannot collect a corporate debt by a suit in his own name. *Randall v. Dudley*, 111 Mich. 437 (1897). The corporate entity is distinct, although one party

<sup>2</sup> *England v. Dearborn*, 141 Mass. 590 (1886), holding that such a stockholder cannot mortgage the corporate property.



independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue.<sup>1</sup> Although one water-works company owns all the stock

owns the whole stock. *Exchange Bank v. Macon Constr. Co.*, 97 Ga. 1 (1895). The fact that one person owns all the stock does not dissolve the corporation. *Harrington v. Connor*, 51 Neb. 214 (1897). See also § 631, *supra*. Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate — a brewery — and the real transaction is a sale of the entire property. *Megibben v. Perin*, 49 Fed. Rep. 183 (1892); *rev'd* on another point in *Perin v. Megibben*, 53 Fed. Rep. 86 (1892). The president of a corporation cannot render it liable on a contract which he has with another person, even though he assigns the contract to the corporation, and as president accepts the assignment in its name, and even though he owns practically all the stock of the corporation. *Woodruff v. Shimer*, 174 Fed. Rep. 584 (1909). A broker employed to sell the property of a corporation may collect his commission if the purchaser buys all the stock of that corporation. *Benedict v. Dakin*, 243 Ill. 384 (1910). Even though two individuals buy all the stock of a company and agree to operate it as a part of their copartnership business, with dummy directors, and then they disagree, this does not entitle them to ignore the corporate existence and place the corporate property in the hands of a court of equity as a part of the copartnership assets. *Jackson v. Hooper*, 76 N. J. Eq. 592 (1910); *rev'g*, 76 N. J. Eq. 185. Where an owner of land knows of a flaw in the title and he turns it over to a corporation for stock, the corporation is not a *bona fide* purchaser, even though subsequently *bona fide* stockholders subscribe to or purchase their stock in good faith and in ignorance of the defect. *Wilson Coal Co. v. United States*, 188 Fed. Rep. 545 (1911).

<sup>1</sup> *Newton Mfg. Co. v. White*, 42 Ga. 148 (1871). See also *Sharp v. Dawes*, 2 Q. B. D. 26 (1876); *Button v. Hoff-*

*man*, 61 Wis. 20 (1884); *Swift v. Smith*, 65 Md. 428 (1886); *England v. Dearborn*, 141 Mass. 590 (1886); *Hopkins v. Roseclaire Lead Co.*, 72 Ill. 383 (1874); *Bellona Co.'s Case*, 3 Bland (Md.), 442, 446 (1831); *Farmers', etc. T. Co. v. Chicago, etc. Ry.*, 39 Fed. Rep. 143 (1889); *rev'd* on another point in 151 U. S. 1. The rule is the same where two persons buy all the stock. *Russell v. McLellan*, 31 Mass. 63 (1833). The corporation still subsists, and the two purchasers do not become partners, or joint tenants, or tenants in common of the corporate property. *Cf. Commonwealth v. Cullen*, 13 Pa. St. 133 (1850). Although one person owns all or nearly all the stock he cannot act as though he was the corporation. *Chase v. Michigan, etc. Co.*, 121 Mich. 631 (1899). Service on the owner of the entire capital stock may stop the running of the statute of limitations. *Linn, etc. Co. v. United States*, 196 Fed. Rep. 593 (1912). The employment of a person as general manager is not proved by proving that the person who owned all the stock of the corporation so employed him. *Hammond v. Hammond, etc. Co.*, 72 Conn. 130 (1899). Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. *Saranac, etc. Co. R. R. v. Arnold*, 167 N. Y. 368 (1901). For an interesting discussion of the question as to why an artificial existence of the corporation, as distinguished from that of stockholders, should be ignored, see *Cincinnati, etc. Co. v. Hoffmeister*, 62 Ohio St. 189 (1900); and *Andres v. Morgan*, 62 Ohio St. 236 (1900). In the case *First National Bank, etc. v. Winchester*, 119 Ala. 168



of another water-works company, a mortgage given by the former company on all its property does not cover the property of the latter company as against *bona fide* purchasers of bonds of the latter company.<sup>1</sup>

(1898), where a private corporation had but four stockholders, and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation and secured by mortgage on the corporate property, the court held that the notes were not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving *Swift v. Smith*, 65 Md. 428 (1886). A state cannot have a bridge company's franchise forfeited on the ground that the city owns the entire stock and charges no tolls and manages the property as its own. *Commonwealth v. Monongahela*, etc. Co., 216 Pa. St. 108 (1906). It is legal for a corporation to purchase property from a woman who owns the majority of the stock, even though she is the wife of the manager. *Figge v. Bergenthal*, 130 Wis. 594 (1906). A city tax applies to the property of a water-works company, even though the entire capital stock of the company is owned by the city itself. *City of Louisville v. McAteer*, 81 S. W. Rep. 698 (Ky. 1904). Even though an English corporation owns nearly all the stock of an American corporation, yet the income of the latter is not subject to the income tax of England. *Kodak Limited v. Clark*, [1903] 1 K. B. 505. A railroad company which acquires all the stock of another railroad company and then files a certificate with the secretary of state under the New York statute, which prescribes that thereupon the former succeeds to the property of the latter, is practically dissolved. *Rochester Railway v. Rochester*, 205 U. S. 236 (1907), aff'g 182 N. Y. 116. The owner of the entire capital stock does not in any legal sense own the property of the company. *Coal, etc. Ry. v. Peabody Coal Co.*, 230 Ill. 164 (1907). A creditor of the stockholders who own practically the entire capital stock cannot attach the property of the corporation for their debt, even though he alleges that the corporation intends to dispose of its assets to defraud creditors. *Schoeneman v. Sowle*, 102 Minn. 466 (1907). Ownership of all the stock by one person does not dissolve the corporation. *Louisville, etc. Co. v. Kaufman*, 105 Ky. 131 (1898). Even though one man owns a majority of the stock of two corporations, and they have dealings with each other, yet upon the insolvency of the one a claim of the other is to be allowed the same as the debt of any other creditor. *Lange v. Burke*, 69 Ark. 85 (1901). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. *East St. Louis, etc. Ry. v. Jarvis*, 92 Fed. Rep. 735 (1899). In a suit by a corporation to obtain property, in accordance with a contract, a trustee who is holding all the stock for the benefit of the stockholders is not a proper party. *Havana, etc. Ry. v. Ceballos*, 49 N. Y. App. Div. 263 (1900). Even though one person owns all the stock except two shares, in a suit by the corporation such stockholder should not be joined. *Fox v. Robbins*, 62 S. W. Rep. 815 (Tex. 1901). Even though a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, yet it cannot ignore the corporate existence and convey, incur, or deal with the property as its own. *Watson v. Bonfils*, 116

<sup>1</sup> *National Water-works Co. v. Kansas City*, 78 Fed. Rep. 428 (1896). See also §§ 663, 664, *supra*.



A railroad company owning all the stock and bonds of another company does not own the property of the latter, and cannot sue on a cause of action belonging to the latter;<sup>1</sup> and ordinarily is not liable for its debts.<sup>2</sup>

There are, however, two exceptions to the rules given above. The first is that corporate action may arise in other ways than by the formal action of its board of directors or meeting of stockholders or of its agents. It may arise by a long course of dealing which estops the corporation from denying the legality of that mode of dealing,<sup>3</sup> or by the corporation acquiescing, or by its accepting the benefits of the transaction.<sup>4</sup>

Fed. Rep. 157 (1902). The fact that one person owns all the stock of a corporation does not make him and the corporation one and the same person. The corporation continues to exist. *State v. Morgan's, etc. Co.*, 106 La. 513 (1901).

<sup>1</sup> *Fitzgerald v. Missouri Pac. Ry.*, 45 Fed. Rep. 812 (1891). See also §§ 663, 664, *supra*. An owner of all the stock is not the owner of the property. *City of Louisville v. McAteer*, 81 S. W. Rep. 698 (Ky. 1904).

<sup>2</sup> Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. *Atchison, etc. R. R. v. Cochran*, 43 Kan. 225 (1890). When a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892). See *Standard Oil Co. v. U. S.*, 164 Fed. Rep. 376 (1908).

<sup>3</sup> See many cases in the succeeding sections relative to the authority of various officers.

<sup>4</sup> Even though an assignment by an insolvent corporation may be only by vote of the stockholders, yet if made on a vote of the directors and the stockholders acquiesce for a considerable time it is legal. *Young v. Improvement, etc. Assoc.*, 48 W. Va. 512 (1900). Where the stockholders instead of directors have been accustomed to transact corporate business, the corporation is bound. *Murphy v. Cane*, 82 Atl. Rep. 854 (N. J. 1912).

A person who owns substantially all the stock and is allowed for a long time to carry on the business may bind the company by pledging some of its assets. *Merchants' Nat. Bank v. Roxbury Distilling Co.*, 196 Fed. Rep. 76 (1912). An informal agreement of all the stockholders and officers to wind up the company and distribute the assets will be enforced by a court of equity, even though there were no formal meetings. *Strickland v. Jolly*, 136 Ga. 885 (1911). A contract between two street railway companies, whereby one is given the right to run its cars over the tracks of the other, is valid, even though it has not been authorized by the board of directors or a meeting of the stockholders, it being shown, however, that the officers made the contract and that it was approved by a majority of the stockholders, and was reported at the next meeting of the stockholders and was not objected to, and has been carried into effect and payments made and operation carried on in accordance therewith. *South, etc. Ry. v. Second Ave. etc. Ry.*, 191 Pa. St. 492 (1899). A person owning practically all the stock of a company and attending to all its affairs, and mingling its bank account with his own, may bind it by a contract to sell its land. *Roberts v. Hilton Land Co.*, 88 Pac. Rep. 946 (Wash. 1907). Where a corporation allows one of the stockholders to transact all the business without any directors' meetings, the corporation is bound by a contract made by him in its behalf. *Groh's Sons v. Groh*, 80 N. Y. App. Div. 85 (1903); *rev'd* on another point in 177 N. Y. 8. A stockholder



It may arise by passively allowing itself to be used as an instrument of wrong or illegal acts.<sup>1</sup> It is to be borne in mind also that by unanimous consent a corporation may do many acts which ordinarily would be *ultra vires* of the corporation.<sup>2</sup> It is also a principle of law that a person buying the securities of a company is not bound always to inquire whether regular corporate action has been taken. The supreme court of the United States says: "One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."<sup>3</sup> Where a man sells land to a company relying on a resolution certified to by the officers to the effect that the purchase had been duly authorized, the company cannot afterwards repudiate the purchase on the ground that the directors' meeting was irregular and no quorum present.<sup>4</sup>

may or may not be an agent of the corporation according to the facts of the particular case. *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251 (1911). Even though stockholders sell their stock to one person and he takes charge of the property as his own, yet if he continues to do business in the corporate name and the stock is not paid for and is finally turned back the company is liable for the debts which he has incurred. *Albany Mill Co. v. Huff Bros.*, 72 S. W. Rep. 820 (Ky. 1903). A contract made by a ma-

jority stockholder is binding on the corporation if the corporation with full knowledge ratifies the contract by accepting the benefits of it. *Dupignac v. Bernstrom*, 37 N. Y. Misc. Rep. 678 (1902); *aff'd*, 76 N. Y. App. Div. 105. Even though the directors have not especially authorized a mortgage, yet, if the person who owns practically all the stock takes part in the transaction and the corporation receives the benefit of it, the mortgage is good. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). A record of a

<sup>1</sup> *People v. North River Co.*, 121 N. Y. 582, 619 (1890). But an agreement of the stockholders of a corporation that they will not compete with a "trust" into which they have entered will not bind the corporation itself. It may revive its business, even though its stockholders are the ones who entered into the "trust." *American Preservers' Co. v. Norris*, 43 Fed. Rep. 711 (1890).

<sup>2</sup> See § 3, *supra*. Where two parties own all the stock, and by agreement one of them takes some of the corporate assets and thereafter the matter is settled satisfactorily and the stock sold, the purchasers knowing of the

facts cannot complain. *Peterson v. Elholm*, 130 Wis. 1 (1906).

<sup>3</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

<sup>4</sup> *Montreal, etc. Co. v. Robert*, [1906] A. C. 196. The secretary's record as to the amount of stock voted in favor of a mortgage may be contradicted by proof taken from the stock book. *Middleton v. Arastraville, etc. Co.*, 146 Cal. 219 (1905).



The second exception is that, where a corporation is merely a "dummy," the court has power to ignore its corporate existence and to hold that the acts of the stockholder are the acts of the corporation itself.<sup>1</sup> Thus, where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of law that a principal is liable on the contracts of its agents.<sup>2</sup>

Where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.<sup>3</sup>

Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.<sup>4</sup>

§ 710. *The expulsion of stockholders.*—The law forbids the directors or stockholders of a corporation having a capital stock from depriving him of his rights as a stockholder. He certainly cannot be deprived of his right to dividends equally with other stockholders.<sup>5</sup> He cannot be deprived of his right to vote.<sup>6</sup> And it is clear that his various rights as a stockholder cannot be taken from him by any or all of the other stockholders. In this respect a corporation having a capital stock is clearly different from a corporation formed for religious, social, charitable, and similar purposes. The former is for purposes of gain, and the property which is represented by stock cannot be taken from a stockholder by expelling him from the corporation.<sup>7</sup>

stockholders' meeting showing acceptance of an auditor's report is an admission of his employment. *Clarke v. Warwick, etc. Co.*, 174 Mass. 434 (1899). "In interpreting the action of the stockholders in passing the resolution, the facts and circumstances surrounding them may legitimately be looked to." *Zeckendorf v. Steinfeld*, 225 U. S. 445, 457 (1912).

<sup>1</sup> See §§ 663, 664, *supra*. Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation.

*Southern Kansas, etc. R. R. v. Towner*, 41 Kan. 72 (1889).

<sup>2</sup> *Interstate Tel. Co. v. Baltimore, etc. Tel. Co.*, 51 Fed. Rep. 49 (1892).

<sup>3</sup> *Day v. Postal Tel. Co.*, 66 Md. 354 (1887).

<sup>4</sup> See § 694, *supra*.

<sup>5</sup> See § 540, *supra*.

<sup>6</sup> See § 622, *supra*.

<sup>7</sup> The right to forfeit stock for non-payment of calls may possibly be called an "expulsion," but is a misuse of that term. See ch. VIII, *supra*. Brokers' associations frequently have by-laws authorizing the expulsion of members. Concerning expulsion in general, see § 504, *supra*.



It is doubtful whether a stock corporation can impose a fine upon the stockholder for a violation of its by-laws.<sup>1</sup>

§ 711. *Stockholders cannot change the directors except at elections.* — The term of office of directors is usually fixed by the charter of the corporation or the statutes applying to it. Such being the case, a director having been elected is entitled to hold his position until the expiration of his term of office. He cannot be turned out either by the stockholders,<sup>2</sup> or the directors, or by a court.<sup>3</sup> Sometimes, however, the charter, statutes, or by-laws authorize and empower the stockholders to remove directors at any time.<sup>4</sup> And where the stockholders

<sup>1</sup> *Monroe, etc. Assoc. v. Webb*, 40 N. Y. App. Div. 49 (1899).

<sup>2</sup> *Imperial, etc. Hotel Co. v. Hampson*, L. R. 23 Ch. D. 1 (1882); *Powers v. Blue, etc. Assoc.*, 86 Fed. Rep. 705 (1898); *Nathan v. Tompkins*, 82 Ala. 437 (1886), holding also that an election is wholly void where part of those elected are to fill the place of officers illegally removed, there being no particular persons designated to fill the legal vacancies. "Without some statute or provision of the charter authorizing his removal or suspension, a director cannot be removed or suspended from office until the end of his term, at least without cause." *People v. Powell*, 201 N. Y. 194, 202 (1911). Every corporation at common law has the power to remove its officers but usually only for cause and after notice and hearing, unless the statute or by-laws provide otherwise.

*Wolf v. Gegenseitige, etc.*, 149 Wis. 576 (1912). See also *Berry v. Cross*, 3 Sandf. Ch. 1 (1845); *Gorman v. Guardian Sav. Bank*, 4 Mo. App. 180 (1877). Cf. dicta in *State v. Brice*, 7 Ohio (pt. 2d), 82 (1836); *Adamantine Brick Co. v. Woodruff*, 4 MacArthur, 318 (1880); *Burr v. McDonald*, 3 Gratt. (Va.) 215 (1846); *Bayless v. Orme, Freem. Ch. (Miss.)* 161 (1841). A director, however, may resign, and in such a case the corporation may accept the resignation. *Cloutman v. Pike*, 7 N. H. 209 (1834), a municipal corporation case. In England the by-laws generally give the stockholders the power to remove directors. See *Browne v. La Trinidad*, L. R. 37 Ch. D. 1 (1887); *Isle of Wight Ry. v. Tahourdin*, L. R. 25

Ch. D. 320 (1883). Where in a corporation the state itself is represented by a certain number of directors, the state may remove those directors at any time, and appoint others in their place. *Tucker v. Russell*, 82 Fed. Rep. 263 (1897).

<sup>3</sup> *Johnston v. Jones*, 23 N. J. Eq. 216 (1872). See also § 624, *supra*, and § 746, *infra*. In the case *State v. Boston, etc. Co.*, 22 Mont. 220 (1899), a question was raised, but not decided, as to the right of a court to remove directors. A director cannot be excluded from his duties as such, nor can his election be declared invalid, merely because of what he may contemplate doing as a director. *Ohio, etc. Co. v. State*, 49 Ohio St. 668 (1892). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. *Stanley v. Luse*, 36 Oreg. 25 (1899).

<sup>4</sup> Such is the law in Ohio, West Virginia, and many other states. Such, also, is the law applicable to national banks. See U. S. Rev. St., § 5136; also *Taylor v. Hutton*, 43 Barb. 195 (1864). Where by statute "two-thirds of the stockholders" may remove any director from office, this means holders of two thirds of the stock, the statute further providing that each share of stock shall have one vote. *State v. Horan*, 22 Wash. 197 (1900). The fact that a secretary's salary is annual does not prevent the company from discharging him at any time, where the by-laws provide for removal at any time. *Douglass v. Merchants' Ins. Co.*, 118



have power by charter or statute to remove directors for cause, the exercise of their discretion therein will not be reviewed in equity.<sup>1</sup> So, likewise, where such a power is given to the stockholders, a court of chancery will not enjoin the holding of a meeting called by the stockholders to consider, among other matters, the removal of the directors.<sup>2</sup> The president of the corporation, duly elected by the board of directors, does not hold his position at the pleasure of the board.<sup>3</sup> Where a by-law allows the removal of a director on a two thirds vote of the whole board, he cannot be removed on a vote of four out of seven, even though one refuses to vote.<sup>4</sup>

The stockholders of a corporation at a special meeting duly called may amend the by-laws so as to authorize the board of directors to remove the president and treasurer, and the board of directors may subsequently make such removal under the amended by-laws.<sup>5</sup> A voluntary unincorporated association without articles, constitution, or rules may remove its president or other officer at any time and without notice, except that the meeting held for that purpose must be duly held, and such meeting cannot expel a member without notice.<sup>6</sup> Stockholders may amend the by-laws so as to increase the number of directors, and may at the same meeting elect the additional directors.<sup>7</sup> In New

N. Y. 484 (1890). The president may remove the teller. *Harrington v. First Nat. Bank*, Thompson's N. B. Cas. 760 (1873). A director cannot have an injunction against stockholders calling and holding a meeting to remove him, there being no allegation that the stockholders have no such right. *Shulman v. Star, etc. Co.*, 113 N. Y. App. Div. 759 (1906). By statute in California a stockholder may by suit have the directors of a mining company removed for not posting a monthly statement of receipts and disbursements. *Kinard v. Ward*, 130 Pac. Rep. 1194 (Cal. 1913).

<sup>1</sup> *Inderwick v. Snell*, 2 Macn. & G. 216 (1850).

<sup>2</sup> *Isle of Wight Ry. v. Tahourdin*, L. R. 25 Ch. D. 320 (1883).

<sup>3</sup> *Archer v. People's Sav. Bank*, 88 Ala. 249 (1889). Where three out of five directors met without notice to the other two, and deposed the president and authorized a mortgage, their acts are void. *Hatch v. Johnson L. & T. Co.*, 79 Fed. Rep. 828 (1895). Where a treasurer was elected in June at an annual salary and the by-laws

provide that the directors should elect officers in September, which, however, they fail to do, they may remove him in January of the following year, especially where the statutes authorize the corporation to remove officers at any time. *O'Neal v. F. A. Neider Co.*, 118 Ky. 62 (1904). 204 Fed. Rep. 231.

<sup>4</sup> *Stephany v. Liberty Cut Glass Works*, 76 N. J. L. 449 (1908).

<sup>5</sup> *In re Griffing Iron Co.*, 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899). Where a directors' by-law, confirmed by the stockholders, fixes their term of office at one year, the stockholders cannot, by amending the by-law, turn the directors out during the year. *Stephenson v. Vokes*, 27 Ont. (Can.) 691 (1896).

<sup>6</sup> *Ostrom v. Greene*, 161 N. Y. 353 (1900), the court saying: "The holding of an office unprotected by rules is not an individual right, but is subject to change at the pleasure of the association."

<sup>7</sup> *Gold Bluff, etc. Co. v. Whitlock*, 75 Conn. 669 (1903). See also § 624, *supra*.



York, under the statute authorizing the attorney-general to bring suit to remove directors and other corporate officers for misconduct, he may commence suit to remove them as directors and also as officers for issuing stock without consideration.<sup>1</sup>

§ 712. *Directors — Their power as a board and as individuals to contract for the corporation — Ratification by the directors.* — All contracts of a corporation are to be made by or under the direction of its board of directors.<sup>2</sup> The board of directors make corporate contracts by a regular vote of the board; or by authorizing an agent to make them; or by allowing an agent to assume and exercise that power; or by accepting a contract or its benefits after it has been made by an unauthorized agent. And in all cases the board of directors and not the stockholders, nor the president, secretary, treasurer, or other agent, is the original and supreme power in corporations to make corporate contracts. The stockholders, indeed, have very few functions.<sup>3</sup> The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors.<sup>4</sup> The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens,

<sup>1</sup> *People v. Lyon*, 119 N. Y. App. Div. 361 (1907); *aff'd*, 189 N. Y. 544.

<sup>2</sup> Quoted and approved in *Wright v. Floyd*, 43 Ind. App. 546 (1909).

<sup>3</sup> See §§ 708-711, *supra*.

<sup>4</sup> See ch. XLI, *supra*, and in fact most of the preceding chapters of this book. There being nothing in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers. *Re Bulwayo, etc. Co., Ltd.*, [1907] 2 Ch. 458. Where a charter may be amended with the written consent of the corporation, a single stockholder owning a minority of the stock cannot object to a change made by the directors. *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908). Even though a by-law provides that a stockholder before selling the stock should give a thirty-day option to the board of directors to purchase it, yet the board of directors may waive that option and allow the transfer and the stockholders themselves cannot object. *Hughes v. Citizens', etc. Co.*, 226 Pa. St. 95 (1909). In suing on a corpo-

rate contract the plaintiff may allege that the corporation made the contract without alleging that the board of directors authorized it. *Black v. Hoopeston Gas, etc. Co.*, 250 Ill. 68 (1911). A stockholder in a street railway company cannot enjoin the company from making an agreement with the city whereby existing doubtful franchises are surrendered and a new franchise taken in return, and such contract may be made by the board of directors without consulting the stockholders. Such a new contract is not invalid, even though by its terms the city is to have fifty-five per cent. of the net earnings after making certain payments, this not being a partnership. Neither is the contract void, even though it gives the control of the street railway to a board of supervising engineers. *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908). Where a company has the charter power to retire its preferred stock this power may be exercised by the board of directors without a vote of the stockholders. *Mannington v. Hocking Valley Ry.*, 183 Fed. Rep. 133 (1910).



and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation.<sup>1</sup> The directors elect the officers, and in this connection it may be added that "at common law there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other."<sup>2</sup> They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it.<sup>3</sup>

But there are limitations on their powers. If the board of directors attempt to do an act or make a contract which the corporate charter does not give the corporation the power to do or enter into, then any stockholder may enjoin that act or contract.<sup>4</sup> Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting and thereby bind the corporation.<sup>5</sup> Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation.<sup>6</sup>

A single director has no power to contract for the corporation.<sup>7</sup>

<sup>1</sup> Quoted and approved in *Wright v. Floyd*, 43 Ind. App. 546 (1909).

<sup>2</sup> *Throop on Public Officers*, § 30; *People v. Green*, 58 N. Y. 295 (1874). Cf. *Atty.-Gen. v. Detroit*, 112 Mich. 145 (1897).

<sup>3</sup> Quoted and approved in *Taylor v. Sutherland*, etc. Co., 107 Va. 787 (1908). See § 750, *infra*.

<sup>4</sup> See ch. XL, *supra*. A board of directors cannot make a contract with an attorney for three years' services where the statute authorizes the board to remove officers, agents, and servants at any time. *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319 (1911). Neither the treasurer nor the board of directors have power to create an act of bankruptcy by admission. *Re Burbank Co.*, 168 Fed. Rep. 719 (1909). The board of directors of a labor union may not have authority to enter into a contract with another union. *Barnes & Co. v. Berry*, 169 Fed. Rep. 225 (1909). As to ratification of such acts by the stockholders, see ch. XLIV, *infra*.

<sup>5</sup> See § 713a, *infra*.

<sup>6</sup> See § 713a, *infra*.

<sup>7</sup> Quoted and approved in *Alabama, etc. Bank v. O'Neil*, 128 Ala. 192, 195 (1901), and *Wright v. Floyd*, 43

Ind. App. 546 (1909). See the cases under § 716, *infra*, where the president even, who is always a director, was held not to have power to contract. A director has no power to bind the corporation. *Gaynor v. Williamsport*, etc. R. R., 189 Pa. St. 5 (1899). A director has no authority to employ an attorney for the company. *Gulf & I. Ry., etc. v. Campbell*, 108 S. W. Rep. 972 (Tex. 1908). A director has no power to make a contract for the corporation. *Wagner v. St. Peter's Hospital*, 32 Mont. 206 (1905). A watchman employed by a director without authority cannot recover for his services. *Brown v. Valley*, etc. Co., 127 Cal. 630 (1900). A director of a trust company, even though he is manager also of its bond department, cannot pledge its securities to secure the debt of a third person to a bank. *Interstate, etc. Co. v. Third Nat. Bank*, 231 Pa. St. 422 (1911). A letter from a director agreeing to buy stock does not prove that the corporation itself purchased the stock. *Kelley v. Essex*, etc. Co., 204 Mass. 80 (1910). Where a director is authorized to employ a broker to sell property subject to the approval of the directors, the broker is entitled to his commission



It is perfectly legal, however, for a board of directors to delegate to an agent the power to make a contract,<sup>1</sup> and this agent may, of course,

even though he makes a sale after the time fixed by the directors, such sale having been accepted by the directors. *Lawson v. Black*, etc. Co., 53 Wash. 614 (1909). A director has no power to sign the company's name as an accommodation acceptor on bills of exchange, and not even a *bona fide* purchaser can enforce such acceptance. *Premier, etc. Bank, Ltd. v. Crabtree, Ltd.*, [1909] 1 K. B. 106. A suit by a director to set aside a corporate act is not a suit of the corporation itself, because it acts only by a majority of a quorum present. *Wright v. Floyd*, 43 Ind. App. 546 (1909). A director in a bank has no power to stop its receiving deposits or to close it. *Eureka County Bank, etc.*, 126 Pac. Rep. 655 (Nev. 1912). A director has no power, unless specially authorized, to bind the company by a representation. *Milwaukee, etc. Co. v. Schoknecht*, 108 Wis. 457 (1901). A director has no power to employ a physician to attend an employee who has been injured. *Sias v. Consolidated etc. Co.*, 73 Vt. 35 (1901). Misrepresentations by a director of a manufacturing corporation do not affect claims held against it by a bank although such director is cashier of the bank. *Hadden v. Dooley*, 92 Fed. Rep. 274 (1899). A director has no authority to contract for the corporation. *Noblesville, etc. Co. v. Loehr*, 124 Ind. 79 (1890); *Allemon v. Simmons*, 124 Ind. 199 (1890); *Goodyear Rubber Co. v. Scott Co.*, 96 Ala. 439 (1892); *New, etc. Co. v. Upton*, 67 N. H. 469 (1893). See also *Chicago, etc. R. R. v. James*, 22 Wis. 194 (1867); s. c., 24 Wis. 388; *Trundy v. Hartford, etc. Co.*, 6 Rob. (N. Y.) 312 (1868), where a director employed a broker; *New Haven, etc. Co. v. Hayden*, 107 Mass. 525 (1871), where a director, stockholder, and overseer contracted to extend the business; *Titus v. Cairo, etc. R. R.*, 37 N. J. L. 98 (1874), where a director sold bonds; *Lockwood v. Thunder, etc. Co.*, 42 Mich. 536 (1880); *Bramah v. Roberts*, 3 Bing. N. Cas. 963 (1837), where a director accepted a bill; *Rice*

*v. Peninsular Club*, 52 Mich. 87 (1883), where a director said that a purchase was all right. But in *Bradstreet v. Bank of Rutland*, 42 Vt. 128 (1869), it was held that an employee who was employed by three directors might recover. If the corporation is only an intermediary of title, such as payee and indorser, the indorsee may recover against the maker without making strict proof as to the authority of the directors to indorse. *Smith v. Johnson*, 3 H. & N. 222 (1858). Where a director causes work to be done on the corporate property on an agreement that he will pay for the same, the corporation is not liable therefor. *Ayers v. Green, etc. Co.*, 48 Pac. Rep. 221 (Cal. 1897). He is not an agent to discount paper. *Washington Bank v. Lewis*, 39 Mass. 24 (1839). Nor to agree to give extra pay. *Stoystown, etc. Turnp. Co. v. Craver*, 45 Pa. St. 386 (1863). A director has no inherent authority to lease property belonging to the corporation, even though he owns a majority of the stock. *Clement v. Young-McShea, etc. Co.*, 70 N. J. Eq. 677 (1906). *Lindley, Companies*, p. 155. See also § 726, *infra*.

<sup>1</sup> *Spear v. Ladd*, 11 Mass. 94 (1814); *Northampton Bank v. Pepon*, 11 Mass. 288 (1814), where a director was authorized to indorse a note; *Bank Commissioner v. Bank of Brest, Harr. Ch. (Mich.)* 106 (1840); *Stevens v. Hill*, 29 Me. 133 (1848); *Lester v. Webb*, 83 Mass. 34 (1861); *Abbot v. American Hard Rubber Co.*, 33 Barb. 578 (1861); *U. S. Bank v. Dana*, 6 Pet. 51 (1832); *Metropolis Bank v. Jones*, 8 Pet. 12, 16 (1834); *Percy v. Millaudon*, 3 La. 568 (1833); *Pennsylvania Bank v. Reed*, 1 Watts & S. (Pa.) 101 (1841); *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256 (1825); *Leavitt v. Yates*, 4 Edw. Ch. 134 (1834). As to delegation of discretionary powers, see § 715, *infra*; *Sheridan, etc. Co. v. Chatham Nat. Bank*, 52 Hun, 575 (1889); *aff'd*, 127 N. Y. 517. Even though a director of a railroad is authorized to acquire



be a director as well as a third person.<sup>1</sup> The board of directors and the corporation are bound also by the contracts of a director or other person who has assumed to contract for the company, and for some time has been allowed by the board to so act and contract.<sup>2</sup> So also the board of directors and the corporation are bound by an unauthorized agent's contract when the contract is acquiesced in or the benefits of that contract are accepted;<sup>3</sup> or when the corporation expressly ratifies and confirms the contract.<sup>4</sup> A by-law that employees shall partici-

a right of way this does not authorize him to agree with the property owner to maintain perpetually a depot at a certain point. *Southern Kansas Ry. v. Logue*, 139 S. W. Rep. 11 (Tex. 1911). Where all the corporate powers are by the charter and by-laws vested in the directors they cannot delegate to a manager sole discretion without interference by them. *Horn v. Faulder and Co. Ltd.*, 99 L. T. Rep. 524 (1908).

<sup>1</sup> A director who is authorized to purchase and pay in stock cannot agree to pay in cash. *Hayden v. Middlesex, etc. Co.*, 10 Mass. 403 (1813). Authority to a director to make contract for the sale of land does not authorize him to convey the land. *Green v. Hugo*, 81 Tex. 452 (1891).

<sup>2</sup> A director by being allowed for many years to do all the business of a bank, binds the bank by his acts the same as though he were a regular officer of the bank. *Pottsville Bank v. Minersville, etc. Co.*, 211 Pa. St. 566 (1905). Where the corporation acquiesces in a person acting as sole manager it is bound by his action without formal action on the part of the board of directors. *Winer v. Bank of Blytheville*, 89 Ark. 435 (1909). No officers are necessary other than directors where the stockholders acquiesce in the directors transacting all the business. *Buck v. Troy, etc. Co.*, 76 Vt. 75 (1903). Where a director conducts all the business of a corporation as though it was his own business, the corporation is bound by his acts. *Clement v. Young-McShea, etc. Co.*, 69 N. J. Eq. 347 (1905). Where the board of directors allow one of their number to manage the company and conduct and

transact its business, he is the same as an executive committee or general manager or managing director, and his acts bind the company, even though there was no formal vote giving him authority. *York v. Mathis*, 103 Me. 67 (1907). See many cases in the following sections. Also *Beers v. Phoenix, etc. Co.*, 14 Barb. 358 (1852), where a director and secretary borrowed money as he was accustomed to do. But unless the custom is known to the directors the corporation is not bound. *Lawrence v. Gebhard*, 41 Barb. 575 (1864). And the act must be *intra vires*. *Women's, etc. Union v. Taylor*, 8 Colo. 75 (1884).

<sup>3</sup> See many cases in subsequent sections herein. Also *New Hope, etc. Co. v. Phenix Bank*, 3 N. Y. 156 (1849), where loans of the company's money were made by a director. Where a director has employed an attorney, but such employment is with the knowledge and assent of the board of directors and executive committee, the company is liable for his fees. *Germania, etc. Co. v. Hargis*, 64 S. W. Rep. 516 (Ky. 1901). Where a corporation has accepted work done on the order of a director and a majority stockholder, it must pay therefor. *Huntington Fuel Co. v. Mellwaine*, 41 Ind. App. 328 (1907).

<sup>4</sup> See § 707, *supra*, on promoters' contracts; also §§ 716-720, *infra*. The ratification of an unauthorized mortgage may be by express resolutions. *Purser v. Eagle Lake, etc. Co.*, 111 Cal. 139 (1896). An unauthorized note issued by a corporation may be ratified by the board of directors. *Nebraska, etc. Co. v. Bell*, 58 Fed. Rep. 326 (1893).



pate in surplus earnings may constitute a contract with them if they have performed.<sup>1</sup>

It is an important principle of law that a corporation may be liable on a contract, the benefit of which it accepts, even though such contract was not authorized by the board of directors. Thus, a contract signed in the corporate name, but without the authority of the board of directors, may be validated by the corporation acting under it for a year.<sup>2</sup>

<sup>1</sup> *Zwolaneck v. Baker Mfg. Co.*, 150 Wis. 517 (1912).

<sup>2</sup> *Jourdan v. Long Island R. R.*, 115 N. Y. 380 (1889). Although a sale of property is not authorized by the board of directors, yet if they accept the pay the sale is valid. *Beach v. Miller*, 130 Ill. 162 (1889). The issuing of stock by an Illinois corporation for property is legal, even though no formal resolution is passed by the board of directors. *Re Beachy & Co.*, 170 Fed. Rep. 825 (1909). Where by consent of all the stockholders in a corporation doing a losing business its president is authorized to sell its property and pay the debts, and he does sell it to one of the stockholders at its full value, the other stockholders having notice of the sale and an opportunity to purchase, one of them cannot afterwards object on the ground that the directors had not authorized the sale. *Ebelhar v. Nave*, 119 S. W. Rep. 1176 (Ky. 1909). A corporation receiving rent with full knowledge of the directors under a lease is bound by it, even if not regularly authorized. *King v. West Coast, etc. Co.*, 129 Pac. Rep. 1081 (Wash. 1913). Where a contractor does extra work upon the assurance of a director that the company will pay for it, and had agreed so to do at a meeting, and a majority of the directors knew of the extra work, the company is liable therefor. *Tryon v. White, etc. Co.*, 62 Conn. 161 (1892). Where by resolution of the stockholders all the property of an embarrassed corporation is transferred to trustees to sell and pay the debts and reconvey the remainder to the corporation, and the trustees proceed to do so, the transaction is legal, even though the stockholders' meeting is not held at its principal office, and proxies were irregular and un-

authorized, and the directors took no action, and the conveyances were irregular. *Kessler & Co. v. Ensley Co.*, 141 Fed. Rep. 130 (1905); *aff'd*, 148 Fed. Rep. 1019. In New York it is the rule that a business corporation is not liable on commercial paper issued in its name, unless it is shown not only that it was issued by the corporate officers, but that it was authorized by a resolution of the board of directors, or by the by-laws, or by a course of dealing by which the corporation held out that the officers were authorized to issue such paper, or by a ratification of the corporation by accepting and retaining the benefits of the paper. *Miners', etc. Bank v. Ardsley Hall Co.*, 113 N. Y. App. Div. 194 (1906). Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital stock into preferred stock and thereafter divide the profits among themselves without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, corporate creditors not being injured. *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274 (1904). The court said: "In the present case we apply this doctrine to the non-observance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent



Again where one railroad company takes over the railroad of another company, whether by lease or otherwise, and continues to perform a

of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante*, were the assent of his fellow stockholders and of the company to be now withdrawn." A mortgage executed by the president is legal, even though not authorized by the board of directors, it appearing that all the officers and stockholders knew of it and accepted the benefit of it. *Fourth Nat. Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905). Ratification in the case of a land contract may have to be in writing to satisfy the statute of frauds. *Salfeld v. Sutter, etc. Co.*, 94 Cal. 546 (1892). It may be a question of fact for the jury as to whether the company accepted the contract or not. *Chapin v. Cambria, etc. Co.*, 145 Pa. St. 478 (1891). Although mortgage bonds are issued by corporate officers without authority, yet if for several years they are used as a pledge to secure corporate debts, and in the meantime directors and stockholders know of their issue, they are valid. *Stainback v. Junk, etc. Co.*, 98 Tenn. 306 (1897). Even though the officers in executing a deed in behalf of the corporation omit a covenant that the grantee assumes a mortgage on the property, as required by the resolutions of the board of directors authorizing such deed, yet if the corporation accepts a consideration for the deed other corporate directors cannot object thereto. *White v. Shepard*, 41 N. Y. App. Div. 113 (1899). An assessment by the directors to pay a mortgage does not legalize such mortgage if it was not properly authorized, even though signed by the president, secretary, and two thirds of the stockholders. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). An unauthorized purchase of real estate and a mortgage thereon by a corporation may be ratified, but only by the same formalities as if original authority were being

given. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). An unauthorized alteration in a mortgage may be ratified by the subsequent acts of the parties. *Woodbury v. Allegheny, etc. R. R.*, 72 Fed. Rep. 371 (1895). Bonds issued by a cemetery corporation, and signed and sealed and recognized at many meetings of the directors, are legal. *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333 (1895); s. c., 157 N. Y. 697. Where the corporation has occupied premises under an unauthorized lease, the court may submit to the jury the question of whether it ratified the lease. *Hayden v. Wheeler, etc. Co.*, 20 N. Y. Supp. 902 (1892). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage, where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. *Warren v. Bigelow Blue Stone Co.*, 74 Hun. 304 (1893). Where all the directors and all the stock except one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. *Witter v. Grand Rapids, etc. Co.*, 78 Wis. 543 (1891). A board of directors may ratify and thereby validate a mortgage which may have been executed without authority. *Allis v. Jones*, 45 Fed. Rep. 148 (1891). A corporation is liable for work done, although the officer employing plaintiff had himself contracted to do the work for the corporation. Plaintiff had no notice of this agreement. *Salt Lake, etc. Co. v. Mammoth Min. Co.*, 6 Utah, 351 (1890). If the corporation admits in its pleading that a contract was entered into, a judgment for plaintiff will not be disturbed although the pleading was not put in evidence. *Teall v. Consolidated, etc. Co.*, 119 N. Y. 654 (1890). A reorganized company may, by accepting the benefits of a contract and liability of the old company, become liable therefor, although the meeting of the di-



contract of the latter for furnishing cars and operating a private branch line, the former is bound thereby and may be compelled to continue to carry it out.<sup>1</sup> And while the stockholders cannot transact business, yet if the directors are present the action may be considered the informal action of the board of directors.<sup>2</sup> Where the president of a railroad renders services in litigation and in obtaining loans on the agreement of the board of directors to pay him therefor, he may recover payment for the same, even though there was no formal resolution of the directors, and even though the by-laws were silent as to the duties of the president and as to his salary.<sup>3</sup> And where a corporation borrows money and gives its note, it is immaterial that one director was absent from the meeting authorizing the note, where the directors subsequently knew about the note and did not object.<sup>4</sup> Even though an original note was not authorized, yet if the renewal was authorized the note is valid.<sup>5</sup>

A purchase-money mortgage given by a corporation is binding, even though not authorized by the board of directors, where the company used the property for two years.<sup>6</sup> Where the directors vote at the stock-

rectors authorizing the contract was informal. *Baker v. Harpster*, 42 Kan. 511 (1889). That the corporation is liable if the work was ordered and done for its benefit, see *Grier v. Hazard*, 13 N. Y. Supp. 583 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract were insufficient; nor can he set up in such a case that the directors had not authorized the contract. *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892). Although a mortgage was not authorized, yet where the board of directors subsequently provide for payment of part of it, and do pay part of it, they ratify it. *Seal v. Puget Sound, etc. Co.*, 5 Wash. St. 422 (1892). It is a ratification of a contract for the corporation to admit its execution in a pleading. *Tingley v. Bellingham, etc. Co.*, 5 Wash. St. 644 (1893). Ratification by a company of an agent's contract is not binding on the other party, if the ratification rejected one provision of the contract. Subsequent ratification of the contract *in toto* is not sufficient unless the

other party assents. *Crabtree v. St. Paul, etc. Co.*, 39 Fed. Rep. 746 (1889).

<sup>1</sup> *Tanzer v. Chicago, etc. R. R.*, 170 Fed. Rep. 240 (1909); s. c., 191 Fed. Rep. 546.

<sup>2</sup> *Fitzpatrick v. O'Neill*, 43 Mont. 552 (1911). A contract of employment made at a meeting at which all the directors and stockholders were present binds the corporation, even though it is oral and not entered in its minute book. *Kropp v. Hermann, etc. Co.*, 138 Mo. App. 49 (1909). Where all the stockholders are directors, the acceptance of a lease by them informally binds the company. *Starwich v. Washington, etc. Co.*, 64 Wash. 42 (1911).

<sup>3</sup> *Bagley v. Carthage, etc. R. R.*, 165 N. Y. 179 (1900), aff'g 25 N. Y. App. Div. 475.

<sup>4</sup> *Mills v. Boyle, etc. Co.*, 132 Cal. 95 (1901).

<sup>5</sup> *Smith v. New Hartford Waterworks*, 73 Conn. 626 (1901).

<sup>6</sup> *Blood v. La Serena, etc. Co.*, 134 Cal. 361 (1901). An irregular meeting of the board of directors authorizing the borrowing of money and the giving of a mortgage may be made legal by the company subsequently



holders' meeting in favor of amending the charter, this removes an objection that as directors they should have voted for the change in the first instance at a directors' meeting.<sup>1</sup>

A corporation may be liable for an accident on a ferry operated in its name, where it knew of the operation and received the benefits of the same.<sup>2</sup> Where a corporation is a mere "dummy," the courts sometimes hold that the corporation is liable for the acts and on the contracts of its stockholders.<sup>3</sup> An express vote of the directors authorizing a note need not be proved where the corporation whose obligation is in question is engaged in a business the nature of which and the duties in relation to which require or justify the giving of negotiable instruments without the officers being authorized thereto by a special vote to that effect.<sup>4</sup> Where a mortgage recites that it was duly executed by authority of the corporation, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed.<sup>5</sup> In California it is held that an unauthorized mortgage is not ratified nor is it made valid by estoppel *in pais* except in a manner in writing sufficient to authorize the mortgage.<sup>6</sup> Corporate creditors' rights by attachments which are obtained between the time of the execution of an illegal mortgage and the ratification of the same may have priority over the mortgage.<sup>7</sup>

§ 713. *De facto directors and officers of a corporation — The validity of their contracts.* — A *de facto* officer is one who has the reputation and position of the officer he assumes to be, and yet is not entitled to the office in point of law.<sup>8</sup> A *de jure* officer is one who has the

accepting and using the money. *Murray v. Beal*, 23 Utah, 548 (1901). Even though a note is signed by two directors as individuals, yet the corporation may be held liable if the loan was to the corporation. *McGarry v. Tanner, etc. Co.*, 21 Utah, 16 (1899).

<sup>1</sup> *Bernstein v. Kaplan*, 150 Ala. 222 (1907).

<sup>2</sup> *Nims v. Mount Hermon Boys' School*, 160 Mass. 177 (1893).

<sup>3</sup> See §§ 663, 664, *supra*.

<sup>4</sup> *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890).

<sup>5</sup> *Sioux City, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899); *Baggott v. Turner*, 21 Wash. 339 (1899). See also § 725, *infra*. Where the seal of the company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether

a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. "None but the corporation and its stockholders or creditors can impeach a transfer of property by the corporation for the want of the previous action of the board of directors; and then only by a direct action brought for that purpose." *Castle v. Lewis*, 78 N. Y. 131 (1879); *Eno v. Crooke*, 10 N. Y. 60 (1854). See also § 808, *infra*.

<sup>6</sup> *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896).

<sup>7</sup> *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897).

<sup>8</sup> "To constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the



lawful right to the office, but who has either been ousted from it or has never actually taken possession of it. An officer is *de facto* when the statute under which he holds office is unconstitutional;<sup>1</sup> or when he was elected but was ineligible,<sup>2</sup> or was irregularly or illegally elected.<sup>3</sup> In private corporations an officer may be *de facto* even if there is no *de jure* office for him to hold; for instance where an increase in the number of directors was irregular.<sup>4</sup> An officer who holds over by reason of the failure of the corporation to elect his successor is not only a *de facto* but a *de jure* officer.<sup>5</sup> A director as a *de facto* director may bind the

functions of the office under such circumstances and for such length of time, without interference, as to justify the presumption of a due election or appointment. The mere exercise of the functions of the office is in itself insufficient." *Moses v. Tompkins*, 84 Ala. 613 (1888). See also *Rex v. Bedford Level*, 6 East, 356 (1805); *Mechanics*, etc. *Bank v. Burnett*, etc. Co., 32 N. J. Eq. 236 (1880); *Hamlin v. Kassafer*, 15 Ore. 456 (1887). *Contra*, *Litchfield Iron Co. v. Bennett*, 7 Cow. 234 (1827); *Clark v. Farmers' Mfg. Co.*, 15 Wend. 256 (1836); *Waite v. Mining Co.*, 36 Vt. 18 (1863). See also *Wait*, *Insolv. Corp.*, § 23. Officers are still *de facto* after judgment of ouster is rendered, but before its entry, even though they acted with knowledge of the decision. *Mining Co. v. Anglo*, etc. *Bank*, 104 U. S. 192 (1881). *Cf.* *Walker v. Fleming*, 70 N. C. 483 (1874). In *McCall v. Byram*, etc. Co., 6 Conn. 428 (1827), it is held that a secretary is *de facto* only where there is at least a pretended election. See *Hamlin v. Kassafer*, 15 Ore. 456 (1887). A demand on a corporation for certain property is not proved by showing a demand on those who afterwards became its incorporators and officers. *McCallum v. Pursell Mfg. Co.*, 1 N. Y. Supp. 428 (1888). Directors whose title is contested are not *de facto* officers as against the old officers holding over. *Ellsworth*, etc. Co. *v. Faunce*, 79 Me. 440 (1887). The question of what constitutes a *de facto* officer was discussed in *Umatilla*, etc. *Assoc. v. Irvin*, 56 Ore. 414 (1910).

The following definitions have been given of an officer *de facto*: "One who

has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Parker v. Kett*, 1 Ld. Raym. 658; *Rex v. Bedford Level*, 6 East, 368 (1805). "One who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election." *Brown v. Lunt*, 37 Me. 428 (1854). "One who has the color of right or title to the office he exercises; one who has the apparent title of an officer *de jure*." *Brown v. O'Connell*, 36 Conn. 451 (1870). "On the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*." *Mallett v. Uncle Sam*, etc. *Min. Co.*, 1 Nev. 197 (1865); *Plymouth v. Painter*, 17 Conn. 588 (1846). In *State v. Curtis*, 9 Nev. 325 (1874), the court held that in order to make a person an officer *de facto* he should in some way have been put into the office and have secured such a holding thereof as to be considered in peaceable possession and actually exercising the functions of an officer; an intrusion by force is not sufficient.

<sup>1</sup> *Leach v. People*, 122 Ill. 420 (1887).

<sup>2</sup> *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841). *Cf.* ch. XXXVII, *supra*.

<sup>3</sup> *Baird v. Bank of Washington*, 11 Serg. & R. 411 (1824), where a minority of the directors elected him; *Delaware*; etc. *Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131 (1853), where the president was not a resident as required by statute.

<sup>4</sup> *Chandler v. Hart*, 161 Cal. 405 (1911).

<sup>5</sup> See § 624, *supra*; *Thorington v. Gould*, 59 Ala. 461 (1877). *Contra*,



company by his acts, if allowed to continue in his position.<sup>1</sup> And, in general, the contracts of all officers *de facto*, acting within the sphere of their office, are binding upon the corporation.<sup>2</sup>

*Curling v. Chalklen*, 3 M. & S. 496, 510 (1833); *Peppin v. Cooper*, 2 B. & Ald. 431 (1819); *People v. Twaddell*, 18 Hun, 427 (1879). If an annual election is not held the directors hold over. *New York, etc. Ry. v. Motil*, 81 Conn. 466 (1908). Hold-over directors may elect officers for the year during which they are holding over. *State v. Guertin*, 106 Minn. 248 (1909). A hold-over board of directors may elect officers for the ensuing corporate year. *Western, etc. Co. v. Burrows*, 144 Ill. App. 350 (1908). The directors of a corporation, who hold over, must perform the duties enjoined by law with the same fidelity as regularly elected officers, and they are likewise subject to the same statutory liability for any failure of duty occurring during the term for which they may be holding over. *Kinard v. Ward*, 130 Pac. Rep. 1194 (Cal. 1913).

<sup>1</sup> A director who sells his stock ceases to be a *de jure* director. If he continues and is permitted to act he is a director *de facto*. *Beardsley v. Johnson*, 121 N. Y. 224 (1890).

<sup>2</sup> *St. Luke's Church v. Matthews*, 4 Dessaus. (S. C.) 578 (1815); *Vernon Soc. v. Hills*, 6 Cow. 23 (1826); *All Saints Church v. Lovett*, 1 Hall, 191 (1828); *Lovett v. German Ref. Church*, 12 Barb. 67 (1852); *Riddle v. Bedford*, 7 Serg. & R. (Pa.) 392 (1821); *York County v. Small*, 1 Watts & S. (Pa.) 315 (1841); *Kingsbury v. Ledyard*, 2 Watts & S. (Pa.) 41 (1841); *Smith v. Erb*, 4 Gill (Md.), 437 (1846); *Burr v. McDonald*, 3 Gratt. (Va.) 215 (1846); *Granville Charitable Assoc. v. Baldwin*, 42 Mass. 359 (1840); *Green v. Cady*, 9 Wend. 414 (1832); *Elizabeth City Acad. v. Lindsey*, 6 Ired. L. (N. C.) 476 (1846); *McCall v. Byram Mfg. Co.*, 6 Conn. 428 (1827); *Lathrop v. Scioto Bank*, 8 Dana (Ky.), 115 (1839); *Delaware, etc. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131 (1853); *St. Mary's Bank v. St. John*, 25 Ala. 566 (1854); *Baird v. Washington Bank*, 11 Serg.

& R. 411 (1824); *Ex parte Rogers*, 7 Cow. 530, n. (1827); *Re Mohawk, etc. R.R.*, 19 Wend. 135 (1838); *Re Chenango Ins. Co.*, 19 Wend. 635 (1838); *Blandford School District v. Gibbs*, 56 Mass. 39 (1848); *Sampson v. Bowdoinham Co.*, 36 Me. 78 (1853); *Penobscot v. Dunn*, 39 Me. 587 (1855); *Fairfield, etc. Co. v. Thorp*, 13 Conn. 173 (1839); *Rex v. Bedford Level*, 6 East, 356, 368 (1805); *Parker v. Kett*, 1 Ld. Raym. 658 (1701); *Wild v. Bank*, 3 Mason, 505 (1825); s. c., 29 Fed. Cas. 1215; *Barrington v. Washington Bank*, 14 Serg. & R. (Pa.) 405 (1826); *Minor v. Mechanics' Bank*, 1 Pet. 46 (1828); *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124 (1845); *M'Gargell v. Hazleton Coal Co.*, 4 Watts & S. (Pa.) 424 (1842), an action for a penalty, in which evidence was admitted to show that the person representing the company was an officer *de facto*; *Re County, etc. Co.*, L. R. 5 Ch. 288 (1870); *Mahoney v. East, etc. Co.*, L. R. 7 H. L. 869 (1875); *Partridge v. Badger*, 25 Barb. 146 (1857), where the treasurer was only *de facto*; *Doremus v. Dutch, etc. Co.*, 3 N. J. Eq. 332 (1835), where seceding trustees made a mortgage; *Mechanics', etc. Bank v. Burnet, etc. Co.*, 32 N. J. Eq. 236 (1880), and *Charitable Assoc. v. Baldwin*, 42 Mass. 359 (1840), where *de facto* directors brought suits; *Clark v. Easton*, 146 Mass. 43 (1888); *Cooper v. Curtis*, 30 Me. 488 (1849), holding that debtors to the corporation cannot set this up; *Susquehanna, etc. Co. v. General Ins. Co.*, 3 Md. 305 (1852), holding that a president who executes an instrument is presumed to be president; *Hackensack, etc. Co. v. De Kay*, 36 N. J. Eq. 548 (1883), where *de facto* directors gave a mortgage. *De facto* directors may control litigation, even though they have not accepted their office in writing, as required by statute. *Young v. Schenck*, 64 Wash. 90 (1911). A *de facto* board of directors may call a



"Where persons have to deal for the first time with an established company, and with those who have been and are acting openly and with-

meeting of the stockholders. *Sherwood v. Wallin*, 154 Cal. App. 735 (1908). A *de facto* director may sign an application for statutory dissolution. *MacMahon v. Stepney*, etc., 140 N. Y. App. Div. 554 (1910). A director who is present at a directors' meeting which forfeits stock for non-payment of calls and supports the resolution, cannot afterwards attack the forfeiture on the ground that the directors were illegally appointed and hence that the forfeiture was void or that notice of forfeiture was not legally served. *Jones v. North Vancouver*, etc. Co., [1910] A. C. 317. *De facto* officers may take charge of and preserve the corporate property and funds. *Ehret v. Ringler Co.*, 144 N. Y. App. Div. 480 (1911). The action of a board of directors cannot be impeached on the ground that their election was due in part to votes cast on stock illegally held by another corporation. *Mannington v. Hocking Valley Ry.*, 183 Fed. Rep. 133 (1910). The acts of directors cannot be attacked on the ground that their qualifying stock had been illegally issued. *O'Dea v. Hollywood*, etc. Ass'n, 154 Cal. 53 (1908). The title of the president to his office cannot be questioned in a suit brought by a corporate creditor against the corporation on a contract made by him, the board of directors having acquiesced in his acting as president. *Heinze v. South*, etc. Co., 109 Wis. 99 (1901). Payments of claims by insurance directors, who have been allowed to serve, cannot be questioned on the ground that they were irregularly elected. *Gleason v. Canterbury*, etc. Co., 73 N. H. 583 (1906). It is no defense to an action by an employee that he was employed by a resolution of a dummy board of directors who had no real interest in the company, and that there was a contest in the company and the president had informed the party that the contract was no good. *Oollier v. Consolidated*, etc. Co., 70 N. J. L. 313 (1904). Even though an amendment to the charter whereby the number of

directors is increased is not for several months recorded in a public office, as required by statute, yet if the increased number of directors is elected their acts bind the corporation. *Werle v. Northwestern*, etc. Co., 125 Wis. 534 (1905). The board of directors by allowing a director to act as treasurer may bind the corporation by his acts. *Jack v. Nat. Bank*, etc. 17 Okla. 430 (1907). A lessee of a corporation who knows that the officers executing the lease had doubtful title to their office, and that their title was in litigation, cannot enforce the lease, if the officers are afterwards ousted. *Groveland*, etc. Co. v. *Farmers'*, etc. Co., 25 Wash. 344 (1901). Directors who are elected at a stockholders' meeting not properly called cannot make and enforce calls. *Hawbeach*, etc. Co. v. *Teague*, 5 H. & N. 151 (1860). A board of directors who are ineligible cannot revoke an agreement to arbitrate a suit. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187 (1889). See also § 624, *supra*. An exhibition corporation is liable for premiums, although the exhibition was conducted by *de facto* officers whose title to office was held to be bad a month prior to the exhibition. *Richards v. Farmers'*, etc. Inst., 154 Pa. St. 449 (1893). Although a director is not qualified according to the by-laws, yet, if he is elected and permitted to act, his election is valid so far as his acts as director affect third persons. *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841). The eligibility of a director who has acted with the consent of all cannot be questioned on an application to have the company dissolved under the statute. *Re Santa*, etc. Co., 4 N. Y. Supp. 173 (1889). The qualifications of a director cannot be questioned by a creditor who is seeking to enforce a statutory liability of officers. *Wallace v. Walsh*, 125 N. Y. 26 (1890). The principle of law that the acts of an ineligible but *de facto* officer may bind the corporation arises often in municipal corporation cases. *State v. Farrier*,



out challenge as directors of that company, and whom they honestly believe to be directors, they certainly are not bound to inquire into the qualifications or validity of appointment of those *de facto* directors."<sup>1</sup>

It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced.<sup>2</sup> The fact that some of the directors are not residents of the state as required by statute, does not invalidate a mortgage authorized by them.<sup>3</sup> And

47 N. J. L. 383 (1885); *aff'd*, 48 N. J. L. 613. Although the directors are not qualified, nevertheless the company cannot repudiate stock issued to a contractor in payment for work, where such work has been received, such contract being authorized by the disqualified directors. The company cannot accept the subscription, and at the same time repudiate the contract mode of payment. *Re Staffordshire Gas, etc. Co.*, 66 L. T. Rep. 413 (1892). See also on the general principle that where a corporation allows persons to act publicly as its officers, it is bound by their contracts made in its behalf with third persons; *U. S. Bank v. Dandridge*, 12 Wheat. 64 (1829); *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 392 (1827); *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (1825); *Troy Turnp. Co. v. M'Chesney*, 21 Wend. 296 (1839); *Warren v. Ocean Ins. Co.*, 16 Me. 439 (1839); *Badger v. Cumberland Bank*, 26 Me. 428 (1846); *Davidson v. Bridgeport*, 8 Conn. 472 (1831); *Selma, etc. R. R. v. Tipton*, 5 Ala. 787 (1843); *Detroit v. Jackson*, 1 Doug. (Mich.) 106 (1843); *Farmers' Bank v. Chester*, 6 Humph. (Tenn.) 458 (1846); *Hall v. Carey*, 5 Ga. 259 (1848); *Conover v. Albany Ins. Co.*, 1 Comst. 290 (1848); *Lohman v. New York, etc. R. R.*, 2 Sandf. 39 (1848); *Beers v. Phoenix Glass Co.*, 14 Barb. 358 (1852); *Alabama Bank v. Comegys*, 12 Ala. 772 (1848); *Mead v. Keeler*, 24 Barb. 20 (1857); *Fryeburg Canal v. Frye*, 5 Me. 38 (1827); *Northern Liberties Bank v. Cresson*, 12 Serg. & R. (Pa.) 306 (1824). Directors may act as such before they acquire qualification shares. *Re International Cable Co.*, 66 L. T. Rep. 253 (1892).

<sup>1</sup> *Webb v. Shropshire Rys.*, [1893] 3 Ch. 307; also holding such to be the

rule where a quorum was not present when they were elected or where they were not qualified. The acts of *de facto* directors bind the corporation. *Lord v. Equitable, etc. Society*, 57 N. Y. Misc. Rep. 417 (1908), *rev'd* on another point in 194 N. Y. 212. See also § 725, *infra*.

<sup>2</sup> *Savage v. Miller*, 56 N. J. Eq. 432 (1898). Although the statutes require three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee having no knowledge of these facts is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), reversing *Wright v. First Nat. Bank*, 52 N. J. Eq. 392. The purchaser at foreclosure sale under a second mortgage cannot attack the first mortgage on the ground that the directors who authorized it were illegally elected by reason of a married woman's stock being voted when she was not present. *Florida Clay Co. v. Vause*, 49 S. Rep. 35 (Fla. 1909). Where the statute requires directors to be stockholders, and two of the directors are not stockholders, but a directors' meeting is regularly called, a mortgage authorized at such a meeting is legal, even though one of the directors who held stock and was qualified was not present, especially where he had agreed to the mortgage and the mortgagee took possession and held it for thirteen months and the corporation did not object. *Silby v. Strong*, 38 Ore. 36 (1900). Even though the statutes require directors to be stockholders and a director has parted with his stock, yet if he continues to act, his acts are not void as to third persons. *Robinson v. Blood*, 151 Cal. 504 (1907).

<sup>3</sup> *Wheelwright v. St. Louis, etc.*



although the statutes require the directors to be residents of the state, nevertheless, even though the directors are non-residents, the incorporation is valid, and the corporation is not dissolved, nor are the stockholders liable as partners.<sup>1</sup> But the acts of *de facto* directors cannot always be invoked in behalf of themselves or stockholders. Although strangers may rely thereon.<sup>2</sup> Directors *de facto* but not *de jure* who fill a vacancy in the board do not confer upon such newly elected director a good title to his office, even though his acts may be binding on the company so far as third persons are concerned.<sup>3</sup> The New York court of appeals has recently held that where a statute requires directors to be stockholders it is not sufficient that stock be transferred to a person to qualify him, if he at once returns to the transferor the certificate indorsed in blank by him, and that although such a director may bind the company as a *de facto* director so far as third persons are concerned, yet that his election may be set aside at the instance of a stockholder, under the New York statute authorizing the courts to pass upon elections in a summary way.<sup>4</sup> A corporate lease which on its face was

Transp. Co., 56 Fed. Rep. 164 (1893). The fact that a contract of a Pennsylvania company is made by its president and managers, who are non-residents and not residents as required by statute, does not enable the other party to the contract to raise that objection. Delaware, etc. Canal Co. v. Pennsylvania Coal Co., 21 Pa. St. 131 (1853). Even though directors are not residents as required by statute, a mortgage authorized by them is legal. Copper, etc. Co. v. Costello, 12 Ariz. 318 (1909).

<sup>1</sup> Demarest v. Flack, 128 N. Y. 205 (1891). It is no ground for a receiver that the majority of the directors are non-residents and have moved the books out of the state. Thoroughgood v. Georgetown, etc. Co., 77 Atl. Rep. 720 (Del. 1910).

<sup>2</sup> Shellenberger v. Patterson, 168 Pa. St. 30 (1895).

<sup>3</sup> George Ringler & Co., 204 N. Y. 30 (1912). In a suit brought by a stockholder to set aside a sale of the stock for non-payment of an assessment, the court may investigate the legality of the title of the directors to their office, and if they have not taken an oath as required by statute the assessment made by them is illegal. Schwab v. Frisco, etc. Co., 21 Utah 258 (1900). *De facto* directors

may enjoin claimants to the offices from interfering with the management, even though equity has no jurisdiction to pass on the legality of an election. De Zavala v. Daughters, etc., 124 S. W. Rep. 160 (Tex. 1909).

<sup>4</sup> Matter of George Ringler & Co., 204 N. Y. 30 (1912). In this case the court stated that even though the certificate was transferred back after the election yet that this did not satisfy the law, although it would be sufficient if the person retained the certificate although the transfer had been made to him for the sole purpose of qualifying him. A stockholder cannot maintain a suit in equity to enjoin an alleged director from acting on the ground that a majority of the directors are mere dummies and do not actually own any stock, as required by statute, and that they were elected under an agreement by which the vendor of a majority of the stock caused the old directors to resign and new ones to be named by the vendee, and that the resignation of one director was withdrawn before it was accepted, but was afterwards accepted and a successor appointed by the board of directors, and that a majority of the stock is now opposed to the existing board of directors. The remedy is *quo warranto* instituted by the Attor-



regularly executed and has been lived up to by the lessee cannot be attacked by third persons on the ground that the board of directors did not authorize it or that they were irregularly elected or that their meeting was not duly called.<sup>1</sup>

A *de facto* director cannot avoid a liability by setting up that he was not a *de jure* director;<sup>2</sup> nor collect a salary as a *de facto* officer;<sup>3</sup> nor make a note to himself and claim that his office gave him the authority.<sup>4</sup> A *de facto* officer is ousted by a *quo warranto* proceeding,<sup>5</sup> and not by a suit in equity,<sup>6</sup> nor by an action in trespass,<sup>7</sup> nor a writ of prohibition,<sup>8</sup> nor by *mandamus*.<sup>9</sup> *De facto* officers are not personally liable on a corporate note issued by their authority.<sup>10</sup>

ney-General in the name of the people. *Moir v. Provident Sav., etc. Soc.* 127 N. Y. App. Div. 591 (1908). *Mandamus* lies at the instance of stockholders to compel the holding of the annual election, the officers having failed and refused to call a meeting for that purpose, and even though the court decides that they are only *de facto* directors, yet the court may require the holding of an election. The defendants may be the corporation itself and the *de facto* officers. *O'Hara v. Williamstown, etc. Co.*, 133 Ky. 828 (1909). Although a director must be a stockholder and he sells his stock, his acts as a director are still binding so far as third persons are concerned. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911).

<sup>1</sup> *Chandler v. Hart*, 161 Cal. 405 (1911).

<sup>2</sup> *Keyser v. McKissam*, 2 Rawle (Pa.), 139 (1828), involving a bond; *Bank of St. Mary's v. St. John*, 25 Ala. 566 (1854). In a suit for a breach of trust this is no defense. *West Bank of Scotland v. Baird and Others*, 11 Ct. of Ses. Cas. (3d series), pp. 96-121 (1872); *Easterly v. Barber*, 65 N. Y. 252 (1875). *Cf. Craw v. Easterly*, 54 N. Y. 679 (1873). A director who has acted as such cannot claim that the election was irregular. *Hall v. West, etc. Pub. Co.*, 180 Pa. St. 561 (1897). A *de facto* director cannot defend against a statutory liability of directors on the ground that he did not hold sufficient stock to qualify himself to be a director. *Donnelly v.*

*Pancoast*, 15 N. Y. App. Div. 323 (1897). One who assumes the duties of a director cannot say that he never was a director. *McDowall v. Sheehan*, 129 N. Y. 200 (1891). A director who acts, even though not qualified, is subject to the rule disqualifying him from selling property to the company. *Stetson v. Northern Inv. Co.*, 104 Iowa, 393 (1898).

<sup>3</sup> *Riddle v. Bedford County*, 7 Serg. & R. (Pa.) 386 (1821).

<sup>4</sup> *Lebanon, etc. Co. v. Adair*, 85 Ind. 244 (1882).

<sup>5</sup> See § 617, *supra*. A superintendent elected by *de facto* directors may be ousted. *State v. Curtis*, 9 Nev. 325 (1874). After the courts have decided that certain persons are directors, *mandamus* will be granted that the defeated parties turn over the books and papers to the former. *Matter of Journal Pub. Club*, 30 N. Y. Misc. Rep. 326 (1900).

<sup>6</sup> See § 618, *supra*.

<sup>7</sup> *Kingsbury v. Ledyard*, 2 Watts & S. (Pa.) 37 (1842).

<sup>8</sup> *San Jose, etc. Bank v. Sierra, etc. Co.*, 63 Cal. 179 (1883).

<sup>9</sup> Under the New York statute *mandamus* is not the proper remedy for an ousted director to test the validity of the election of his successor, the statutory remedy being an action by the attorney-general at the instance of the claimant. *People v. Powell*, 201 N. Y. 194 (1911).

<sup>10</sup> *Potwin v. Greenwald*, 123 Ill. App. 34 (1905).



§ 713a. *Meetings of directors — Place — Notice — Action without meeting — Quorum.* — A meeting of the directors of a corporation may be held outside of the state creating the corporation, unless the charter or a statute expressly forbids such a meeting. The acts, proceedings, and contracts of a meeting of the board of directors held outside of the state are valid and enforceable.<sup>1</sup> Under the Illinois statute a mortgage

<sup>1</sup> The first or organization meeting of the directors may be held out of the state. *Glymont Imp. etc. Co. v. Toler*, 80 Md. 278 (1894). A by-law that regular directors' meetings shall be held in the state does not prevent special meetings outside of the state. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896); *Wright v. Bundy*, 11 Ind. 398, 404 (1858), where a mortgage of a railway incorporated by Indiana was held valid though executed in Ohio; *Bassett v. Monte Christo, etc. Co.*, 15 Nev. 293 (1880), where power to issue bonds and mortgage real property in Nevada was conferred at a meeting of directors held in New York, the corporation having been chartered by Pennsylvania — but here the charter authorized the corporation to meet and act at any place in the United States; *Ohio, etc. R. R. v. McPherson*, 35 Mo. 13 (1864), where calls for payment of subscriptions to stock made by a board of directors at meetings held outside of the state creating the corporation were held to be valid; *Wood Hydraulic, etc. v. King*, 45 Ga. 34 (1872), in which the minutes of a meeting of directors held out of the state chartering their company were held to be evidence of the acts of the board in making contracts in other states. A directors' meeting out of the state may authorize a mortgage on real estate. *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888); *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439 (1883); *Galveston, etc. R. R. v. Cowdrey*, 11 Wall. 459, 476 (1870), in which it was held that *bona fide* holders of railroad bonds could not be prejudiced by the fact that the mortgage by which they were secured was executed by virtue of a resolution of directors at a meeting held out of the state which chartered the road; *Bellows v. Todd*, 39 Iowa, 209, 217 (1874), where a conveyance of real estate was authorized; *Arms v. Conant*, 36 Vt. 744 (1864); *McCall v. Byram Mfg. Co.*, 6 Conn. 428 (1827); *Smith v. Alvord*, 63 Barb. 415 (1866); *Singer v. Salt Lake City, etc. Co.*, 17 Utah, 143 (1898). *Cf. Ormsby v. Vermont, etc. Co.*, 56 N. Y. 623 (1874); *Aspinwall v. Ohio, etc. R. R.*, 20 Ind. 492, 497 (1863). Corporations incorporated in New Jersey were formerly required by statute to hold their directors' meetings within that state. *Hilles v. Parrish*, 14 N. J. Eq. 380 (1862). The president may call a meeting of the directors at a place other than the chief place of business. *Corbett v. Woodward*, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. A person who participates in a directors' meeting held out of the state cannot object to it on that ground. *Wood v. Boney*, 21 Atl. Rep. 574 (N. J. 1891). The directors may hold their meeting outside of the state. *Missouri, etc. Co. v. Reinhard*, 114 Mo. 218 (1893). An assignment of a corporate mortgage may be executed in another state. *Gray v. Waldron*, 101 Mich. 612 (1894). In *Brockway v. Gadsen, etc. Co.*, 102 Ala. 620 (1894), a meeting of the board of directors outside of the state was held to be illegal under the Alabama statute which regulates such meetings. A foreign corporation is not necessarily doing business in the state, sufficient to authorize service upon one of its directors under the New York statute, merely because its transfers of stock are registered in the state and its directors meet there and it keeps a bank-account there. *Honeyman v. Colorado, etc. Co.*, 133 Fed. Rep. 96 (1904). A holding company incorporated in South Africa does business in London, within the meaning of the Income Tax Law, where most of its purchases and sales



authorized by a directors' meeting held outside of the state is illegal, unless such meeting was authorized or its acts ratified by a vote of two thirds of the directors at a regular meeting in the state in accordance with the statute.<sup>1</sup>

There has been some controversy and doubt as to the necessity of giving notice of directors' meetings. Many cases apply to directors' meetings the same rules that apply to stockholders' meetings. Other cases hold that less formality and strictness are required in calling a directors' meeting. The decisions are quite uniform, however, in holding that as to all special meetings of the board of directors notice must be given.<sup>2</sup>

of stock are made in London, and some stockholders' meetings are held there and directors' meetings are held there. *Goerz & Co. Ltd. v. Bell*, [1904] 2 K. B. 136.

<sup>1</sup> *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897). A newly elected president may file a petition to be allowed to file an information in the nature of a *quo warranto* to compel a *de facto* president to surrender the office where the basis of the petition is that the meeting of the board of directors which elected the *de facto* president was held out of the state in violation of the statutes of Illinois. *Place v. People*, 192 Ill. 160 (1901). Under the Illinois statute which prohibits the directors from holding their meetings outside of the state, unless authorized or ratified by a vote of two thirds of the directors at a regular meeting, a mortgage on land in Missouri authorized at a meeting held in Missouri is illegal, and a subsequent ratification thereof at a meeting regularly held in Illinois does not validate such mortgage as against an attachment levied before such ratification. *Union, etc. Bank v. State, etc. Bank*, 155 Mo. 95 (1900).

<sup>2</sup> A mortgage authorized at a special meeting of directors, no notice of which had been given to two directors who were not present, is not enforceable, the minutes not having been approved at any subsequent meeting. *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). A mortgage authorized at a meeting of the board of directors of which no notice was given and some of the directors were absent is not

valid, and the declarations of a joint mortgagor that the corporation had authorized the mortgage are inadmissible. *Relley v. Campbell*, 134 Cal. 175 (1901). A chattel mortgage authorized at a directors' meeting at which only half the directors were present, and notice of which had not been given to directors who were not present, is illegal. *Broughton v. Jones*, 120 Mich. 462 (1899). Notice to all the trustees of a religious corporation is necessary. *Thompson v. West*, 59 Neb. 677 (1900). "That all the directors are entitled to notice, either express or implied, of any meeting at which any business is transacted, in order that the business may be binding upon all the persons concerned, admits of no question. . . . If the meetings held are regular meetings, — that is, such as are provided for by charter or the by-laws, fixing time and place, — then notice thereof is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation is transacted, express notice must be given of the time and place and the object or purpose of the meeting." Hence, an assignment of bank accounts by a corporation to its president, as collateral security, is not valid where no notice was given to all the directors of the meeting authorizing the assignment. *Whitehead v. Hamilton Rubber Co.*, 52 N. J. Eq. 78 (1893). A meeting of a majority of the directors at an unusual time and place is not valid where the minority had no notice. *First Nat. Bank v. Asheville, etc. Co.*,



The law is inclined to tolerate more freedom in the notice and the calling and holding of directors' meetings, inasmuch as the meetings

116 N. C. 827 (1895). A special meeting of directors is void if no notice is given to absent directors. The fact that a director owns or controls a majority of the stock does not validate such a meeting even though he favored their action. *Hill v. Rich Hill, etc. Co.*, 119 Mo. 9 (1893). An assignment for the benefit of creditors, authorized at a meeting of the board of directors where a part of the directors were absent and had no notice thereof, is not valid. *Simon v. Sevier Assoc.*, 54 Ark. 58 (1890). Even though stock is issued under a resolution of the directors which is invalid because the meeting was not properly called, yet if the stock is actually issued the informality is deemed waived. *Holcombe v. Trenton, etc. Co.*, 82 Atl. Rep. 618 (N. J. 1912). Notice of a directors' meeting cannot be waived in advance by a director where the time and purpose of the meeting have not yet been determined upon. *Re Portuguese, etc. Mines*, L. R. 42 Ch. D. 160 (1889). A mortgage authorized at a directors' meeting at which four were present and the other received no notice is illegal, the giving of notice being possible, and there being no necessity for immediate action. *Bank of Little Rock v. McCarthy*, 55 Ark. 473 (1892). An assignment for the benefit of creditors, made by order of a directors' meeting at which three directors were present and the other two were not notified, is invalid, and no bar to a creditor's action to collect unpaid subscriptions. *Doernbecher v. Columbia, etc. Co.*, 21 Oreg. 573 (1892). Where a directors' meeting, according to the by-laws, may be called by the president, or if there is no president, by two directors, the two directors cannot call it even if the president refuses to do so. The acts of a meeting of a board so called are illegal, a majority of the directors only being present. *Smith v. Dorn*, 96 Cal. 73 (1892). A director is entitled to notice of a meeting to elect a president. Undue haste and failure to give notice will suffice to set the elec-

tion aside. A subsequent meeting of the board cannot ratify it. The election must be held over again. *State v. Smith*, 15 Oreg. 98 (1887); *Singer v. Salt, etc. Co.*, 17 Utah, 143 (1898). In *Harding v. Vandewater*, 40 Cal. 77 (1870), a note given for an assessment upon a subscription which was called at a special meeting of the board of trustees of a mining company, of which two of the trustees had no notice, was held to be void. In *Farwell v. Houghton Copper, etc.*, 8 Fed. Rep. 66 (1881), it was held that one who had been a shareholder and purchased all the property of the company at a meeting of the directors held without notice, at which he was present and knew that one director was absent, was bound to know that notice to such absent director was necessary, and that he was not a *bona fide* purchaser without notice. Where the deed of settlement provided for special meetings, the time and place of which were to be fixed by notices countersigned by the secretary, it was held that a meeting of the requisite number of directors without previous agreement to meet on any fixed day or hour was not a meeting duly convened within the charter provision. *Moore v. Hammond*, 6 Barn. & C. 456 (1827). To same effect in municipal corporation cases, *Smyth v. Darley*, 2 H. L. Cas. 789 (1849); *Rex v. Carlisle*, 1 Stra. 385 (1720). An adjourned meeting of directors may act to the same extent that the original meeting might have acted. *Smith v. Law*, 21 N. Y. 296 (1860); *Wills v. Murray*, 4 Exch. 843 (1850). An assessment made at an irregularly called directors' meeting is void. *Thompson v. Williams*, 76 Cal. 153 (1888). Two out of three directors cannot authorize a chattel mortgage, the third not having been notified of the meeting. The mortgagee was one of the directors. *Doyle v. Mizner*, 42 Mich. 332 (1879). Bonds issued under authority of a meeting of two commissioners of a town without notice to a third commissioner are not valid.



are more frequent, the absences more common, the acts less fundamental, and ratification by acting on the contracts more certain and easy. Acquiescence in the action of a board, even if not legally convened, has frequently been held sufficient to legalize such action. Thus where there are three directors and one of them is a non-resident, a pledge of bonds authorized at a directors' meeting, of which the non-resident director has no notice, is nevertheless valid where for two years the corporation has not complained.<sup>1</sup> A preference given by a meeting of the

Pike County *v.* Rowland, 94 Pa. St. 238 (1880). In *Kersey, etc. Co. v. Oil, etc. R. R.*, 12 Phila. 374 (1877), a lease was declared void because it was authorized only by a meeting of directors of which part of the directors had no notice and were not present. A special meeting of an executive committee is irregular unless notice is given to each member. *Metropolitan, etc. Co. v. Domestic, etc. Co.*, 44 N. J. Eq. 568 (1888). In a case where directors were empowered to meet once a week at their office, without notice or summons, but on such day and at such hour as they should from time to time agree upon, it was held that a resolution come to by a quorum assembled without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed. *Moore v. Hammond*, 6 B. & C. 456 (1827). If the board meeting be specially convened, the general rule is that notice must be served upon every member entitled to be present. *Pike County v. Rowland*, 94 Pa. St. 238 (1880). *Mandamus* lies to compel vestrymen to attend a meeting when by reason of dissensions they decline so to do. *People v. Winans*, 9 N. Y. Supp. 249 (1890). Notice to all is necessary, although a quorum is present. *Johnston v. Jones*, 23 N. J. Eq. 216 (1872), where the meeting was for the purpose of calling a stockholders' meeting. Concerning the differences between the position of municipal corporation officials and the officers of a private corporation, see *Wallace v. Walsh*, 125 N. Y. 26, 36 (1890). A recess may be taken by a board without formal action, and two meetings on the same day may be construed as one meeting with a recess.

*State v. Powell*, 101 Iowa, 382 (1897). Where a meeting of the board of directors could not authorize suit to collect assessments because the assessments were not yet due, an adjourned meeting of that meeting cannot authorize such suit, all of the directors not being present at the adjourned meeting and no new notice thereof having been given. *Bank of National City v. Johnston*, 133 Cal. 185 (1901). An assignment by a corporation for the benefit of its creditors, executed by order of a meeting of the board of directors, no notice of which was given to absent directors, is not good as against an execution levied two days after such assignment, although it may be good as to creditors who acquiesce in such assignment. *Vaught v. Ohio, etc. Co.*, 49 S. W. Rep. 426 (Ky. 1899). A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given, and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid, and may be set aside by a judgment creditor of the selling corporation. *Summers v. Glenwood, etc. Co.*, 15 S. Dak. 20 (1901). A directors' meeting without notice to a director who is not present is not valid. *Cupit v. Park City Bank*, 20 Utah, 292 (1899).

<sup>1</sup> *Union Trust Co. v. Electric Park, etc. Co.*, 163 Mich. 687 (1910). Where a corporate mortgage is executed by two of the directors, one as president and the other as secretary, and the remaining director knew of it and did not object, the mortgage is good. *Denver, etc. Inv. Co. v. Rudolph*, 47 Colo. 380 (1910). Where the officers assigning patents owned by



board of directors at which a quorum is present, notice of which was not given to the other directors, may be valid if no officer or stockholder

the company are a majority of the board, and shortly after the other member of the board is informed thereof, the assignee in good faith is protected, the company not having seasonably disapproved. *United States, etc. Co. v. Electric Co.*, 189 Fed. Rep. 382 (1911); modified in 194 Fed. Rep. 866. A corporate receiver cannot object to a contract on the ground that the directors' meeting authorizing it was not properly convened, but the receiver may avoid corporate notes issued contrary to express statute. *Leavitt v. Yates*, 4 Edw. Ch. 134 (1834). Where the directors of a bank are accustomed to hold directors' meetings at the bank whenever a quorum is present, this custom will be upheld, and a meeting is legal although no notice thereof is given, there being no by-law or statute on the subject. *American Nat. Bank v. First Nat. Bank*, 82 Fed. Rep. 961 (1897). Notice of a directors' meeting need not be given to a director who resides abroad, nor to another director who is traveling abroad. The court, however, refused to lay down the broad rule that no notice in any case need be given to directors who are abroad. *Halifax, etc. Co. v. Fracklyn*, 62 L. T. Rep. 563 (1890). Where three of seven directors are non-residents, one having sold his stock, one traveling, and one inaccessible for immediate notice, the four remaining directors may hold a meeting and authorize an assignment of the corporate property for the benefit of creditors. The assignment was held to be legal, the traveling director and the inaccessible director having subsequently voted in a meeting for the selection of an assignee. *National Bank of Commerce v. Shumway*, 49 Kan. 224 (1892). A waiver of notice of a director's meeting signed by the director after the meeting is insufficient. *Holcombe v. Trenton, etc. Co.*, 82 Atl. Rep. 618 (N. J. 1912): Where notice of a directors' meeting is given by telephone, and three out of seven could not be reached before the meet-

ing and had no notice of it, and afterwards all seven directors signed a waiver of notice, the action taken at the meeting is valid. *Stafford, etc. Ry. v. Middle, etc. Co.*, 80 Conn. 37 (1907). A notice of a school trustees' meeting need not be given to trustees out of the state who could not have attended anyway. *Porter v. Robinson*, 30 Hun, 209 (1883). *Lane v. Brainerd*, 30 Conn. 565 (1862), holding that the corporate record of a meeting at which a quorum was present was presumptive proof that all the directors had been duly notified, whether living in the state or elsewhere. A by-law enacted by the directors in reference to the calling of a directors' meeting, even if not complied with, does not invalidate the meeting. *Samuel v. Holladay, Woolw.* 400 (1869); s. c., 21 Fed. Cas. 306. A quorum of directors may bind the corporation, although the other directors are not notified, there being no by-law or charter provision requiring notice. *Edgerly v. Emerson*, 23 N. H. 555 (1851). *Contra*, *Despatch Line v. Belamy Mfg. Co.*, 12 N. H. 205 (1841). Where a subsequent meeting of directors expressly ratifies the acts of a preceding meeting, any defect in the notice given of the latter meeting is cured. *County Court v. Baltimore, etc. R. R.*, 35 Fed. Rep. 161 (1888). Acts of a board of directors, no notice having been given to absent directors, may be valid by acquiescence. *Reed v. Hayt*, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659. Although an allotment of stock may be illegal by reason of notice not having been given of a directors' meeting, yet the allotment may be confirmed by a subsequent legally called meeting. *Re Portuguese, etc. mines, L. R.* 45 Ch. D. 16 (1890). A person who commits a trespass on the property of a corporation cannot question the regularity of a contract of such corporation, so far as such regularity turns on the action of a directors' meeting, or meeting of an executive committee, or assent of three fifths of the stockholders, as



thereafter objected to the same.<sup>1</sup> No notice need be given of the holding of a regular director's meeting.<sup>2</sup> Where five of eight members of the board of an insolvent company meet and authorize the sale of certain personal property, and such sale is carried out, other creditors cannot raise the objection that no notice was given to the remaining three members of the board.<sup>3</sup> If all the directors are present at a meet-

required by statute. *Farnsworth v. Western, etc. Co.*, 6 N. Y. Supp. 735 (1889). "The evidence that a day was fixed by common consent is sufficient to show notice to all of the meetings on that day." "It was wholly immaterial in what way the day of the regular meetings was fixed." *Atlantic, etc. Ins. Co. v. Sanders*, 36 N. H. 252, 269 (1858). Directors are required to take notice of an annual meeting, and no notice need be given of an adjournment thereof. *Western Imp. Co. v. Des Moines Nat. Bank*, 103 Iowa, 455 (1897). Even though no notice is given to a director of a meeting of the board, yet where the matter passed upon by the board is one which he would be disqualified from voting upon, the meeting is legal. *Troy Min. Co. v. White* 10 S. Dak. 475 (1898). A person who is elected a director but does not accept need not be notified of a directors' meeting. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400 (1894). A director who is not a stockholder cannot complain that a meeting of the directors was held without notice to him. *Anderson, etc. Co. v. Pungs*, 127 Mich. 543 (1901). Notice need not be given to a director where it is not practicable, or where he secretes himself or is beyond the reach of notice and it is necessary that immediate action be taken. *Singer v. Salt Lake City, etc. Co.*, 17 Utah, 143 (1898). A resolution by a directors' meeting that the company is insolvent may sustain bankruptcy proceedings, even though some of the directors were not notified of the meeting. *Re Lisk Mfg. Co.*, 167 Fed. Rep. 411 (1908). Where there are three directors and one of them had been violently ejected and had then brought suit for fraud in inducing him to purchase stock, the remaining two may hold a meeting and put the company into bankruptcy

without notice to him of the meeting. *Re Kenwood Ice Co.*, 189 Fed. Rep. 525 (1911). Where two of the four persons named as directors in the articles of incorporation knew nothing about them, the action of the other two binds the corporation. *Smith v. Sinbad, etc. Co.*, 158 Cal. 342 (1911).

<sup>1</sup> *Moller v. Keystone, etc. Co.*, 187 Pa. St. 553 (1898). Where two of the five directors are not stockholders and have never attended meetings or taken part in the management, a resolution of the remaining three may be binding on the company even though the first two had no notice of the meeting and were not present. *Watts v. Gordon*, 153 S. W. Rep. 483 (Tenn. 1913). A mortgage may be valid, even though the directors' meeting which authorized it, was without notice to one director, it appearing that he was merely a nominal stockholder and director. *Stiwell v. Webb, etc. Co.*, 79 Ark. 45 (1906). In the case *Buck v. Troy, etc. Co.*, 76 Vt. 75 (1903), it is held that a majority of the board may transact ordinary business without notice to the minority. See 132 Pac. Rep. 556.

<sup>2</sup> *Gumaer v. Cripple Creek, etc. Co.*, 40 Colo. 1 (1907). Where the day fixed by the by-laws for the meeting of the board of directors is on a holiday, the meeting cannot be held the next day no notice being given and no adjournment taken, and hence an assessment on stock levied at such a meeting is not binding and a sale for non-payment may be set aside. *Cheney v. Canfield*, 158 Cal. 342 (1910). Notice need not be given of the time of the meeting of the board of directors where it is specified in the by-laws. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911).

<sup>3</sup> *Johnson Co. v. Miller*, 174 Pa. St. 605 (1896). See 204 Fed. Rep. 577.



ing, it is immaterial that notice was not given, even though the by-laws required it.<sup>1</sup> Where meetings of the directors can, by the by-laws, be called only by the president or majority of the board, the secretary cannot call one.<sup>2</sup> A party dealing with a corporation is not bound to inquire whether proper notice was given of a directors' meeting.<sup>3</sup> A notice to directors of a corporation of a meeting, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation.<sup>4</sup> Notice need

<sup>1</sup> *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381 (1893). No notice of a directors' meeting is necessary if all are present. *Bank of National City v. Johnston*, 60 Pac. Rep. 776 (Cal. 1900), rev'd on another point in 133 Cal. 185. Where all the directors are present and authorize a loan, the loan is legal, even though the details are further authorized at a meeting of which no notice was given, but at which all were present, except the president, who afterwards perfected the loan. *Wolf & Bro. v. Erwin*, etc. Co., 71 Ark. 438 (1903). No notice of a directors' meeting is necessary if all are present. *Robson v. Fenniman Co.*, 85 Atl. Rep. 356 (N. J. 1912). In Missouri it is held that even though the by-laws provide that a directors' meeting may be held without notice if all are present, yet two of the three directors cannot thereby go into the presence of the third director and declare the meeting on, as against the objection of such third director. *State v. Manhattan*, etc. Co., 149 Mo. 181 (1899).

<sup>2</sup> *Hill v. Rich Hill*, etc. Co., 119 Mo. 9 (1893). The vice-president may call a special meeting of the board of directors in the absence of the president where the by-laws provide for the president calling such meeting, and the president is deemed absent, even though he is within four or five hours' travel. *Bell v. Standard*, etc. Co., 146 Cal. 699 (1905). Where the secretary has power to call a meeting of the directors, but instead of his doing so the president uses a rubber stamp to affix the secretary's name to the call, and it transpires that every director either received the notice or was present at the meeting, the informality is immaterial. *Ashley Wire*

*Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896).

<sup>3</sup> Quoted and approved in *In re New York*, etc. 141 Fed. Rep. 430 (1905). *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), reversing *Wright v. First Nat. Bank*, 52 N. J. Eq. 392. A mortgage authorized by a quorum of directors may be valid, though the other directors were not present and were not notified. *Bank v. Flour Co.*, 41 Ohio St. 552 (1885). See also § 712, *supra* and § 725, *infra*. "One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation." *Louisville*, etc. Ry. v. *Louisville Trust Co.*, 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record. A corporate lease which on its face was regularly executed and has been lived up to by the lessee, cannot be attacked by third persons on the ground that the board of directors did not authorize it or that they were irregularly elected or that their meeting was not duly called. *Chandler v. Hart*, 161 Cal. 405 (1911).

<sup>4</sup> *Re Argus Co.*, 138 N. Y. 557 (1893); *New Haven Sav. Bank v. Davis*, 8 Conn. 192 (1830), holding



not be given of an adjourned meeting of the directors, the adjournment being in accordance with the by-laws.<sup>1</sup>

The notice must be given a reasonable time before the hour of the meeting, and the mode of giving or serving the notice must be reasonable. All this turns on the circumstances and facts in each case.<sup>2</sup>

that a meeting of bank directors was legal for an ordinary transaction, although the notice did not specify its object, and that mortgaging its real estate to secure a debt was proper at such meeting. Where, a few days before a new board was to go in, a notice of a directors' meeting states that it is to hear the treasurer's report and transact other business that might come before the board, it is illegal for the board, at such meeting, to make a perpetual lease of all the corporate property. *Mercantile Library Hall Co. v. Pittsburgh Library Assoc.*, 173 Pa. St. 30 (1896). The notice of a special meeting of the directors need not state the purpose of the meeting. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911). Notice of the business to be transacted at a director's meeting need not be given. *Bell v. Standard, etc. Co.*, 146 Cal. 699 (1905). A notice of a special meeting of the board of directors need not specify the business which is to be considered. *Wills v. Murray*, 4 Exch. 843 (1850). A notice of a special meeting of the trustees of a religious corporation must state the object of the meeting. *Maclaury v. Hart*, 10 N. Y. Supp. 125 (1890). It is not necessary to state in the notice convening a meeting of the directors of a company the business to be transacted at the meeting, even if it is of an extraordinary character; and any decision come to at such meeting cannot afterwards be questioned on the ground that no notice of such business was given. *Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788. Special meetings of the directors may be held, although the by-laws do not provide for such. *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1 (1897).

<sup>1</sup> *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911).

<sup>2</sup> A notice of a directors' meeting sent out in the afternoon for the even-

ing is sufficient, if delivered to a servant at a director's residence, even though such director was absent from home, his absence not being known to the party calling the meeting until such notice was delivered. *Re Argus Co.*, 138 N. Y. 557 (1893). Notice of a directors' meeting, received on the morning of the day of the meeting, is insufficient although the meeting was to be at four o'clock in the afternoon. The court said: "*Prima facie* this was not a reasonable time. The managers are all reported as business men, who cannot be presumed to be ready to drop their own affairs and attend off-hand on such a notice. One full day in advance of the time fixed is as little as the law could presume to be reasonable, and in many cases that would be too short." The court said, however, that a by-law or the practice of the board might vary this rule. *Mercantile Library Hall Co. v. Pittsburgh Library Assoc.*, 173 Pa. St. 30 (1896). A meeting of directors called in the morning for two o'clock that day is invalid where one director could not come until three o'clock and another received the notice next morning. A quorum was present. *Re Homer, etc. Mines*, L. R. 39 Ch. D. 546 (1888). One day's notice of an executive committee meeting is sufficient, but where the committee consists of three, and two of them come into the office of the third and hold a meeting then and there against his protest, the meeting is illegal unless there was an emergency requiring it. *Hayes v. Canada, etc. Co.*, 181 Fed. Rep. 289 (1910). One day's notice of a meeting at a place which could not be reached by a resident director within that time is not sufficient, even though the meeting is adjourned and telegraphic notice sent to the director, there being no emergency requiring quick action. *Hayes v. Canada, etc. Co.*, 181 Fed. Rep. 289 (1910). A director cannot complain



Where no special method of serving notice of directors' meetings is prescribed, and the notice is served by mail, upon proof of mailing, the receipt of the notice is presumed, even as against a director's doubt as to his having received it.<sup>1</sup> Notice to all the directors is presumed.<sup>2</sup> There has been a question whether directors could vote and act as a board without coming together. Many attempts have been made to

that he had only one or two days' notice of a meeting where it appears that the time was adequate for him to attend. *Hero v. Consumers', etc. Co.*, 48 S. Rep. 989 (La. 1909). Leaving notice of a directors' meeting at a director's business place suffices, even though he is known to be ill. *Corbett v. Woodward*, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. Notice to a director is sufficient if given orally to the director's brother at the director's place of business, where a by-law allowed notice to be given by mail or in other ways. *Williams v. German, etc. Ins. Co.*, 68 Ill. 387 (1873). Notice to directors, sent by mail, is sufficient if sent in time so that the director, after receiving it, would have time to reach the place of meeting. *Covert v. Rogers*, 38 Mich. 363 (1878). A meeting of the directors may be valid although two of them, being absent from the state, did not receive the notice. *Chase v. Tuttle*, 55 Conn. 455 (1888). Telegraphic notice to two directors out of the state, of a meeting to make an assignment, is sufficient, though not received by them, a majority having met and ordered the assignment. *Chase v. Tuttle*, 55 Conn. 455 (1888).

<sup>1</sup> *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896). Where written notices of a special directors' meeting, properly addressed, are sent by mail to them, it is presumed that such notices were received, though there is no by-law that notice may be given by mail. *Stockton, etc. Works v. Houser*, 109 Cal. 1 (1895). Notice by postal card of a directors' meeting suffices where it is customary and all received it. *People v. Albany Med. Coll.*, 26 Hun, 348 (1882); *aff'd*, 89 N. Y. 635.

<sup>2</sup> *Robinson v. Blood*, 151 Cal. 504 (1907). Notice is presumed. Foote

*v. Greilick*, 166 Mich. 636 (1911); *Ross v. Crockett*, 14 La. Ann. 811 (1859); *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601 (1878). Notice of a meeting of directors is presumed. *Hardin v. Iowa, etc. Co.*, 78 Iowa, 726 (1889); *Stockton, etc. Works v. Houser*, 109 Cal. 1 (1895). Where the corporate record shows that a quorum of the directors was present, this is *prima facie* evidence that all had notice. *Fletcher v. Chicago, etc. Ry.*, 67 Minn. 339 (1897). No proof need be given that the directors were notified of the meeting where the minutes recite that they were so notified, and there was no proof to the contrary. *Turner v. Fidelity, etc.*, 2 Cal. App. 122 (1905). The fact that all the members of a board of directors of a limited partnership are not present does not raise a presumption that the meeting was irregular. *Stradley v. Cargill, etc. Co.*, 135 Mich. 367 (1904). Proof that the secretary, twenty-four hours before a meeting of the directors, sent to each of them a written notice by his office boy raises a presumption that proper notice was given. Where the minutes of a directors' meeting are written out and signed by the secretary it is presumed that all directors had notice of the meeting. *Balfour-Guthrie, etc. Co. v. Woodworth*, 124 Cal. 169 (1899). It is presumed that directors had notice of a meeting. *Mills v. Boyle, etc. Co.*, 132 Cal. 95 (1901). A corporation defending against its note on the ground that all the directors were not notified of a meeting which authorized the same has the burden of proof of showing that such was the case. *Barrell v. Lake, etc. Co.*, 122 Cal. 129 (1898). Notice to directors is presumed. *Singer v. Salt Lake City, etc. Co.*, 17 Utah, 143 (1898).



sustain a vote of the directors, which they had separately and singly agreed to. The law, however, is now clear that such separate assent is void. Directors are elected to meet and confer, and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner.<sup>1</sup> Many of the cases to the contrary may be rec-

<sup>1</sup> *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634 (1895). *Re Hayeraft, etc. Co.*, [1900] 2 Ch. 230; *Hamlin v. Union, etc. Co.*, 68 N. H. 292 (1895); *Peirce v. Morse-Oliver, etc. Co.*, 94 Me. 406 (1900); *Monroe, etc. Co. v. Arnold*, 108 Ga. 449 (1899). Separate action by the directors is illegal. *Brinkerhoff, etc. Co. v. Boyd*, 192 Mo. 597 (1905). Separate consent of the directors is not sufficient. *Demarest v. Spiral, etc. Co.*, 71 N. J. L. 14 (1904). The directors cannot act separately, even though the stockholders consent thereto. *Audenreid v. East, etc. Co.*, 68 N. J. Eq. 450 (1904). Even though under the New Jersey statutes special provisions may be inserted in the certificate of incorporation, yet this will not sustain a special provision which is inserted to the effect that a resolution in writing, signed by all of the directors, shall have the same effect as though they had a meeting and passed a resolution. *Audenreid v. East, etc. Co.*, 68 N. J. Eq. 450 (1904). An informal agreement of all the stockholders and officers to wind up the company and distribute the assets will be enforced by a court of equity, even though there were no formal meetings. *Strickland v. Jolly*, 72 S. E. Rep. 348 (Ga. 1911). Where a corporation has issued its mortgage bonds to a trustee to be delivered on order of its board of directors, and it borrows money and three of its board of directors, including the treasurer, general manager, and secretary, request the trustee to deliver certain bonds to the creditor, this is sufficient as against a trustee in bankruptcy. *Presbyterian, etc. v. Gilbee*, 212 Pa. St. 310 (1905). A corporation is not bound by a contract for the sale of its property, even though four or five directors and also the owner of the majority of the stock, write their names on the contract under the word "accepted." Moreover, the statute of

frauds applies to the transaction as affecting real estate. *Taylor v. R. D. Scott & Co.*, 149 Mich. 525 (1907). A corporation cannot collect the price of a machine sold by the majority of the directors authorizing it without a meeting. *Mattoax Leather Co. v. Patzowsky*, 80 Atl. Rep. 241 (Del. 1911). A deed of real estate executed by the directors of a corporation separately and at different times, but not formally authorized by them as a board, is not only ineffectual as a conveyance of real property, but equally so as a contract to convey. *Baldwin v. Canfield*, 26 Minn. 43, 54 (1879). The verbal assent of directors to the execution of a mortgage is not good. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). Where the directors own all the stock of a corporation, they may authorize its president to sell its assets, and the fact that the authority was not given at a regular directors' meeting is immaterial. *Jordan v. Collins*, 107 Ala. 572 (1895). A mere street conversation between the directors, by which they "agree" that subscriptions shall be called, is not a sufficient call. *Branch v. Augusta Glass Works*, 95 Ga. 573 (1895). A separate assent of a township committee to the construction of a street railway is illegal. *West Jersey Traction Co. v. Camden, etc. Co.*, 53 N. J. Eq. 163 (1895). Separate action of the directors without a meeting is not good. *Limer v. Traders' Co.*, 44 W. Va. 175 (1897). Separate acquiescence of the directors is not sufficient. *Sanderson v. Tinkham, etc. Co.*, 83 Iowa, 446 (1891). The directors of a religious corporation cannot act as a board by the separate assents of the members to the act in question. *Columbia Bank v. Gospel Tabernacle*, 127 N. Y. 361 (1891). The separate assent of the directors to a mortgage is not good. *Duke v. Markham*, 105 N. C. 131



onciled by the principle of law that the acts of a board of directors may be validated by subsequent acquiescence, even though the board

(1890). Directors can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only. *Buttrick v. Nashua*, etc. R. R., 62 N. H. 413 (1882). Directors cannot act except as a board. *North Hudson, etc. Assoc. v. Childs*, 82 Wis. 460 (1892). Directors can act as such in meeting only. Their individual assent is not sufficient. *State v. People's, etc. Assoc.*, 42 Ohio St. 579 (1885); *Junction R. R. v. Reeve*, 15 Ind. 236 (1860); *Stoystown, etc. Turnp. Co. v. Craver*, 45 Pa. St. 386 (1863). A bargain and sale deed of corporate property, authorized and executed separately and singly by all the directors without a board meeting, is void. *Baldwin v. Canfield*, 26 Minn. 43 (1879); *Gashwiler v. Willis*, 33 Cal. 11 (1867). Separate and single consent of a quorum of directors to the secretary's execution of a bond is void. *D'Arcy v. Tamar, etc. Ry.*, L. R. 2 Exch. 158 (1867). The assent of a mere majority of the board, given singly and separately, gives no authority to a cashier to do an act outside of his customary duties. *Elliot v. Abbot*, 12 N. H. 549 (1842). Where a mortgage is executed by order of directors assenting apart and not in a meeting, and is executed by a president and secretary who were elected by the stockholders at a meeting not properly called, the stockholders having no power to elect such officers in any case, the mortgage is not good. *Re St. Helen Mill Co.*, 3 Sawy. 88 (1874); s. c., 21 Fed. Cas. 161. A pledge of corporate securities to raise money is legal where six of the eight directors consented, even though no meeting was held. *Hubbard v. Camperdown Mills*, 26 S. C. 581 (1887). Directors may bind the corporation by their separate approval of claims when they have been accustomed so to do. *Longmont, etc. Co. v. Coffman*, 11 Colo. 551 (1888). The separate assent of the board of trustees of a religious corporation to the execution of a note is void. They must meet. *People's Bank v. St. Anthony's, etc.*

*Church*, 109 N. Y. 512 (1888). An assignment for the benefit of creditors authorized by the directors acting separately and not as a board is invalid. *Calumet Paper Co. v. Haskell, etc. Co.*, 144 Mo. 331 (1897).

Where an officer is sued for malfeasance in office, it is no defense that his acts were authorized by directors who did not meet as a board, but separately and singly assented to acts. Directors bind the corporation by their votes only when they meet as a board. "The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members." *National Bank v. Drake*, 35 Kan. 576 (1886). A tax which is assessed by two trustees in meeting assembled, who then obtain the separate and private assent of the third trustee, is void. *Keeler v. Frost*, 22 Barb. 400 (1856); *Schuman v. Seymour*, 24 N. J. Eq. 143 (1873). The members of a board of highway commissioners cannot authorize or ratify a contract by separate approval. A meeting is necessary. *Taymouth v. Koehler*, 35 Mich. 22 (1876). The majority of a school board cannot act separately and singly, no meeting being held. *Herrington v. District, etc.*, 47 Iowa, 11 (1877). The separate consent of three directors was held not good in *Bosanquet v. Shortridge*, 4 Exch. 699 (1850). A due-bill running from the corporation to a person and signed by the directors cannot be defeated by showing that the directors did not meet, but signed it separately and singly. *Sampson v. Bowdoinham, etc. Corp.*, 36 Me. 78 (1853); *Collins' Claim*, L. R. 12 Eq. 246 (1871). The execution of a replevin bond by the president for the corporation is legal, a majority of the directors singly and separately assenting thereto. *Bank of Middlebury v. Rutland, etc. R. R.*, 30 Vt. 159 (1858), where Redfield, Ch.



was summoned irregularly or proceeded irregularly. Thus the separate assent of directors to the president executing a mortgage in the name of the corporation may be equivalent to acquiescence on the part of the directors in his assuming such authority and may bind the corporation.<sup>1</sup> Where a statute provides that the charter may be amended in certain respects upon the directors or a majority of them making and signing a certificate, such making and signing need not be at a meeting of the directors. No meeting is required.<sup>2</sup> A statute that corporate bonds may be issued by unanimous vote of the board of directors is satisfied by the unanimous vote of the directors who attend the meeting, a quorum being present.<sup>3</sup>

A director cannot obligate himself to vote in a certain way, even as to the election of president.<sup>4</sup> Directors, of course, cannot act or

J., said: "The cases are numerous where the consent of a majority of the directors given separately has been held binding upon the company." Probably in these last cases the contract would have been binding even if the directors had not acted at all. See also *Cammeyer v. United, etc. Churches*, 2 Sandf. Ch. 186, 229 (1844), holding that the trustees must meet in order to act, and that their affirmative vote in a stockholders' or general assemblage is not sufficient. Collective action as a board, and not individual action as members of the board, is necessary to bind the corporation. *Allegheny County Workhouse v. Moore*, 95 Pa. St. 408 (1880); *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 273 (1883). Where there are but two stockholders, and they are directors, and no directors' or stockholders' meeting has been held since the organization meeting, and these two have carried on the business as though it was a partnership concern, a *bona fide* assignment by these two persons in the name of the corporation to secure preferred creditors of the corporation is good, although no corporate seal was used and no meetings were held authorizing the act. *Teitig v. Boesman*, 12 Mont. 404 (1892). When all the officers assent to a money obligation being given in the corporate name by the chief officer, the prioress, the educational corporation is bound. *Louisville, etc. R. R. v. St. Rose Literary*

*Soc.*, 91 Ky. 395 (1891). See also *Re Great Northern, etc. Works*, L. R. 44 Ch. D. 472 (1890), drawing a distinction where *all* of the directors assent. Directors cannot act singly. *Morrison v. Wilder Gas. Co.*, 91 Me. 492 (1898). Where some of the directors agree privately among themselves to pay for certain things needed by the corporation, and the latter uses them, they alone are liable for the price thereof. *Lyndon, etc. Co. v. Lyndon, etc. Inst.*, 63 Vt. 581 (1891).

<sup>1</sup> *National, etc. Bank v. Sandford, etc. Co.*, 157 Ind. 10 (1901). Where all the stockholders, being directors, agree informally and without meeting that a certain person shall be the corporate agent and take entire control, he is authorized to bind the corporation by his acts. *Wood v. Wiley, etc. Co.*, 56 Conn. 87 (1888). The separate action of all the directors is legal when all the stockholders acquiesce therein and where such action has been carried out by the corporation. *Morisette v. Howard*, 62 Kan. 463 (1901).

<sup>2</sup> *Burden v. Burden*, 159 N. Y. 287 (1899). Where the directors vote at the stockholders' meeting in favor of amending the charter, this removes an objection that as directors they should have voted for the change in the first instance at a directors' meeting. *Bernstein v. Kaplan*, 150 Ala. 222 (1907). 156 S. W. Rep. 1048.

<sup>3</sup> *Tidewater, etc. Ry. v. Jordan*, 124 Pac. Rep. 716 (Cal. 1912).

<sup>4</sup> *Dulin v. Pacific, etc. Co.*, 103 Cal.



vote by proxy.<sup>1</sup> The minority directors are entitled to be heard at a directors' meeting.<sup>2</sup> Even though one director falsely tells another that he does not intend to attend the meeting, and the latter fails to attend, this is not fraud.<sup>3</sup> Where a regularly called meeting of the board of directors is locked out of the room they may hold the meeting in the hall.<sup>4</sup> Even though the by-laws prescribe the place, day and hour of the regular meeting of the directors, yet two out of four directors cannot force a meeting by entering the room where the president is and passing a motion before he can withdraw, the three constituting a quorum.<sup>5</sup>

A majority of the whole board of directors constitute a quorum. When the meeting is properly called and a majority attend, that majority may proceed to transact business. If a majority are present a majority of that majority bind the board and the corporation, although they are a minority of the whole board.<sup>6</sup> The number necessary to

357 (1894). A contract of dummy directors that they will act as directed, is illegal and unenforceable. *Jackson v. Hooper*, 76 N. J. Eq. 592 (1910). A director cannot contract as to how he will vote. Even though the agent of a stockholder is elected a director to protect the latter's interest, yet that duty must be subordinate to his independent and impartial judgment as a director, and any contract to the contrary is void. *Singers-Bigger v. Young*, 166 Fed. Rep. 82 (1908).

<sup>1</sup> *Perry v. Tuskaloosa, etc. Co.*, 93 Ala. 364 (1891); *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561 (1891); *State v. Perkins*, 90 Mo. App. 603 (1901); *Re Portuguese, etc. Co.*, L. R. 42 Ch. D. 160 (1889); *McLaren v. Fiskien*, 28 Grant, Ch. (Can.) 352 (1881); *Attorney-General v. Scott*, 1 Vesey, 413 (1749), where the election of a minister was committed to trustees. It was held that they could not delegate to proxies their right to vote. A vote by letter on a particular question would, of course, be the same as voting separately and singly. Although one of the directors illegally voted by proxy, and his vote was necessary, yet the court in *Dudley v. Kentucky High School*, 9 Bush (Ky.), 576 (1873), refused to set the vote aside, the court saying that only one stockholder objected, and that the majority might ratify.

<sup>2</sup> *Great Western Ry. v. Rushout*, 5 De G. & Sm. 290, 310 (1852).

<sup>3</sup> *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911).

<sup>4</sup> *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911).

<sup>5</sup> *Trendley v. Illinois Traction Co.*, 241 Mo. 73 (1912), the court saying: "There is no legal process by which a director of a private business corporation can be forced to attend a meeting, and he cannot lawfully be compelled by physical force to attend, nor can he be trapped into attendance against his will."

<sup>6</sup> *Wells v. Rahway, etc. Co.*, 19 N. J. Eq. 402 (1869); *Cram v. Bangor, etc.*, 12 Me. 354 (1835); *Cahill v. Kalamazoo, etc. Ins. Co.*, 2 Doug. (Mich.) 124 (1845); *Ex parte Willcocks*, 7 Cow. 402 (1827); *People v. Walker*, 2 Abb. Pr. 421 (1856); *Sargent v. Webster*, 54 Mass. 497 (1847). If only a minority of the board are present the acts are not valid. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308 (1869); *Ernest v. Nichols*, 6 H. L. Cas. 401, 417 (1857); *Price v. Grand, etc. R. R.*, 13 Ind. 58 (1859); *Ridley v. Plymouth, etc. Co.*, 2 Exch. 711 (1848). A majority of the board constitutes a quorum, and a majority of that quorum may transact business. *Gumaer v. Cripple Creek, etc. Co.*, 40 Colo. 1 (1907). Where a reduction of the number of directors is attempted,



constitute a quorum remains the same, even though there are vacancies in the body.<sup>1</sup> A minority of the directors cannot adjourn the meeting.<sup>2</sup>

but not made in compliance with the statute, an attempt at voluntary dissolution by a majority of the directors as reduced is not legal, they not being a majority of the original number of directors. *Matter of Dolgeville, etc. Co.*, 160 N. Y. 500 (1899). Resolutions passed at a meeting at which a legal quorum of the directors is not present cannot be validated by action of the stockholders. *Bassett v. Fairchild*, 132 Cal. 637 (1901). A conversation between four of eleven directors is not sufficient to authorize a chattel mortgage. *Citizens', etc. Co. v. Hammel*, 14 Cal. App. 564 (1910). Even though a conveyance by a corporation was authorized by less than a majority of the board, yet if a majority was present and the stockholders acquiesced, a creditor cannot raise any objection. *El Cajon, etc. Co. v. Robert, etc. Co.*, 165 Fed. Rep. 619 (1908). A resolution to forfeit stock for non-payment of a subscription is void if a majority of the directors was not present and where a meeting of the board of directors is called the company is estopped from claiming that it was a meeting of the executive committee. *Matter of New York, etc. Co.*, 145 N. Y. App. Div. 623 (1911). Where a director withdraws from the meeting and leaves it without a quorum it cannot act; so also where a director is present but refuses to vote or take any part in the proceedings, he cannot be counted as a part of the quorum. *North, etc. Assoc. v. Milliken*, 110 La. 1002 (1903). A director who is present but does not vote is counted in the negative. *Commonwealth v. Wickersham*, 66 Pa. St. 134 (1870). Where a by-law allows the removal of a director on a two-thirds

vote of the whole board, he cannot be removed on a vote of four out of seven, even though one refuses to vote. *Stephany v. Liberty Cut Glass Works*, 76 N. J. L. 449 (1908). See also § 608, note, *supra*, on this subject. A stockholder who takes part in and assents to the action of a stockholders' meeting which authorizes a sale of the property to another corporation in exchange for stock of the latter to be issued to stockholders of the former cannot afterwards object thereto, and demand cash, even though his assent was only by refraining from voting against the proposition. *Carr v. Rochester, etc. Co.*, 207 Pa. St. 392 (1904). The majority of a board of directors constitute a quorum, and a majority of the quorum decide the action of the board. *Leavitt v. Oxford, etc. Co.*, 3 Utah, 265 (1883). A majority of a quorum of directors bind the corporation. *Buell v. Buckingham*, 16 Iowa, 284 (1864). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. *Holcomb v. Bridge Co.*, 9 N. J. Eq. 457 (1853). A majority of the trustees are necessary to constitute a quorum. *State v. Porter*, 113 Ind. 79 (1888). A by-law cannot authorize less than a majority to act when the charter requires a majority. *State v. Curtis*, 9 Nev. 325 (1874). A by-law of the corporation authorizing a quorum of five directors, with the president, to transact ordinary business, is valid, though there are twenty-three directors. *Hoyt v. Thompson*, 19 N. Y. 207 (1859). Where by resolution of the board four constitute a quorum, an act at a board of three is not binding.

<sup>1</sup> *Erie R.R. v. City of Buffalo*, 180 N. Y. 192, 197 (1904). A by-law requiring five directors is deemed to have been amended, where for ten years the corporation has but three directors. *Buck v. Troy, etc. Co.*, 76 Vt. 75 (1903).

<sup>2</sup> *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667 (1908). A minority of the board have no power to adjourn the meeting. *Cheney v. Canfield*, 158 Cal. 342 (1910).



Difficulty has arisen in determining whether a person taking a mortgage from or executing a contract with a corporation is bound to ascer-

Ducarry *v.* Gill, 4 Car. & P. 121 (1830). Where there are eight vestrymen and the statute requires five to constitute a quorum, four cannot act, although there are three vacancies in the board. Moore *v.* Rector, etc., 4 Abb. N. Cas. 51 (1873). When the presence of the president is by law necessary to the meeting of an executive committee, a meeting without him cannot bind the corporation. Corn Exch. Bank *v.* Cumberland Coal Co., 1 Bosw. 436 (1857). Where two out of six directors have been accustomed to act as a quorum, a forfeiture of stock by two is legal. Lyster's Case, L. R. 4 Eq. 233 (1867). The acts of less than a quorum are valid if they are subsequently ratified by a quorum. Austin's Case, 24 L. T. Rep. (N. S.) 932 (1871). A lease taken by a meeting of a board of directors at which no quorum was present is ratified by the acquiescence of two boards elected in subsequent years, with knowledge and no objection. Oregon Ry. *v.* Oregon Ry. & Nav. Co., 28 Fed. Rep. 505 (1886). "Where there is a definite body in a corporation, a majority of that definite body must not only exist at the time when any act is to be done by them, but a majority of that body must attend the assembly where such act is done." Rex *v.* Miller, 6 T. R. 268 (1795), per Lord Kenyon. A custom is legal which allows three to constitute a quorum of a board of nine directors. *Re Regents', etc. Co.*, W. N. 1867, p. 79 (1867). An allotment of shares by a board of two when the charter requires three is void. The subscription is not collectible. *Re British, etc. Co.*, 59 L. T. Rep. 291 (1888). Although a meeting of directors is legally called, yet if a quorum does not attend, those who do attend cannot adjourn to another day. It requires a quorum to adjourn. McLaren *v.* Fiskien, 28 Grant, Ch. (Can.) 352 (1881). A managing committee of eight cannot act at a meeting of six only. Brown *v.* Andrew, 13 Jur. 938 (1849). A quorum of the directors must be pres-

ent to act, and this quorum consists of a majority. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891). In a municipal corporation, if all the board are present and four vote one way, while the other four do not vote at all, the vote prevails. It is a majority of a quorum. State *v.* Dillon, 125 Ind. 65 (1890). If all six members of a city council are present, three may pass a resolution, although the other three do not vote. Rushville Gas Co. *v.* Rushville, 121 Ind. 206 (1889). Where the record shows that two of the four directors present voted aye and one nay, and the other director was in the chair, and the motion was declared carried, the law presumes that the chairman voted aye. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). A meeting of four legally elected and three illegally elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman *v.* Chicago, etc. R. R., 139 Ill. 658 (1892). The confirmation by the board of directors of resolutions passed by a meeting not containing a quorum relates back, and is as if the resolutions were regularly passed in the first place. *Re Portuguese, etc. Mines*, L. R. 45 Ch. D. 16 (1890). Two directors cannot transact business when there are four directors. *Re Portuguese, etc. Co.*, L. R. 42 Ch. D. 160 (1889). In an action by an insurance company to collect an assessment it is no defense that losses were allowed at meetings of the directors where no quorum was present. Atlantic, etc. Ins. Co. *v.* Sanders, 36 N. H. 262, 269 (1858). A majority of the quorum may decide a question, and a plurality may elect any officer, unless otherwise provided by charter or by-laws or by law. *Ex parte Willcocks*, 7 Cow. 410 (1827); Cooley, Const. Lim. (4th ed.) \*141; Oldknow *v.* Wainwright, 2 Burr. 1017 (1760); Booker *v.* Young, 12 Gratt. (Va.) 303 (1855). Where twelve are present, and one candidate receives six votes, another four, and



tain whether a quorum of the directors was present at the directors' meeting which authorized the instrument, and whether a majority voted in favor thereof. There are many cases where mortgages and contracts have been held void by reason of defects in the calling, holding, or voting at the directors' meeting.<sup>1</sup> The rule sustained by the great weight of authority, however, is that where a corporate mortgage or contract is signed and sealed by the corporation and delivered to the proper person, who takes it in good faith, he may act upon it, and is protected even though the directors' meeting was not regularly called or held.<sup>2</sup> Thus a contract between two gas companies leading to a large expenditure of money cannot be repudiated by one of them on the ground that a quorum of its directors was not present when the contract was authorized.<sup>3</sup>

A quorum of the directors is presumed to have been present.<sup>4</sup> A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted.<sup>5</sup>

another one, and one blank, there is no election. *People v. Conklin*, 7 Hun, 188 (1876).

<sup>1</sup> See §§ 709, 712, *infra*, and cases in this section; also cases in § 808, *infra*; also § 725, *infra*.

<sup>2</sup> See §§ 725, 808, *infra*. Even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, although a purchaser with notice cannot enforce such guaranty. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court." A *bona fide* purchaser of corporate bonds is entitled "to presume that all necessary preliminaries not required to be a matter of public record have been properly performed,"

and hence it is no defense that the directors met out of the state when they authorized the mortgage securing the issue. *Schultze v. Van Doren*, 64 N. J. Eq. 465 (1902). A person making a contract with a corporation relying on its minute book is not affected by the fact that the minutes were passed at a meeting of the directors not duly called. *Wyss-Tahman v. Beaver, etc. Co.*, 219 Pa. St. 189 (1907).

<sup>3</sup> *Greensboro Gas Co. v. Home, etc. Co.*, 222 Pa. St. 4 (1908). Where the three directors own all the stock and one as president assigned a patent application, and another director witnesses it, and a third had knowledge of it, and the assignee knew of no irregularity, the assignment is good, although no meeting was held. *United States, etc. Co. v. J. B. M. Electric Co.*, 194 Fed. Rep. 866 (1912).

<sup>4</sup> *Sargent v. Webster*, 54 Mass. 497 (1847).

<sup>5</sup> *Bassett v. Fairchild*, 132 Cal. 637 (1901). In counting a quorum of the board, a director to whom a mortgage is voted at the meeting cannot be counted. *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). Where a board of directors, consisting of six, sell corporate property to two of them, the sale being authorized at a meet-



Although a meeting of the board of directors at which a quorum is not present calls a stockholders' meeting, and the stockholders' meeting takes action, yet where no stockholders object until six months thereafter the court will not interfere.<sup>1</sup> Where the charter makes a majority of directors a quorum, a minority cannot fill a vacancy in the board.<sup>2</sup> The president is not entitled to a casting vote, in case of a tie, where he has already voted once.<sup>3</sup> Although there are less directors than the statute or charter requires, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons.<sup>4</sup>

ing at which five were present, including the two, the remaining three do not constitute a quorum and the sale is illegal. *Leary v. Interstate, etc. Bank*, 63 S. W. Rep. 149 (Tex. 1901). Money received by a director of a coöperative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. *McClure v. Wilson*, 70 N. Y. App. Div. 149 (1902). In Indiana it is held that directors may vote as directors on the question of giving themselves a preference. *Nappanee, etc. Co. v. Reid, etc. Co.*, 159 Ind. 614 (1903).

<sup>1</sup> *Southern, etc. Bank v. Rider*, 73 L. T. Rep. 374 (1895). Where stock is sold by the corporation for non-payment of an assessment, levied at a meeting of the board of directors where a quorum is not present, the sale may be set aside, unless the stockholders have acquiesced in the sale and the stock has passed into *bona fide* hands. *Hatch v. Lucky Bill Min. Co.*, 25 Utah, 405 (1903).

<sup>2</sup> *State v. Curtis*, 9 Nev. 325 (1874). A director who is chosen by the board when less than a quorum is present may be treated as not a director, even though he has met with the board frequently when a majority was present. His remedy is not *mandamus*. *People v. New York, etc. Asylum*, 7 N. Y. St. Rep. 277 (1887); *aff'd*, 122 N. Y. 190. A purchaser of property at an execution sale cannot contest the right of the corporation to redeem on the ground that such redemp-

tion was by a board of directors illegally elected, in that a minority of the board filled vacancies in the board and then proceeded to take action. *Baggott v. Turner*, 21 Wash. 339 (1899). Under the statutes of California, where a bank becomes insolvent the court may appoint directors to fill vacancies. *Braslan v. Superior Court, etc.*, 124 Cal. 123 (1899).

<sup>3</sup> A by-law cannot give him this right. *State v. Curtis*, 9 Nev. 325 (1874). The president does not have, in addition to his first vote, a casting vote as president. *Toronto, etc. Co. v. Blake*, 2 Ont. (Can.) 175 (1882). A by-law cannot give to the presiding officer a casting vote at an election after he has once voted his stock. *Lamb v. McIntire*, 183 Mass. 367 (1903).

<sup>4</sup> *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890); *Wallace v. Walsh*, 125 N. Y. 26 (1890). Where the charter provided that two directors might act, although vacancies existed in the board, it is immaterial that the number of directors is less than the minimum charter number. *Re Scottish Petroleum Co.*, L. R. 23 Ch. D. 413 (1883). Although the statutes require three directors who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), *rev'g Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). Where the charter requires three directors who shall be and continue to be stockholders, and one of them sells his



A corporate creditor attaching property of the company which has already been assigned to another creditor cannot attack such assignment on the ground that, while the statute required three directors, only two directors existed, the third one having resigned.<sup>1</sup> The express authority of an officer to execute a contract is not affected by a change in the board of directors.<sup>2</sup> Questions relative to the resignation of a director and the election of his successor are considered elsewhere.<sup>3</sup>

stock, the remaining two cannot act, yet the remaining directors may call a stockholders' meeting to hold an election. *Toronto, etc. Co. v. Blake*, 2 Ont. (Can.) 175 (1882). It is held in *Faure, etc. Co. v. Phillipart*, 58 L. T. Rep. 525 (1888), that where the board of directors was to consist of from three to seven, but the quorum to consist of two, and where by resignation the whole board is reduced to two, these two cannot act; nor can they elect one or more to fill the vacancies. The quorum can act only when the board consists of the requisite number. This objection, however, cannot be raised by one who takes part as director. Where by charter the board of directors is to be from five to seven, and three may act, three cannot act when there are but four directors. The act is not binding on the corporation. *Kirk v. Bell*, 16 Q. B. 290 (1851). See also *Bottomley's Case*, L. R. 16 Ch. D. 681 (1880); *Lindley, Companies*, p. 157. A company whose directors are to be twelve may act, although by resignation or death the number is less than twelve. *Thames, etc. Ry. v. Rose*, 4 Man. & G. 552 (1842). Where the by-laws provide that there shall be from four to eight directors and the company starts business with only three, an allotment of stock by them is not binding. *Re Sly, etc. Co. Ltd.*, [1911] 2 Ch. 430. Where a majority of the directors may fill vacancies, and of seven directors only two remain, they cannot fill the vacancies. *Moses v. Tompkins*, 84 Ala. 613 (1888).

Although there are vacancies in a board consisting of fifteen members,

yet action may be taken by eight or more of the directors at a meeting duly called. *New England, etc. Co. v. Haynes*, 71 Vt. 306 (1899). A mortgage made by four directors when the statute required five, there being one vacancy, is legal if the mortgage is ratified by the full board, and such ratification may be by recognition of the mortgage in a second mortgage. *Porter v. Lassen County, etc. Co.*, 127 Cal. 261 (1899). Where there are two vacancies in a board of five, the act of two of the remaining three directors is not legal, under the statutes of California. *Brown v. Valley, etc. Co.*, 127 Cal. 630 (1900). Where the by-laws provide that notwithstanding vacancies, continuing directors may act, two directors may act, they being the only directors, although the by-laws provide that there should be from three to nine directors. Moreover, persons dealing with the corporation in ignorance of defects in the constitution of the board are not bound to take notice of it and may enforce their claims. *Re Bank of Syria*, [1900] 2 Ch. 272; *aff'd*, [1901] 1 Ch. 115. Where there are vacancies in the board of directors the remaining directors have no power to act unless the charter or by-laws of the company authorize them to act under such circumstances; but as to all matters in the ordinary course of business of the company, persons dealing with the corporation in good faith are protected, even though there are vacancies in the board of directors. *Lindley on Companies* (5th ed.), p. 157. A committee of arbitration may act by a majority

<sup>1</sup> *Castle v. Lewis*, 78 N. Y. 131 (1879).

<sup>2</sup> *Kidd v. New Hampshire, etc. Co.*, 74 N. H. 160 (1907).

<sup>3</sup> See § 624, *supra*.



A statute that upon an officer in a bank borrowing money of the bank without security, his office shall become vacant and he shall cease to become a director, is self-executing.<sup>1</sup> A statute authorizing the directors to remove any officer does not authorize them to remove one of the directors.<sup>2</sup> Directors cannot expel one of their number under a by-law enacted to give them such power of expulsion.<sup>3</sup> A reduction in the number of directors does not *ipso facto* oust any of the directors, and it becomes effective only when a sufficient number resign or their term of office expires.<sup>4</sup> A director legally elected may enjoin the company and the other directors from interfering with his acting as a director and attending meetings.<sup>5</sup> The court will order corporate officers to allow a director to examine the books, even though he is but a dummy director, and an injunction against their removing the books does not suspend the general and ordinary business of the corporation, within the meaning of the New York statute.<sup>6</sup> *Mandamus* lies to compel an outgoing corporate officer to deliver the corporate books and papers to the new one.<sup>7</sup>

vote unless the agreement provides otherwise. The resignation of one member just before the award is made does not invalidate the award. *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337 (1901); *aff'd*, 113 Fed. Rep. 1020.

<sup>1</sup> His continuance in office may bind the corporation by his acts, but does not prevent a creditor attacking an assignment for creditors made by him in behalf of the bank. *Cupit v. Park City Bank*, 20 Utah, 292 (1899). Where a director, who is also treasurer, sells his stock to the other directors, it being a part of the sale that he give up his offices, the corporation may treat his offices as vacant. *Anderson, etc. Co. v. Pungs*, 127 Mich. 543 (1901). An injunction suit by a director to restrain the other directors from excluding him from the board fails where the charter provides that any director accepting an office for profit in the company thereby vacated his directorship, and he had accepted a position of trustee of a corporate mortgage. *Astley v. New Tivoli, Ltd.*, [1899] 1 Ch. 151. Notes issued by directors who are disqualified by having sold their stock and as a scheme to create a liability on the part of the stockholders are not good, espe-

cially where the meeting of the directors was not properly called. *Close v. Potter*, 155 N. Y. 145 (1898). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. *Stanley v. Luse*, 36 Oreg. 25 (1899).

<sup>2</sup> *Laughlin v. Geer*, 121 Ill. App. 534 (1905).

<sup>3</sup> *Raub v. Gerken*, 127 N. Y. App. Div. 42 (1908). Even though a director has been illegally removed from office by a vote of the board of directors and a meeting of the stockholders, under an amendment to the certificate of incorporation, yet his remedy is *quo warranto*, and not *mandamus*, a new director being in actual possession of the place. *People v. Powell*, 201 N. Y. 194 (1911).

<sup>4</sup> *Matter of Manoca, etc. Ass'n*, 128 N. Y. App. Div. 796 (1908).

<sup>5</sup> *Grundy v. Briggs*, [1910] 1 Ch. 444.

<sup>6</sup> *People v. Bonwit Bros.*, 69 N. Y. Misc. Rep. 70 (1910). See also § 501, *supra*.

<sup>7</sup> *People v. Powers*, 145 N. Y. App. Div. 693 (1911). A trustee in bankruptcy of an insolvent corporation may by summary proceedings obtain



Even though a director resigns for the sole purpose of avoiding a statutory liability and causes his son to be elected director in his place and continues to be the agent and manager of the business, nevertheless he is not liable under the statute.<sup>1</sup>

The question of whether the directors may delegate their authority to an executive committee has given rise to much controversy. Such a delegation of authority has become very common, and is sustained by the courts. This question is discussed elsewhere.<sup>2</sup> There being nothing in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers.<sup>3</sup>

§ 714. *Minute-book of directors' meetings and other books of the corporation as evidence of acts and contracts of the corporation and authorization of agents.*—The minute-book of the proceedings of the directors' meetings is proper evidence to prove a corporate contract or the authority of a corporate agent to act or contract for it.<sup>4</sup> Where

possession of the corporate records and stock books. *Babbitt v. Dutcher*, 216 U. S. 102 (1910).

<sup>1</sup> *Brown v. Clow*, 158 Ind. 403 (1902). Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and even though one of them resigns, the liability continues for the benefit of past as well as future creditors. *Nix v. Miller*, 26 Colo. 203 (1899). See also § 624, *supra*.

<sup>2</sup> See § 715, *infra*.

<sup>3</sup> *Re Bulawayo, etc. Co. Ltd.*, [1907] 2 Ch. 458.

<sup>4</sup> Quoted and approved in *Torras v. Raeburn*, 108 Ga. 345 (1899). The statement of the president that the board of directors had passed certain resolutions is not admissible. *Childs v. Ponder*, 117 Ga. 553 (1903). The authenticity of corporate books must be proved before they will be admitted in favor of the corporation as against a member. *Fraternal, etc. Assoc. v. Edwards*, 9 Ga. App. 43 (1911). A general sales manager of a manufacturing corporation may be proved to be such by his own testimony on the witness stand. *Joslyn v. Cadillac, etc. Co.*, 177 Fed. Rep. 863 (1910). An oral agreement of a stockholder to take

a conveyance of the property and pay all the debts and the par value of the stock to each stockholder may be enforced by the first-named stockholder. The minutes of the directors may prove the nature of the transaction. *Fleming v. Reed*, 77 N. J. Eq. 563 (1909). Corporate books may be used to prove a right against the corporation itself or against one of the stockholders, so far as regularity and legality of the corporate proceedings are concerned. They must, however, be identified and this may be done by having an officer swear that he is the proper custodian and that they are the original books. *Lowry Nat. Bank v. Fickett*, 122 Ga. 489 (1905). Parol evidence that a person is treasurer and manager is sufficient without producing the corporate records to that effect. *Empire, etc. Co. v. Gardiner, etc. Co.*, 10 Ariz. 117 (1906). Even though the minute-book is in another state, yet this does not excuse failure to produce the minutes or a certified copy thereof, and hence the statements of officers of the company as to the contents of such minute-book are incompetent. *Central, etc. Co. v. Sprague, etc. Co.*, 120 Fed. Rep. 925 (1902). A mere vote of the directors that a certain party be given the popcorn privilege for a specified time for



the resolutions of the directors authorize the making of a contract, and the contract is subsequently prepared and executed, its terms

a specified sum does not in itself make a contract. *Hazard v. Hope Land Co.*, 69 Atl. Rep. 602 (R. I. 1908). See also p. 368, note 3, *supra*, and note 3, p. 2476, *infra*. The authority of a corporate agent to manage the affairs of a company cannot be proved by a question to a witness in the absence of the vote of the directors or proof that the resolution cannot be found. *Hurd v. Hotchkiss*, 72 Conn. 472 (1900). The corporate records may be shown to be such by the testimony of a director who is also treasurer at the time. *Illinois, etc. Assoc. v. Plagge*, 177 Ill. 431 (1898). Entries in the minute-book fifty years old are admissible in behalf of the corporation to prove title to land claimed by the corporation by adverse possession. *Hamerslag v. Duryea*, 58 N. Y. App. Div. 288 (1901); *aff'd*, 172 N. Y. 622. Even though the secretary did not sign the minutes of a meeting as copied into the record book, yet such minutes may be used to prove that a resolution was passed at that meeting. *Woodhaven Bank v. Brooklyn, etc. Co.*, 69 N. Y. App. Div. 489 (1902). A party may introduce in evidence a portion of the minutes pertaining to the matter in litigation, leaving it to the opposite side to introduce the remainder if the latter desires. *Fouche v. Merchants', etc. Bank*, 110 Ga. 827 (1900). Where the appointment of an agent is by resolution of the directors, or in any other manner requiring a record of the matter, the entry upon the minutes or books of the corporation may be introduced in evidence of the appointment. *Buncombe Turnp. Co. v. McCarson*, 1 Dev. & B. (N. C.) 306 (1835); *Owings v. Speed*, 5 Wheat. 420, 424 (1820); *Thayer v. Middlesex Ins. Co.*, 27 Mass. 326 (1830); *Narragansett Bank v. Atlantic Silk Co.*, 44 Mass. 282 (1841); *Clark v. Farmers' Mfg. Co.*, 15 Wend. 256 (1836); *Methodist Chapel v. Herrick*, 25 Me. 354 (1845); *Haven v. New Hampshire Asylum*, 13 N. H. 532

(1843). Where a corporate agent is appointed by a resolution, his authority cannot be proved by parol. The extent of the authority in such a case is a question of law for the court. *McCreery v. Garvin*, 39 S. C. 375 (1893). In order to make the corporate books admissible, proof must be given as to who kept them, and that the entries were made at the proper time or by the proper directors, and that the entries were properly made. *Powell v. Conover*, 75 Hun, 11 (1894). A contract duly accepted and agreed to in a directors' meeting and entered on the minutes, which are duly signed, is a contract in writing. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). Directors' minutes are evidence of a contract, though written up after the meeting. *Wells v. Rahway, etc. Co.*, 19 N. J. Eq. 402 (1869). In a suit by an employee of a corporation for pay for services, the defendant's books, properly kept by its proper officers, are admissible in evidence to prove payments to plaintiff on account of services. *Ganther v. Jenks, etc. Co.*, 76 Mich. 510 (1889). A resolution of the board of directors authorizing an assignment for the benefit of creditors is sufficient. *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383 (1891). The minutes of directors' meetings as they appear in a corporate book will not be excluded as evidence merely because the secretary swears that they were written up several years after the meetings and were made partially from the recollection of the president. *McIlhenny v. Binz*, 80 Tex. 1 (1890). In proving a *de facto* corporation, the meetings and the issue of stock and the transaction of business may be proved by parol without producing the books. *Johnson v. Akerstrom*, 70 Minn. 303 (1897). After notice to the corporation to produce its records is given, secondary evidence may be introduced. *Thayer v. Middlesex, etc. Co.*, 27 Mass. 325 (1830); *Elems v. Ogle*, 15 Jur. 180 (1850); *Lohman v. New York, etc. R. R.*, 2 Sandf. 39



being more full than the resolutions of the directors, the contract between the parties is that one which was actually executed.<sup>1</sup> All the resolutions of the directors may be read together in order to ascertain the true nature of a transaction.<sup>2</sup> In a suit by a corporation for specific performance of a contract by which certain claims were sold to the corporation, it may be shown that the minutes of the meetings authorizing the purchase were fraudulently altered so as to exclude some of the claims.<sup>3</sup> A director has a right to examine all the books and papers of the company.<sup>4</sup>

(1848), holding that the failure to produce may send the question to the jury. To same effect, *Narragansett Bank v. Atlantic Silk Co.*, 44 Mass. 282 (1841). The presumption is that a suit in the corporate name was authorized by it. *Bangor, etc. R. R. v. Smith*, 47 Me. 34 (1859). In proving employment, notice to produce must be given. *Haven v. New Hampshire Asylum*, 13 N. H. 532 (1843). So also in proving agency. *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836); *Montgomery R. R. v. Hurst*, 9 Ala. 513 (1846). As to proving subscription to stock, see ch. IV, *supra*. Parol evidence cannot explain the minutes. *Gould v. Norfolk, etc. Co.*, 63 Mass. 338 (1852). The rough minutes are evidence if not subsequently written out. *Waters v. Gil-*

*bert*, 56 Mass. 27 (1848). It may be shown that the minutes are incorrect. *Van Hook v. Somerville, etc. Co.*, 5 N. J. Eq. 137, 169 (1845). Proof that the book is a corporate record is made by the person having custody of the book. *Smith v. Natchez, etc. Co.*, 2 Miss. 479, 492 (1837). It must be proved that it is a corporate book, kept as such, and by the proper officer. *Highland Turnp. Co. v. McKean*, 10 Johns. 154 (1813); *Whitman v. Granite Church*, 24 Me. 236 (1844). Proof may be by the secretary. *Stephens v. Meritt*, 64 Mass. 27 (1852). The bookkeeper may prove his entries. *Union Bank v. Knapp*, 20 Mass. 96 (1825). Or, if he is dead, his handwriting may be proved. *Union Bank v. Knapp*, 20 Mass. 96 (1825); also *Chenango, etc. Co. v. Lewis*, 63 Barb.

<sup>1</sup> *Keystone, etc. Co. v. Bate*, 196 Pa. St. 566 (1900). Even though the resolution of the board of directors accepting an oral proposition does not contain the entire proposition made to a corporation, yet the entire oral proposition may be binding on the corporation. *Rochester, etc. Co. v. Browne*, 55 N. Y. App. Div. 444 (1900); *aff'd*, 179 N. Y. 542.

<sup>2</sup> *Hartley v. Pioneer Iron Works*, 181 N. Y. 73 (1905). Where the by-laws require notice of any special business to be transacted at the annual meeting, the court may consider the notice in connection with the minute-book of the meeting, even though the by-laws provide that the minute-book shall be conclusive. *Betts and Co. Ltd. v. McNaghten*, [1910] 1 Ch. 430. "In interpreting the action of the stockholders in passing the resolution, the

facts and circumstances surrounding them may legitimately be looked to." *Zeekendorf v. Steinfeld*, 225 U. S. 445, 457 (1912).

<sup>3</sup> *Nowell v. M'Bride*, 162 Fed. Rep. 432 (1908). Minority stockholders may prove by parol evidence that the minutes of a meeting are not correct and are the very contrary of what took place. *Just v. Idaho, etc. Co.*, 16 Idaho, 639 (1909). Even though the price at which stock is to be sold is to be the value as shown by the corporate books, a suit in equity does not lie to correct the books where such sale may never take place. *Drucklieb v. Harris*, 209 N. Y. 211 (1913), the court holding also that the corporation itself has nothing to do with a contract between its promoters relative to the sale of the stock.

<sup>4</sup> See § 511, *supra*.



A corporation may enter into a written contract under seal without a formal vote or written entry of a vote by the directors. Where the directors are present, and all assent to the execution of the contract, this is sufficient. Proof of corporate resolutions or votes, and of votes of the directors, is made by producing the original minutes or record-book of the corporation. If there is no question that the book is the minute-book of a corporation, it is immaterial that it is not in the possession of the regular custodian.<sup>1</sup> Where the record-book is lost, or no record was ever made, secondary evidence may be resorted to.<sup>2</sup>

111 (1872). Where a corporation is disproving agency, it is held to strict proof. Its records are inadmissible unless proof is given that they were kept by the proper officer, and unless he testifies to them. *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565 (1875); *aff'd*, 96 U. S. 640. See *Gafford v. American, etc. Co.*, 77 Iowa, 736 (1889). For a very full note on the admissibility of corporate books as evidence, see 23 Cent. L. J. 468-473. An examination before trial, to ascertain whether the defendant corporation authorized a person to make a contract for it, was granted in *Bloom v. Pond's Extract Co.*, 18 N. Y. Supp. 179 (1891). See 87 Atl. Rep. 331.

<sup>1</sup> Quoted and approved in *Gold, etc. Co. v. Dennis*, 121 Pac. Rep. 677, 678 (Colo. 1912). It is immaterial that the issue of stock for property was not done by formal resolution entered in the minutes. *Whitlock v. Alexander*, 76 S. E. Rep. 538 (N. C. 1912). If no record is made parol evidence may show the proceedings. *Robson v. Fenniman Co.*, 85 Atl. Rep. 356 (N. J. 1912). *Wyss-Thalman v. Beaver, etc. Co.*, 219 Pa. St. 189 (1907). As a collateral matter the president may testify that he is president without producing the minutes of the corporation. *Knight v. Landis*, 75 S. E. Rep. 834 (Ga. 1912). Where the directors at a meeting agree that a certain salary shall be paid to the manager, he may collect it even though there was no formal resolution passed or entered in the minutes of the meeting. *Re Gouverneur Pub. Co.*, 168 Fed. Rep. 113 (1909). The secretary cannot bind the corporation by entries made in the corporate books by him-

self to the effect that he is interested in certain stock. *Fletcher v. Kidder*, 127 Pac. Rep. 73 (Cal. 1912).

<sup>2</sup> *Zihlman v. Cumberland Glass Co.*, 74 Md. 303 (1891). Where a stockholder has been paid a certain salary for three years for work done, it is too late for the corporation to claim that he was not employed by a resolution of the board of directors. *Allen v. Central, etc. Co.*, 131 Pac. Rep. 78 (Cal. 1913). A resolution of the board of directors cannot be proved by parol unless it was shown that it was not recorded or that the record was lost. *Durbrow v. Hackensack, etc. Co.*, 77 N. J. L. 89 (1908). Where the record is lost the directors' acts may be shown by parol. *Starwich v. Washington, etc. Co.*, 64 Wash. 42 (1911). A resolution of the board of directors purchasing the business may be shown to have been passed, even though not recorded. *Iowa Drug Co. v. Souers*, 139 Iowa, 72 (1908). It may be shown by parol evidence that the minutes of a directors' meeting are incomplete, and that a secretary was formally elected. *State v. Guertin*, 106 Minn. 248 (1909). Proceedings of the board of directors may be shown by parol evidence if no minute has been made of them. *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22 (1910). Where a meeting of the directors discuss and agree to take a lease of property and the president and secretary execute such lease, it is binding, even though no formal resolution was adopted or recorded. *McQuaide v. Enterprise, etc. Co.*, 14 Cal. App. 315 (1910). If the authority of a corporate agent is not in the minutes, it may be proven by parol. *Alton Mfg. Co. v. Garrett*,



A resolution adopted at a stockholders' meeting is valid, although only a pencil memorandum was made of it and no formal record made until long afterwards. The proceedings may be proved by parol.<sup>1</sup>

etc. Inst., 243 Ill. 298 (1910). Oral evidence of a discussion at a stockholders' meeting is inadmissible to vary or explain a resolution actually adopted. *Lipsett v. Hassard*, 158 Mich. 509 (1909). Directors' resolutions not entered in the minute-book may be proven by parol. *Poutch v. National, etc. Co.*, 147 Ky. 242 (1912). A resolution of the board of directors may be proved by parol. *Watts v. Gordon*, 153 S. W. Rep. 483 (Tenn. 1913). Even though the directors' minutes do not show authorization of a corporate mortgage it may be shown in other ways. *Miller v. Bellamore, etc. Co.*, 86 At. Rep. 13 (Conn. 1913). The minutes of a meeting at which directors were elected may be proved by parol if the written record has been lost. *Hudson v. J. B. Parker, etc. Co.*, 173 Mass. 242 (1899). A by-law may be proved by oral evidence where there was no written entry of the same in the corporate records. *Masonic, etc. Assoc. v. Severson*, 71 Conn. 719 (1899). A resolution of the board of directors releasing the mortgage may be proved by parol, no record having been made. *In re Bank of West Superior*, 109 Wis. 672 (1901). Reasonable salaries paid to the officers for services rendered cannot be recovered back, although no formal resolution was passed in regard thereto. *McCourt v. Singers-Bigger*, 145 Fed. Rep. 103 (1906); s. c., 150 Fed. Rep. 102. Where the record-book containing the minutes of a stockholders' meeting has been lost, the proceedings may be proved by the oral testimony of any witness who was present. *Blanton v. Kentucky, etc. Co.*, 120 Fed. Rep. 318 (1902); aff'd, 149 Fed. Rep. 31. A resolution of the directors authoriz-

ing the issue of a note and mortgage is valid, even though not recorded and even though the statute requires a two thirds vote of the directors, and a record that the motion was carried is sufficient if parol evidence is given that two thirds of the directors voted for it. *Ismon v. Loder*, 135 Mich. 345 (1904). If the minutes contain but a portion of an agreement the balance may be shown by parol. *Grath v. Mound City, etc. Co.*, 121 Mo. App. 245 (1907). The implied authority of certain officers to make a certain contract may be proved by what was said and done at meetings of the board of directors, even though not recorded. *Smith v. Bank of New England*, 72 N. H. 4 (1903). If the minute-books or stock-books are lost their contents may be proved by parol. *Garmany v. Lawton*, 124 Ga. 876 (1906). Where the minutes of meetings are merely pinned into the record-book, proof must be given that they are the actual minutes. *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). If no minutes of a directors' meeting are kept the proceedings may be proved by parol evidence. *Braxmar v. Stanton*, 110 N. Y. App. Div. 167 (1905). Where a corporation makes a written assignment of a claim and the assignee sues thereon, it is presumed that the assignment was authorized and this is not disproved by the fact that there was no written resolution of the board of directors. *McKee v. Cunningham*, 2 Cal. App. 684 (1906). Where the books have been destroyed by accident their contents may be proved by parol. *Thistlethwaite v. Pierce*, 30 Ind. App. 642 (1903). The president of a trust company has no authority to make a

<sup>1</sup> *Handley v. Stutz*, 139 U. S. 417 (1891). The records of the stockholders' meetings may be used to show the purpose of a stockholder's resolution. *Wiley v. Athol*, 150 Mass. 426 (1890). The first draft of min-

utes signed by the secretary and initialed by the president are a proof of the proceedings, where they have not been copied into the minutes. *Chott v. Tivoli Amusement Co.*, 114 Ill. App. 178 (1904).



But a stockholder cannot prove by parol that a dividend was declared, the records not showing the same. His remedy is by proceedings to correct the corporate record.<sup>1</sup>

contract by which it guarantees the sale of the securities of a shipbuilding company, and proof that the board of directors authorized such a contract must be very clear to sustain it. *Gause v. Commonwealth T. Co.*, 124 N. Y. App. Div. 438 (1908); *aff'd*, 196 N. Y. 134. The best proof of a corporate act is the record of the board of directors, and other evidence cannot be introduced unless such record does not exist or is inaccessible. *Topeka Co. v. Oklahoma Co.*, 7 Okla. 220 (1898). Although the record does not show that certain stock was voted, yet it may be proved by parol evidence that it was voted. *Franklin T. Co. v. Rutherford, etc. Co.*, 57 N. J. Eq. 42 (1898). Where no written minutes are kept of the proceedings of stockholders, they may be proved by parol. *Birmingham, etc. Co. v. Birmingham Traction Co.*, 128 Ala. 110 (1900). Where no record is kept of directors' resolutions authorizing a mortgage, they may be proved by parol. *Murray v. Beal*, 23 Utah, 548 (1901). If no record is kept, the action of the board of directors may be proved by parol. *Hendrie, etc. Co. v. Collins*, 13 Colo. App. 8 (1899). The fact that a majority of the members of the corporation voted for a loan, as required by statute, may be shown by parol evidence, even though such vote does not appear in the records of the corporation. *Illinois, etc. Assoc. v. Plagge*, 177 Ill. 431 (1898). Where the corporate books are lost, a contract that a certain person should not pay toll, in consideration of closing a private way, may be proved by parol. *Pigg v. Stacey*, 49 S. W. Rep. 1065 (Ky. 1899). Where all the directors are present and assent thereto, a written contract may be made by the corporation without any formal vote or entry in the minutes. *Indiana, etc. Co. v. Robinson*, 29 Ind. App.

59 (1902). Where there are but two directors and one of them is general manager and carries on the entire business, and he and the president sell all the property of the company, it is immaterial that they did not hold a formal meeting as directors to authorize such sale. *Magowan v. Groneweg*, 16 S. Dak. 29 (1902). See s. c., 14 S. Dak. 543. A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that the transaction was not duly authorized by the board of directors or assigned by the proper officers, where he has participated in the results of their action. *Swentzel v. Franklin, etc. Co.*, 168 Mo. 272 (1902). Where a street-railway company employs a person as its agent to purchase a majority of the stock of another street-railway company, and he does so, and the former pays him for the stock and for his services, he cannot refuse to deliver the stock on the ground that the company had no power to purchase or on the ground that it had passed no resolutions authorizing him to purchase, and the former may recover the stock from a transferee with notice from the agent. *Manchester St. Ry. v. Williams*, 71 N. H. 312 (1902). Even though no formal resolutions are passed or record made, yet, if all the stockholders and directors are present, and it is agreed that one stockholder should loan money to the company, the company must repay the same. *Burke v. Sidra Bay Co.*, 116 Wis. 137 (1902). A mortgage authorized at a stockholders' meeting at which all the directors were present is legally authorized. *Crossette v. Jordan*, 132 Mich. 78 (1902). It may be shown by parol that a resolution gave the vice-president a certain salary, where such resolution was not entered on

<sup>1</sup> *Dennis v. Joslin, etc. Co.*, 19 R. I. 666 (1896).



The question of whether the books are evidence against officers, and whether the officers are conclusively presumed to have notice

the record and he performed services other than those pertaining to his office. *Selley v. American, etc. Co.*, 119 Iowa, 591 (1903). "The entry of a resolution in a minute is not essential to the validity of the resolution, which is proved *aliunde*." *Re Great Northern, etc. Works*, L. R. 44 Ch. D. 472 (1890). Although a resolution is not inserted in the minutes of the meeting, it may be proved by other evidence. So held as to a resolution authorizing the secretary to borrow money. *Bank of Yolo v. Weaver*, 31 Pac. Rep. 160 (Cal. 1892). "Parol evidence is admissible to prove the action of the board of directors or stockholders where the record fails to state it." *Allis v. Jones*, 45 Fed. Rep. 148 (1891). "Where a corporation consists of a small number of persons like a partnership, they may transact all their business by conversation, without formal votes; and it would be a violation of the plainest principles of justice to hold those who deal with them to prove all their acts by written votes, which they do not keep or do not produce." *Melledge v. Boston, etc. Co.*, 59 Mass. 158, 179 (1849). Parol evidence may be given to prove a vote of a salary to an officer where the secretary is dead and the minute-book does not contain a record of the vote. *Pickett v. Abney*, 84 Tex. 645 (1892). A vote of the directors employing a person is not a contract. It must be known to and accepted by the person employed. It may be shown by parol that the contract was to be binding only in case certain negotiations were carried out. A statement by the treasurer, showing the liabilities and making no mention of his salary, is admissible as evidence. *Sears v. King's, etc. R. R.* 152 Mass. 151 (1890). See also, on this subject, *U. S. Bank v. Dandridge*, 12 Wheat. 64, 95 (1827); *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324, 425 (1827); *St. Mary's Church v. Cagger*, 6 Barb. 576 (1849); *Maxwell v. Dulwich College*, 1 Fonbl. Eq. 296 (1834); *Magill v. Kaufman*, 4 Serg.

& R. (Pa.) 317 (1818); *Brady v. Brooklyn*, 1 Barb. 584 (1847); *Essex Turnp. Corp. v. Collins*, 8 Mass. 292, 298 (1811); *Marshall v. Queensborough*, 1 Sim. & S. 520 (1823); *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392 (1849); *Garvey v. Colcock*, 1 Nott & McC. (S. C.) 231 (1815); *Bates v. Bank of Alabama*, 2 Ala. 452 (1841). The corporate secretary's letters to a vendor are admissible as evidence. *Scott v. Middletown, etc. R. R.*, 86 N. Y. 200 (1881). The minutes of a directors' meeting may by parol be shown not to include the whole agreement where the party being contracted with was present at the meeting and discussed the matter with the board. *Tibbals v. Mount Olympus Water Co.*, 10 Wash. 329 (1894). A verbal agreement of the directors in meeting assembled to pay the treasurer a certain salary is binding on the company, although no written resolution thereof is entered in the minutes. *Outterson v. Fonda Lake Paper Co.*, 20 N. Y. Supp. 980 (1892). When there are but a few persons interested in a corporation, "ordinary business may be transacted without the formality of resolutions. It may be done by conversation without formal votes." *Hall v. Herter*, 83 Hun, 19 (1894). See s. c., 90 Hun, 280, and 157 N. Y. 694. The resolutions of directors need not be reduced to writing in order to be valid. *Columbia, etc. Co. v. Vancouver, etc. Co.*, 32 Oreg. 532 (1898). Corporate minutes need not be written out by the secretary himself. It is sufficient that he sign them. *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1 (1897). A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. *Rogers v. Pell*, 154 N. Y. 518 (1898). Authority to an agent, given by the board of directors, may be proved by oral evidence, there being no record of the same in the corporate books. There



of all that is contained in the corporate books, is considered elsewhere.<sup>1</sup> The books, of course, are not admissible as evidence against strangers

is no law requiring a board of directors to keep a record of their proceedings. *Morrill v. C. T. Segar Mfg. Co.*, 32 Hun, 543 (1884). *Contra*, *Andover, etc. Turnp. Co. v. Hay*, 7 Mass. 102, 107 (1810); *Colcock v. Garvey*, 1 Nott & McC. (S. C.) 231 (1815); *Peek v. Detroit, etc. Works*, 29 Mich. 313 (1874); but see *Taymouth v. Koehler*, 35 Mich. 22 (1876). The acts of the directors need not be formally entered on the corporate minutes. *Nashua, etc. R. R. v. Boston, etc. R. R.*, 27 Fed. Rep. 821 (1886); *Morrill v. Segar, etc. Co.*, 32 Hun, 543 (1884); *Moss v. Averell*, 10 N. Y. 449 (1853). Parol evidence may show that the corporate records have been burned. *Baptist House v. Webb*, 66 Me. 398 (1877). Or lost. *Wallace v. First Parish, etc.*, 109 Mass. 263 (1872); *Prothro v. Minden Sem.*, 2 La. Ann. 939 (1847). It may be proved by parol that the board of directors authorized an agent to draw a bill of exchange. No corporate seal or record evidence is necessary. *Preston v. Missouri, etc. Co.*, 51 Mo. 43 (1872). The directors' votes may be proved by parol when they were not recorded. *Edgerly v. Emerson*, 23 N. H. 555 (1851); *Wait, Insolv. Corp.*, § 529. It may be for the jury to say whether a subsequent meeting changed the minutes. *Delano v. Smith Charities*, 138 Mass. 63 (1884). The company is not bound by fraudulent insertions, at least where strangers have not relied thereon. *Holden v. Hoyt*, 134 Mass. 181 (1883). See also *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (1825); *Hoag v. Lamont*, 60 N. Y. 96 (1875); *Fleckner v. Bank of U. S.*, 8 Wheat. 338 (1823); *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392 (1849), holding that an appointment need not be entered upon the records of the corporation. Secondary evidence of the records is not admissible unless the officers are first examined and the originals are not to be found. *Mullan-*

*phy Sav. Bank v. Schott*, 135 Ill. 655 (1891). In a suit to set aside an alleged illegal sale of stock for non-payment of assessments, the records of the corporation cannot be proved by oral evidence. *Corcoran v. Sonora, etc. Co.*, 8 Idaho, 651 (1902). Entries in the corporate books should be proved by the books themselves, and not by the clerk, unless an excuse is given for their non-production. *National Bank v. Navassa, etc. Co.*, 56 Hun, 136 (1890). Where the original minutes have been destroyed, the minutes as they have been copied into the minute-book are admissible. *Brower v. East, etc. Co.*, 84 Ga. 219 (1890). The books of the company are the best evidence, and not the testimony of officers as to what they had seen on the books. *Dial v. Valley, etc. Assoc.*, 29 S. C. 560 (1888). A copy of a resolution of the directors of an alien corporation is not evidence until proof of a reasonable effort to obtain the original is given. *Bowick v. Miller*, 21 Oreg. 25 (1891). Sworn copies taken from corporate books are incompetent unless evidence is given of the loss of the book itself. *Latour-ette v. Clark*, 51 N. Y. 639 (1872). Entries need not be proven by the clerk who made the entries. *First Nat. Bank v. Tisdale*, 84 N. Y. 655 (1881). Books of the board of directors, in which their proceedings are recorded, proved by proving the handwriting of the clerk and president, are competent evidence to prove the facts therein recorded. *Owings v. Speed*, 5 Wheat. 420 (1820). Acts of a board of directors may be shown by parol when no record of them has been made. *Zalesky v. Iowa, etc. Co.*, 102 Iowa, 512 (1897). In an action by a foreign corporation, oral proof of the corporate books, papers, and records, in the possession of the corporation outside the state, is not admissible in its behalf. *Mandel v. Swan, etc. Co.*, 154 Ill. 177 (1895).

<sup>1</sup> See § 727, *infra*.



dealing with the corporation.<sup>1</sup> Where there is no statute or by-law requiring a private corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal that a resolution was passed cannot be questioned by any one claiming under or through the corporation.<sup>2</sup> Minutes or resolutions entered in the books of the corporation may constitute a contract, or sufficient evidence of a contract to satisfy the statute of frauds, and even a third party may be entitled to the benefits of such contract.<sup>3</sup> When a corporation denies

Query, whether, under the statutes of Tennessee requiring the board of directors to keep a full and true record of all their proceedings, an authorization of a mortgage is legal where no such record of the authorization is made? *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624 (1893). Even though the resolutions authorizing a mortgage were oral, and no written record was made, yet they may be proved to sustain the mortgage. *Boggs v. Lakeport, etc. Assoc.*, 111 Cal. 354 (1896). Where the secretary is dead, and his memoranda of the minutes cannot be found, and no record has been made, the minutes may be proved by parol. *New Boston, etc. Co. v. Saunders*, 67 N. H. 249 (1892). Resolutions of the board may be shown by parol where only a part of the business has been entered in the minutes. *Cameron v. First, etc. Bank*, 34 S. W. Rep. 178 (Tex. 1896). The acts and resolutions of the directors, if not recorded, may be proved by parol. *Langsdale v. Bonton*, 12 Ind. 467 (1859); *Bay, etc. Assoc. v. Williams*, 50 Cal. 353 (1875). Minutes not signed by the chairman are not evidence of a call; nor is a subsequent ratification of those minutes. *Cornwall, etc. Co. v. Bennett*, 5 H. & N. 423 (1860).

<sup>1</sup> See § 727, *infra*.

<sup>2</sup> *Prentiss, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). A certified copy of resolutions sent to a mortgagee, and authorizing a mortgage, are sufficient proof without proving loss of the corporation records. *Purser v. Eagle Lake, etc. Co.*, 111 Cal. 139 (1896). A copy of a resolution of the board of directors certified to by the secretary and authenticated under

the corporate seal is admissible in evidence but not if the seal is not attached. *Interstate, etc. Co. v. Powell Bros., etc. Co.*, 126 La. 22 (1910). Where bank books cannot be introduced in evidence without stopping the business of the bank, the cashier may testify as to what the books contain. *Washington, etc. Exch. v. Wilson & McCoy*, 152 N. C. 21 (1910). A person purchasing a mortgage from a savings bank through its treasurer and secretary may rely upon a copy of a resolution passed by the trustees authorizing such sale, and duly signed by the secretary. So though the secretary had intentionally made the copy different from the original. *Whiting v. Wellington*, 10 Fed. Rep. 810 (1882). A copy of the directors' resolution is evidence, not when merely certified to by the secretary, but when sworn to by him. *Hallowell, etc. Bank v. Hamlin*, 14 Mass. 178 (1817). See also § 713a, *supra*.

<sup>3</sup> *Washer v. Independence, etc. Co.*, 142 Cal. 702 (1904). Where the board of directors vote to accept a written offer to sell land to a corporation, this makes a binding contract, especially where a letter to that effect is written. *Beach, etc. Co. v. American, etc. Co.*, 202 Mass. 177 (1909). A resolution of a board of directors duly entered on its minute-book and signed by its president satisfies the statute of frauds as to a contract of employment. *Maune v. Unity Press*, 143 N. Y. App. Div. 94 (1911). Where a signed copy of a resolution of the board of directors selling certain corporate lands was handed to the vendee this satisfies the statute of frauds. *Western, etc. Co. v. Kalama, etc. Co.*, 42 Wash. 620 (1906). A resolution of the board of



that an employee was authorized to make a contract for it, its officers may be examined before trial, but its books and minutes need not be produced unless it is shown that they contain entries relating to that fact.<sup>1</sup> A statute making it a criminal offense for a corporate officer to make false entries in any record or document applies to false entries in the minute-book.<sup>2</sup>

§ 715. *Executive committee.*—There formerly was some doubt as to whether the powers of a board of directors might be delegated to an executive committee. The right of the board of directors to delegate to agents generally the transaction of the ordinary and routine business of the corporation is unquestioned, and indeed is absolutely necessary.<sup>3</sup> But in matters involving discretion there are decisions to

directors, even though entered on the minutes, authorizing the president to sell the real estate of the corporation, does not satisfy the statute of frauds. *Cumberland, etc. R. R. v. Shelbyville, etc. R. R.*, 117 Ky. 95 (1903). A resolution of municipal authorities for supplying water may take the contract out of the statute of frauds relative to sales of merchandise, but not until such resolution has been made known to the other party and accepted by the latter. *Mayor, etc. v. Town of Harrison*, 71 N. J. L. 69 (1904). A resolution of the board of directors may be sufficient evidence of a contract relative to land. *Newport News, etc. Co. v. Newport News, etc. Ry.*, 97 Va. 19 (1899). The corporate record of the vote of the directors and the signature of the recording officer satisfies the statute of frauds as to answering for the debts of another. *Lamkin v. Baldwin, etc. Co.*, 72 Conn. 57 (1899). An entry on the corporate minutes of a resolution to form a corporate contract is sufficient on notice of the same to the other party, and suffices to form the contract. It satisfies the statute of frauds. *Argus Co. v. Mayor, etc.*, 55 N. Y. 495 (1874). An entry on the directors' minute-book, duly signed, is sufficient to prevent a contract being void by the statute of frauds. *Jones v. Victoria, etc. Co.*, L. R. 2 Q. B. D. 314 (1877). If on production of the books no resolution is found, proof of acts, etc., may be given. *Melledge v. Boston, etc. Co.*, 59 Mass. 158, 179 (1849). See also § 721, *infra*, and note 4, p. 2468, *supra*.

<sup>1</sup> *Wood v. Mott Iron Works*, 114 N. Y. App. Div. 108 (1906). See § 519, *supra*, covering many phases of this subject.

<sup>2</sup> *Ex parte McKenney*, 10 Cal. App. 357 (1909).

<sup>3</sup> The corporation may authorize its president to sell and assign its negotiable paper. *Stevens v. Hill*, 29 Me. 133 (1848); *Northampton Bank v. Pepon*, 11 Mass. 288 (1814). Nearly all corporate acts are done by means of subordinate agents. Such delegations of authority are necessary. See *Manchester Ry. v. Fisk*, 33 N. H. 297 (1856). Difficulty occurs in defining the line which separates powers that may be delegated from those which may not be. See *Lyon v. Jerome*, 26 Wend. 485 (1841); *Gillis v. Bailey*, 21 N. H. 149 (1850). A corporation owning water-works outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one and the profits to be divided equally. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549 (1895). Directors may authorize two of their number to execute corporate notes to a person. *Leavitt v. Oxford, etc. Co.*, 3 Utah, 265 (1883). Or appoint an agent to execute a deed. *Arms v. Conant*, 36 Vt. 744 (1864). Where various corporations appoint a committee to carry on litigation, they are each liable for the attorneys' fees, the attorneys having no knowledge of a limitation of the powers of the committee in the matter. *Prindle v.*



the effect that the directors cannot delegate that discretion.<sup>1</sup> The clear weight of authority, however, holds that the powers of a board of directors may be delegated to an executive committee of that board, and the acts and contracts of such a committee may be made binding on the corporation.<sup>2</sup> Although the charter provides that the board of

Washington L. Ins. Co., 73 Hun, 448 (1893); *aff'd*, 149 N. Y. 614. Directors having power to fix the rates of their railroad may delegate that power to agents. *Manchester, etc. R. R. v. Fisk*, 33 N. H. 297 (1856). See also many cases, in the following sections of this work and § 712, *supra*.

<sup>1</sup> The directors of a New Jersey holding corporation owning a majority of the stock of a New York insurance company cannot place the stock in a voting trust for a period of years, because it is the duty of such directors to manage and control the property of the corporation instead of delegating such control to outside individuals. *Knickerbocker, etc. Co. v. Voorhees*, 100 N. Y. App. Div. 414 (1905). Where subscribers to the stock of a proposed telephone corporation authorize a committee of nine to purchase material and incorporate, and five of the committee in opposition to four do purchase and incorporate, the minority are not bound by their action. *Mt. Carmel, etc. Co. v. Mt. Carmel, etc. Co.*, 119 Ky. 461 (1905). Directors cannot delegate to two of their number the question of whether a conditional subscription to shares should be accepted. *Howard's Case*, L. R. 1 Ch. 561 (1866). Two directors acting as agents to receive calls have no power to waive a forfeiture of stock and receive the calls thereon. *Card v. Carr*, 1 C. B. (N. S.) 197 (1856). Directors cannot delegate to a committee the power to forfeit and sell stock for non-payment of calls. *York, etc. R. R. v. Ritchie*, 40 Me. 425 (1855). A Pennsylvania railroad corporation cannot authorize its board of directors to delegate to an executive committee the location of the route. *Weidenfeld v. Sugar, etc. R.R.*, 43 Fed. Rep. 615 (1892). In *Gillis v. Bailey*, 21 N. H. 149 (1850), it was held that a board of directors could not delegate

to an agent the power to lease various pieces of property owned by the corporation. Power to make assessments cannot be delegated by the directors. *Farmers', etc. Ins. Co. v. Chase*, 56 N. H. 341 (1876); *Silver Hook Road v. Greene*, 12 R. I. 164 (1878), where the delegation was to the treasurer. But see *Read v. Memphis, etc. Co.*, 9 Heisk. (Tenn.) 545 (1872), where such delegation to the president was upheld. *Cf. Lindley, Companies*, p. 156. The directors' duty to pass on paper offered for discount cannot be delegated in Louisiana. *Perey v. Milaudon*, 3 La. 568 (1832). *Cf. Morse, Banks and Banking*, 108. Directors having power to purchase stock cannot delegate that power to a general manager. No ratification arises from the fact that the purchase was entered on the books. *Cartmell's Case*, L. R. 9 Ch. 691 (1874). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. *Dupignac v. Bernstrom*, 76 N. Y. App. Div. 105 (1902). See also § 534, *supra*.

<sup>2</sup> An executive committee may be appointed under the statutory power of the company "to appoint such subordinate officers and agents as the business of the corporation shall require." The executive committee may delegate to one of their number the indorsing of checks, etc. *Sheridan, etc. Light Co. v. Chatham Nat. Bank*, 127 N. Y. 517 (1891). A contract



directors shall manage the affairs and does not provide for an executive committee, the by-laws may do so for ordinary business operations, but

between two railroads, by which one was given the right to run over the tracks of the other, is legal, although it is executed by the authority only of the executive committee and of a meeting of the stockholders, the court saying the determination of the management of the corporate affairs rests with its stockholders, and that the stockholders had the power to authorize the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. *Union, etc. Ry. v. Chicago, etc. Ry.*, 163 U. S. 564, 597 (1896), aff'g 51 Fed. Rep. 309 (1892), and 47 Fed. Rep. 15 (1891). See also *Black River Imp. Co. v. Holway*, 85 Wis. 344 (1893), and *Hoyt v. Thompson's Executor*, 19 N. Y. 207 (1859), where the committee consisted of any five or more directors who attended meetings of which notice was given to all. See also *Hoyt v. Sheldon*, 3 Bosw. 267 (1858). "Unless otherwise provided by law, the stockholders may authorize the board of directors to delegate to an executive committee the authority to do any and all acts which the directors are authorized to do. The executive committee thus derives its authority from the stockholders through the board of directors." *United States v. Union Pacific R. R.*, 226 U. S. 470, 475 (1913). The by-laws of a steamship company may authorize an executive committee to carry on the business of the company and a contract of employment by such committee is binding. *Young v. Canada, etc. Co.*, 211 Mass. 453 (1912). Directors of a trust company may delegate the details of the business to an executive committee and are not liable for the failure of the executive committee to properly pass upon various transactions. *Kavanaugh v. Gould*, 147 N. Y. App. Div. 281 (1911). A member of the executive committee, who is also practically the business agent of the corporation, may agree that if a sub-contractor will not file a lien his claim will be paid. *Culver v. Pocono, etc. Co.*, 206 Pa. St. 481 (1903). An executive committee of a trust company cannot legally purchase for it its own stock. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608 (1906). Where an advisory committee has authorized the president to borrow money for the company the company is bound. *Re Cincinnati, etc. Co.*, 167 Fed. Rep. 486 (1909). An executive committee may authorize the officers to indorse a note in its current business, especially where the charter authorizes the creation of such a committee. *Tilden v. Goldy, etc. Co.*, 9 Cal. App. 9 (1908). An executive committee may dismiss an appeal, even though the board of directors have not acted. *Young v. Schenck*, 64 Wash. 90 (1911). Where the stockholders have expressly authorized an executive committee, the corporation itself cannot repudiate the action of that committee. *Bankers', etc. Assoc. v. Nachod*, 128 N. Y. App. Div. 281, 297 (1908). A resolution to forfeit stock for non-payment of a subscription is void if a majority of the directors was not present and where a meeting of the board of directors is called the company is estopped from claiming that it was a meeting of the executive committee. *Matter of New York, etc. Co.*, 145 N. Y. App. Div. 623 (1911). A railroad corporation which has pledged its own bonds may afterwards assign the equity of redemption to the pledgee and this assignment may be authorized by the executive committee. *Bibber-White Co. v. White River, etc. Co.*, 175 Fed. Rep. 470 (1909). An executive committee has no power to make a contract appointing a sole selling agent for five years and giving him six per cent. on all goods sold by him or any one else. Moreover such a contract is unilateral and not binding when the agent does not agree to sell any goods. *Commercial, etc. Co. v. Northampton, etc. Co.*, 115 N. Y. App. Div. 388 (1906); aff'd, 190 N. Y. 1. The board of directors may delegate to an executive committee the power to issue promissory notes.



the executive committee cannot change the mode of calling stockholders' and directors' meetings.<sup>1</sup>

*First National Bank v. Com. Travelers' Assoc.*, 108 N. Y. App. Div. 78 (1905); *aff'd*, 185 N. Y. 575, the court intimating, however, that the board of directors could not delegate discretionary powers to a sub-committee. Where all the stock is sold through the executive committee, the stockholders may be bound by the false representations of such committee. *Garrett Co. v. Appleton*, 101 N. Y. App. Div. 507 (1905); *aff'd*, 184 N. Y. 557. Where the board of directors allow one of their number to manage the company and conduct and transact its business, he is the same as an executive committee or general manager or managing director, and his acts bind the company, even though there was no formal vote giving him authority. *York v. Mathis*, 103 Me. 67 (1907). Where a meeting of the board of directors has been called, the executive committee cannot two hours before such meeting make a contract for a sole selling agency for the entire output of the company for five years. *Commercial, etc. Co. v. Northampton, etc. Co.*, 190 N. Y. 1 (1907); the court intimating also that such an unusual contract would have been beyond the power of the executive committee, even if no meeting of the board of directors had been called.

The acts and contracts of a *de facto* executive committee were upheld in *Salem, etc. Co. v. Lake Superior, etc. Mines*, 112 Fed. Rep. 239 (1901), on the ground that the corporation and the board of directors had for a long time allowed such executive committee to act as though it had been regularly constituted and authorized so to act. A party dealing with a special committee of the board of directors of a corporation must take notice of the powers of such committee. *Kelsey v. New England, etc. Ry.*, 60 N. J. Eq. 230 (1900); *s. c.*, 62 N. J. Eq. 742. Where the charter provides that the business shall be managed by three

executive officers they may execute a mortgage, it appearing that no directors have ever been elected. *Bell, etc. Co. v. Kentucky, etc. Co.*, 106 Ky. 7 (1899).

In *Tempel v. Dodge*, 89 Tex. 68 (1895), it was held that a corporation had no right to create by its by-laws an executive committee to exercise the powers of the board of directors. "The managers might, undoubtedly, clothe a committee, in the intervals between the sittings of the board, with all their own authority to conduct the ordinary business of the company." But it seems that this executive committee cannot delegate its power to one of their number. *Olcott v. Tioga R. R.*, 27 N. Y. 546, 558 (1863). Where the by-laws authorize the directors to transact business through a committee, that committee may consist of one person. *Re Touraine Co.*, L. R. 25 Ch. D. 118 (1883). The by-laws may authorize the directors to delegate their powers to a committee. *Harris's Case*, L. R. 7 Ch. 587 (1872), where the committee allotted shares. Directors may delegate to a committee power to sell corporate property, and a mortgage given by the committee is valid. Certainly so where the board of directors subsequently accepted the papers connected with it. *Burrill v. Nahant Bank*, 43 Mass. 163 (1840). In *Andres v. Fry*, 113 Cal. 124 (1896), the contract of the executive committee authorized to purchase patent-rights was declared legal. The constitution of an incorporated camp-meeting association may authorize an executive committee and give it power to make regulations as to the use of the grounds. *Round Lake Assoc. v. Kellogg*, 141 N. Y. 348 (1894). An employee of a company who sues for services, under a written contract made with the "chairman" and "managing director," may collect; their authority is presumed as agents or executive committee.

<sup>1</sup> *Hayes v. Canada, etc. Co.*, 181 Fed. Rep. 289 (1910).



The majority of the directors cannot, however, exclude the minority from the meetings and from being heard, by delegating power to a committee, and "even if the minority had a voice given to them, still, if there existed a combination among the majority, before that voice was heard, to overbear it," the acts of such a body would be illegal.<sup>1</sup> Where the board of directors delegates to a committee the power to act for it, due notice of meetings of the executive committee must be given to all its members, but a majority of the committee suffices to constitute

*Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674 (1866). In New York it is clearly held that the directors of a banking or loan and trust company may appoint an executive committee and authorize it to act for the board of directors, and that the acts of this committee are as binding, valid, and effective as though they had been authorized by the board of directors directly. *Palmer v. Yates*, 3 Sandf. 137 (1849). *Cf. Bank Com'r's v. Bank of Buffalo*, 6 Paige, 497 (1837). In *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299 (1813), the right of the directors to delegate their power to contract to a committee was not questioned. Stockholders cannot elect a committee not consisting of directors and compel the directors to act with that committee in corporate matters. *Boot, etc. Co. v. Dunsmore*, 60 N. H. 85 (1880). It is fraudulent for an executive committee to vote large compensation to themselves for services as promoters. *Blatchford v. Ross*, 54 Barb. 42 (1869). In *St. Louis, etc. Assoc. v. Augustine*, 2 Mo. App. 123 (1876), a loan committee contracted for the corporation. Where the executive committee can act only when the president is present, action without his presence is void. *Corn, etc. Bank v. Cumberland, etc. Co.*, 1 Bosw. 436 (1857). As to committees of municipal corporations, see *Dillon, Mun. Corp.*, §§ 60, 374. Contracts, etc. by an executive committee have often been recognized as valid. See *Tracy v. Guthrie, etc. Soc.*, 47 Iowa, 27 (1877). A stockholder's request to such a committee to bring an action to remedy a corporate wrong is sufficient. *Hazard v. Durant*, 11 R. I. 196 (1875). The committee's consent to an arbitration may be ratified by the

company. *Fryeburg Canal v. Frye*, 5 Me. 38 (1827). Although a contract is irregularly made by the executive committee of a corporation, there being no notice and no quorum, yet, by accepting the benefits of the contract afterwards, the company is bound. *Metropolitan, etc. Co. v. Domestic, etc. Co.*, 44 N. J. Eq. 568 (1888). In *Curtis v. Leavitt*, 15 N. Y. 9 (1857), a finance committee had authorized the issue of bonds. The charter required a resolution of the board of directors. The court held that acquiescence cured the defect. In *Taylor v. Agricultural Assoc.*, 68 Ala. 229 (1880), the executive committee was provided for by charter. A committee authorized to settle with a person cannot settle also with a firm in which he is interested, but the company may ratify. *Merchants', etc. Co. v. Rice*, 70 Iowa, 14 (1886). The acts of the executive committee may be construed to be subject to the approval of the next meeting of the board of directors. *Indianapolis, etc. R. v. Hyde*, 122 Ind. 188 (1890). An executive committee having the general direction and superintendence of the affairs of the company have no power to issue stock, the whole capital stock being already issued. *Ryder v. Bushwick R. R.*, 134 N. Y. 83 (1892), aff'g 10 N. Y. Supp. 748. A person sued on a tort cannot raise the objection that the proceedings of an executive committee or board of directors were irregular, or that stockholders did not consent to a contract. *Farnsworth v. Western, etc. Co.*, 6 N. Y. Supp. 735 (1889). See also *Black River Imp. Co. v. Holway*, 85 Wis. 344 (1893).

<sup>1</sup> *Great Western Ry. v. Rushout*, 5 De G. & Sm. 290, 310 (1852).



a meeting and proceed to business, and a majority of that majority binds the committee, the directors, and the corporation by its vote.<sup>1</sup>

<sup>1</sup> *Burleigh v. Ford*, 61 N. H. 360 (1881); *Metropolitan, etc. Co. v. Domestic, etc. Co.*, 44 N. J. Eq. 568 (1888). Such also is the case with municipal corporations. *State v. Jersey City*, 27 N. J. L. 493 (1859); *Junkins v. Doughty Falls, etc. Dist.* 39 Me. 220 (1855). Arbitrators or appraisers in private matters must be unanimous in their conclusion, but in public matters as between a city and a waterworks company a majority rule. *City of Omaha v. Omaha Water Co.*, 218 U. S. 180 (1910). An executive committee to perform merely ministerial duties is legal, and when they all meet and consult a majority rules. *Young v. Schenck*, 64 Wash. 90 (1911). One day's notice of an executive committee meeting is sufficient, but where the committee consists of three, and two of them come into the office of the third and hold a meeting then and there, against his protest, the meeting is illegal unless there was an emergency requiring it. *Hayes v. Canada, etc. Co.*, 181 Fed. Rep. 289 (1910). An executive committee of three has no power to reduce the number to two and expel one of them. *Hayes v. Canada, etc. Co.*, 181 Fed. Rep. 289 (1910). The directors may delegate to a committee the power to procure plans and let a contract. A majority of that committee may act and bind the corporation. A third party is justified in acting on the ostensible authority of the committee. *McNeil v. Boston Chamber of Com.*, 154 Mass. 277 (1891). The action of an executive committee of three is legal even though one withdraws before a vote is taken. *Young v. Canada, etc. Co.*, 211 Mass. 453 (1912). The action of two out of three of an executive committee appointed under authority from the stockholders is binding on the corporation where such action pertained merely to ordinary business. *Canada-Atlantic, etc. Co. v. Flanders*, 145 Fed. Rep. 875 (1906); s. c., 165 Fed. Rep. 321, where the court discussed the question of what powers might

be delegated to an executive committee. Where one member of an executive committee of three orders material and another member sees the bills and does not object, the corporation is liable, and even though the by-laws provide that the directors must assent before the acts of the executive committee are binding, yet this restriction does not apply to ordinary business where such restriction has been systematically ignored. *John A. Roebling's Sons Co. v. Barre, etc. Co.*, 76 Vt. 131 (1903). A committee appointed by the directors cannot act unless all are present, although a majority may govern. *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890). Where many persons authorize eight to act as a managing committee, those persons are not liable for debts contracted by a meeting of six of that committee. *Brown v. Andrew*, 13 Jur. 938 (1849). Power to an executive committee of directors "to do all acts necessary for the prosperity" does not authorize the purchase of real estate by a majority of the executive committee, nor is the company bound by that same majority improving the land. *Tracy v. Guthrie, etc. Soc.*, 47 Iowa, 27 (1877). The minority of the committee certainly cannot act. *Trott v. Warren*, 11 Me. 227 (1834). The managing committee of an unincorporated association may legally resolve that checks signed by any three of them shall bind all. *Maitland's Case*, 4 De G., M. & G. 769 (1853). The executive committee cannot delegate their powers to one of their number. *Cook v. Ward*, L. R. 2 C. P. D. 225 (1877). See also *Lyon v. Jerome*, 26 Wend. 485 (1841), where canal commissioners delegated their powers to an engineer. One of two supervisors cannot contract. *Cooper v. Lampeter*, 8 Watts (Pa.) 125 (1839). A committee of arbitration may act by a majority vote unless the agreement provides otherwise. The resignation of one member just before the award is made does not invalidate the award. Republic of



There being nothing in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers.<sup>1</sup> Even in America it has been held legal to vest all authority in supervising engineers.<sup>2</sup> An auditing committee with the power to pay or reject claims have no power to rescind or settle contracts, or determine the future action of the company.<sup>3</sup>

§ 716. *President — His power to contract for the corporation.* — The president of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management.<sup>4</sup> His duty is merely to preside at meetings of the board of directors, and to perform only such other duties as the by-laws or resolutions of the board of directors may expressly authorize.<sup>5</sup> This is a rule established by the great weight of authority.

The board of directors may of course expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other director.<sup>6</sup> This question has frequently been before the courts, and many decisions have been rendered in regard to it. A large number of the cases are given in the notes below.<sup>7</sup>

*Colombia v. Cauca Co.*, 106 Fed. Rep. 337 (1901); *aff'd*, 113 Fed. Rep. 1020.

<sup>1</sup> *Re Buluwayo, etc. Co. Ltd.*, [1907] 2 Ch. 458.

<sup>2</sup> A stockholder in a street railway company cannot enjoin the company from making an agreement with the city whereby existing doubtful franchises are surrendered and a new franchise taken in return, and such contract may be made by the board of directors without consulting the stockholders. Such a new contract is not invalid, even though by its terms the city is to have fifty-five per cent. of the net earnings after making certain payments, this not being a partnership. Neither is the contract void, even though it gives the control of the street railway to a board of supervising engineers. *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908).

<sup>3</sup> *Skinner v. Walter, etc. Co.*, 140 N. Y. 217 (1893).

<sup>4</sup> Quoted and approved in *Groeltz v. Armstrong, etc. Co.*, 115 Iowa, 602 (1902), and *Black v. Harrison Home Co.*, 155 Cal. 121 (1909).

<sup>5</sup> Quoted and approved in *Brown v. Bass*, 132 Ga. 41 (1909).

<sup>6</sup> Quoted and approved in *Black v. Harrison Home Co.*, 155 Cal. 121 (1909), and *Varney & Evans v. Hutchinson, etc. Co.*, 70 W. Va. 169 (1911).

<sup>7</sup> *Federal Courts*: In the case *De La Vergne, etc. Co. v. German, etc. Inst.*, 175 U. S. 47 (1899), a contract was made by which the president of an Illinois manufacturing corporation sold all its assets to a rival New York corporation, and all the shares of stock in the Illinois corporation were also delivered to the New York corporation. The court held the transaction to be illegal on the ground that the president was not authorized to sell the assets, and that on the other hand the New York corporation was prohibited by its charter from purchas-



The question seems to have arisen in many forms, and the great weight

ing stock in other corporations. The president of a bank has no implied power to borrow money for it. *Western Nat. Bank v. Armstrong*, 152 U. S. 346 (1893). The president has no authority to direct the treasurer to refuse to receive payments of subscriptions. *Potts v. Wallace*, 146 U. S. 689 (1892). The president and cashier cannot agree with an indorser that he will not be held liable. *Bank of U. S. v. Dunn*, 6 Pet. 51 (1832); *Bank of Metropolis v. Jones*, 8 Pet. 12 (1834). An insurance company president has no power to contract for insurance, the by-laws providing that all obligations shall be made by the board of directors. *Marquess v. Hartford, etc. Co.*, 198 Fed. Rep. 475 (1912). The president of an insurance company has no authority to accept a policy for it. *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. Rep. 378 (1911), rev'd on another ground in 198 Fed. Rep. 468. The president of a corporation is not presumed to have authority to sign and verify a petition of the corporation to be declared a bankrupt. *Re Jefferson Casket Co.*, 182 Fed. Rep. 689 (1910). Where the president of a trust company borrows money from it and deposits as security railroad bonds which had been deposited with the trust company as trustee by the railroad company, the railroad company may maintain a suit to have such bonds canceled, even though the president of the trust company was also director and secretary of the railroad company. *Washington, etc. Ry. v. Real Estate, etc. Co.*, 177 Fed. Rep. 306 (1910); s. c., 191 Fed. Rep. 566. The president of a corporation cannot render it liable on a contract which he has with another person, even though he assigns the contract to the corporation and as president accepts the assignment in its name, and even though he owns practically all the stock of the corporation. *Woodruff v. Shimer*, 174 Fed. Rep. 584 (1909). A coal company is not bound by the act of its president in turning over to the company a personal contract between himself

and a third person, and a statement by him that the company has ratified it is inadmissible. *Re Roanoke Furnace Co.*, 166 Fed. Rep. 944 (1909). A chairman of a joint-stock association has no power to agree to give a person \$16,000 of stock for services in obtaining a transfer of patents, and the fact that the association keeps the patents, which it has paid for, does not obligate it to issue such stock. *Dickinson v. Matheson, etc. Co.*, 161 Fed. Rep. 874 (1908). The president has no power to change a purchase of property into a lease of property. *In re Cullman, etc. Assoc.*, 155 Fed. Rep. 373 (1907). The president has no power to convey the lands of the company and a forged resolution giving him power does not sustain the deed, it being shown also that he had not been accustomed to sell corporate lands and that the officers and stockholders knew nothing of the sale. *Ansley, etc. Co. v. Western, etc. Co.*, 152 Fed. Rep. 841 (1907). The president of a newspaper corporation is not personally liable in damages for a libel published in the newspaper, even though he was editor in chief and the principal stockholder, it appearing that he had no personal knowledge of the publication before it was made. *Folwell v. Miller*, 145 Fed. Rep. 495 (1906). A pledgee in good faith of the bonds of a corporation from its president and secretary acting for the corporation is protected. *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 146 (1904); aff'd, 137 Fed. Rep. 387. The president of a bank has no authority to agree with the pledgor of stock to the bank that it would not be sold in liquidation of the debt. *Arbogast v. American, etc. Bank*, 125 Fed. Rep. 518 (1903). Misrepresentations by the president of a bank to a surety company in order to obtain a bond from the cashier do not bind the bank. *United States, etc. Co. v. Muir*, 115 Fed. Rep. 264 (1902). The president of a railroad company has no inherent authority to negotiate a loan of \$150,000 and agree to pay ten per cent. thereof as brokerage. *Tobin v. Roar-*



of authority holds that a president has no inherent power to represent

ing, etc. R. R., 86 Fed. Rep. 1020 (1898). The president has no power to assign a patent belonging to the company to pay a corporate debt where there is no meeting of the board of directors to authorize the same. *Kansas, etc. Co. v. Devol*, 72 Fed. Rep. 717 (1896). The president of a national bank has no power inherent in his office to execute a note in the name of the bank. *National Bank, etc. v. Atkinson*, 55 Fed. Rep. 465 (1893). "It is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use." *Cherry v. City Nat. Bank*, 144 Fed. Rep. 587 (1906); *aff'd*, 208 U. S. 541. The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. *Grand Rapids, etc. Co. v. Cincinnati, etc. Co.*, 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. The president has no power to execute a mortgage. *Corbett v. Woodward*, 5 Sawyer, 403 (1879); *s. c.*, 6 Fed. Cas. 531.

*Alabama*: The president has no authority to sell corporate property. *Drennen & Co. v. Jasper Inv. Co.*, 153 Ala. 322 (1907). Where the corporate seal is not attached to a mortgage the authority of the president to execute it must be shown. *American, etc. Assoc. v. Smith*, 122 Ala. 502 (1899). The president has no authority to discharge the secretary, who was elected by the board of directors. *Mobile, etc. R. R. v. Owen*, 121 Ala. 505 (1899). The president has no inherent authority. *Brush, etc. Co. v. City, etc. Montgomery*, 114 Ala. 433 (1897); *Mobile, etc. Ry. v. Gilmer*, 85 Ala. 422 (1888). The president of a company cannot agree for

it to redeem certain outstanding claims against it — "labor tickets." *Stanley v. Sheffield, etc. Co.*, 83 Ala. 260 (1888).

*Arizona*: The president has no authority to confess judgment. *Arizona, etc. Co. v. Benton*, 12 Ariz. 373 (1909). The president and secretary have no authority to sell all the corporate property. *Little Butte, etc. Co. v. Girand*, 123 Pac. Rep. 309 (Ariz. 1912).

*Arkansas*: The president who subscribes for stock has no authority to accept property in payment therefor from himself. *Ford, etc. Co. v. Clement*, 97 Ark. 522 (1911). Where a corporation sells stock for non-payment of the subscription, the president has no authority to purchase the stock for the corporation itself, and a corporate creditor may hold the original subscriber liable for the unpaid part of the subscription price, even though the suit was commenced three years after the sale. *Tiger Bros. v. Rogers, etc. Co.*, 96 Ark. 1 (1910). The president has no power by contract to sell the entire assets of the company. *Ft. Smith, etc. Co. v. Baker*, 84 Ark. 444 (1907). A defense that the officers were not authorized to execute a contract must be pleaded. *Simon v. Calfee*, 80 Ark. 65 (1906). The president has no authority to make the corporation a partner in a copartnership. *Dixie, etc. Co. v. Morris*, 79 Ark. 113 (1906). The president and secretary have no inherent power to execute notes in the name of the corporation. *Estes v. German Nat. Bank*, 62 Ark. 7 (1896).

*California*: *Black v. Harrison Home Co.*, 155 Cal. 121 (1909), approving the above text. An enforcement by a corporation of a note running to it, the indorsement being by the president and general manager in the due course of business, is binding and need not be under seal. *Ramboz v. Stansbury*, 13 Cal. App. 649 (1910). A certificate of stock signed by a *de facto* president is good. *Sherwood v. Wallin*, 154 Cal. 735 (1908). The president has no authority to sell the



or contract for the corporation. His duties are confined to presiding

output of the corporation. *Northwestern, etc. Co. v. Whitney*, 5 Cal. App. 105 (1907). Where without the knowledge of the board of directors the president purchases from a corporation notes which it owns and indorses the corporate name thereon, the corporation cannot be held liable on such indorsement. *Smith v. Pacific, etc. Works*, 145 Cal. 352 (1904). The president and secretary have no power to make a contract by which the corporation issues certain stock and agrees to take it back within a certain time and to pay the equivalent of dividends thereon in the meantime. *Fontana v. Pacific, etc. Co.*, 129 Cal. 51 (1900). The president cannot bind the corporation by his agreement that it will pay the debts of a person. *Hamilton v. Bates*, 35 Pac. Rep. 304 (Cal. 1893). A president has no inherent power to execute a mortgage. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). The president of a ditch company has no power to exchange half of its ditch for half of the ditch of another company. *Bliss v. Kaweah, etc. Co.*, 65 Cal. 502 (1884). The president and a director of a miners' water supply company have no power to purchase land for an extension of the works, but the board of directors may ratify the purchase. *Blen v. Bear, etc. Co.*, 20 Cal. 602 (1862).

*Colorado*: Where two officers jointly are authorized to make leases, the terms of the lease, when once fixed by them, cannot be changed without the consent of the board of directors. *Aliunde, etc. Co. v. Arnold*, 16 Colo. App. 542 (1901).

*Connecticut*: A dentist cannot avoid payment for goods which he buys of a corporation by setting up that he was to make payment in professional services to the president and his family, such agreement not being known to the board of directors. *Bowditch, etc. Co. v. Jones*, 74 Conn. 149 (1901). Where an executor is president of a corporation, no formal demand for payment of a claim by the corporation against the estate need be

made. *Brown v. Brown*, 58 Conn. 85 (1889).

*Florida*: The president of a private corporation may employ an agent to negotiate for a sale of a part of its property. *Skinner Mfg. Co. v. Douville*, 54 Fla. 251 (1907).

*Georgia*: No officer of a corporation has inherent power to purchase shares of its own capital stock. *Nunez, etc. Co. v. Moore*, 10 Ga. App. 350, (1912). *Prima facie* the president has authority to advertise the business of a mercantile corporation. *Outcault, etc. Co. v. American, etc. Co.*, 10 Ga. App. 211 (1911). Neither the president nor treasurer has power to sell corporate property. *Brown v. Bass*, 132 Ga. 41 (1909). The presumption that the president was authorized to execute a corporate note does not arise where the instrument on its face is not for corporate purposes in the ordinary course of corporate business. *Capital, etc. Co. v. Jackson*, 2 Ga. App. 771 (1907). The president of a bank has no power to agree that the maker of a note need not pay it. *Swindell & Co. v. Bainbridge, etc. Bank*, 3 Ga. App. 364 (1908).

*Idaho*: The president and secretary have no power to sell the property of the corporation or to authorize anybody else to sell it. *Johnson v. Sage*, 4 Idaho, 758 (1896).

*Indiana*: The president has no implied authority. *Wainwright v. Roots Co.*, 97 N. E. Rep. 8 (Ind. 1912). The president of a mining company has power to employ a physician to attend to an injured employee. *Cushman v. Cloverland, etc. Co.*, 83 N. E. Rep. 390 (Ind. 1908). Even though the president buys pipe for the company, yet if he bought it in his individual capacity he may sell it, although he may have to account to the corporation for his profit. *Tevis v. Hammersmith*, 170 Ind. 286 (1908). The president has no inherent power to sign and issue a corporate note. *Elkhart, etc. Co. v. Turner*, 170 Ind. 455 (1908). The president has no implied power to mortgage the corporate property. *National State*



and to voting as a director.<sup>1</sup> The fact, however, that he is almost al-

*Bank v. Vigo, etc. Bank*, 141 Ind. 352 (1895).

*Iowa*: The president of a bank has no power to modify the cashier's bond where by statute such bond was controlled by the board of directors. *Ida County, etc. Bank v. Seidensticker*, 92 N. W. Rep. 862 (Iowa, 1902). Where a corporation is sued on a note, and it denies that the president had authority to sign the note, such authority must be proved. *Marshall, etc. Co. v. Oren, etc. Co.*, 117 Iowa, 157 (1902). The president of a railroad corporation has no power to let a construction contract. *Templin v. Chicago, etc. Ry.*, 73 Iowa, 548 (1887); *Griffith v. Chicago, etc. R. R.*, 74 Iowa, 85 (1888).

*Kansas*: The president and cashier cannot even conjointly sell the safe of a bank. *Asher v. Sutton*, 31 Kan. 286 (1884).

*Kentucky*: A slander of title by the president and secretary does not render the corporation liable unless they were acting in the course of its business. *Continental, etc. Co. v. Little*, 135 Ky. 618 (1909). The president has no power to authorize an agent to sell the land of the company. *New Glasgow, etc. Co. v. Shaw*, 99 S. W. Rep. 661 (Ky. 1907). A chattel mortgage executed by the president and secretary and purporting to be executed by the corporation is presumed to be legal. *Burkamp v. Healey*, 72 S. W. Rep. 759 (Ky. 1903). The president and secretary have no inherent power to execute a corporate mortgage. *Mason, etc. Co. v. Metcalfe Mfg. Co.*, 44 S. W. Rep. 629 (Ky. 1898). The president of a bank has no power to compromise a debt due to it from an insolvent firm. *Wheat v. Bank of Louisville*, 5 S. W. Rep. 305 (Ky. 1887). The president cannot employ workmen. *Mt. Sterling, etc. Co. v. Looney*, 1 Mete. (Ky.) 550 (1858).

*Louisiana*: The president has no power to consent to the appointment of a receiver and to waive legal notice.

*Saxon v. Southwestern, etc. Co.*, 113 La. 637 (1904). The president and secretary have no power to employ a broker to purchase real estate for the company, and hence neither party is bound by a purchase made by the broker. *Jackson Brewing Co. v. Canton*, 118 La. 823 (1907). Inasmuch as the president of a corporation has no inherent authority to issue its stock, the corporation is not liable if he issues fraudulent stock, the president having kept the money received for the stock, and it appearing that the forged certificates did not even resemble the genuine stock, and that the signatures of the secretary and treasurer had been forged by the president. *Rogers v. Southern Fiber Co.*, 119 La. 714 (1907).

*Maine*: The president has no implied authority to sell the treasury stock. *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). Where the corporation is merely an intermediary of title to a note, less strict proof is required. *Brown v. Donnell*, 49 Me. 421 (1860).

*Maryland*: The president of a church corporation has no power to purchase lumber for it to rebuild. *East Baltimore, etc. Co. v. K'Nessett, etc.*, 100 Md. 125 (1904).

*Massachusetts*: An offer of a corporation to sell out in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. *Bi-Spool, etc. Co. v. Acme Mfg. Co.*, 153 Mass. 404 (1891). The president of a lumber company has no power to employ a general agent in another part of the country. The latter can hold the company liable for his salary only by proving that at least a majority of the directors knew thereof and acquiesced. *Murray v. Nelson Lumber Co.*,

<sup>1</sup> Quoted and approved in *Ex parte Rickey*, 31 Nev. 82 (1909).



ways the corporate officer who is directed to sign the corporate contracts

143 Mass. 250 (1887). The president, treasurer and general manager cannot give a mortgage. *England v. Dearborn*, 141 Mass. 590 (1886). Where the president is authorized to discharge one mortgage, the company is not bound by his mistake in discharging two mortgages. *Smith v. Smith*, 117 Mass. 72 (1875). The president of a bank has no power to sell and assign a note held by it. *Hallowell, etc. Bank v. Hamlin*, 14 Mass. 178 (1817).

*Michigan*: Merely proving the signature of a corporation to a note by proving that it was signed by the president, secretary and treasurer is not sufficient. *Gould v. Gould & Co.*, 134 Mich. 515 (1903). The fact that a person buying land is president of a company and gives a draft on the company in part payment does not make it a purchase by the company for which it is liable. *Re Seymour*, 83 Mich. 496 (1890). The president, treasurer and general manager cannot give accommodation or renewal notes. *McLellan v. Detroit, etc. Works*, 56 Mich. 579 (1885). A president of a bank cannot agree that sureties on paper given to the bank will not be held liable. *First Nat. Bank v. Bennett*, 33 Mich. 520 (1876).

*Minnesota*: The president has no authority to increase the price of construction work. *Grant v. Duluth, etc. Ry.*, 66 Minn. 349 (1896). A director is liable to his bank on a note given to it by him, although the president, who has purchased stock of the director, cancels the note in payment for the stock and considers himself indebted to the bank for that amount. There was no ratification by the bank. *Rhodes v. Webb*, 24 Minn. 292 (1877).

*Mississippi*: The president cannot execute a note for the company. *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116 (1856).

*Missouri*: The president of a manufacturing corporation may employ a physician to attend to an employee injured in the line of his duty. *Weinsberg v. St. Louis, etc. Co.*, 135 Mo. App. 553 (1909). Where a corporation owns certain personal property and

a creditor of the vice-president levies on it, relying on the statement of the vice-president that it belonged to him, the corporation is not bound. *Gregmoore Orchard Co. v. Gilmour*, 159 Mo. App. 204 (1911).

*Montana*: The president has no power to employ an architect. *Mathias v. White S. S. Assoc.*, 19 Mont. 359 (1897).

*Nebraska*: If the president of a bank sells its securities he is liable to it for any loss incurred thereby. *First Nat. Bank v. Lucas*, 21 Neb. 280 (1887).

*Nevada*: *Ex parte Rickey*, 31 Nev. 82 (1909), approving the above text. A president and secretary have no implied power to give a corporate note. *Edwards v. Carson Water Co.*, 21 Nev. 469 (1893). The president cannot lease land. *Yellow, etc. Co. v. Stevenson*, 5 Nev. 224 (1869).

*New Hampshire*: The president and treasurer are not authorized to contract that the excess realized by the corporation in the sale of property taken by strict foreclosure shall belong to the mortgagor. *Holland v. Laconia, etc. Assoc.*, 68 N. H. 480 (1896). The president has no power to employ an architect to prepare plans; and the company is not liable therefor. *Wait v. Nashua, etc. Assoc.*, 66 N. H. 581 (1891).

*New Jersey*: The president of a railroad has no authority to pay a person for causing suits to be discontinued. *Thomson v. Central, etc. Ry.*, 80 N. J. L. 328 (1910). The president of a railroad has no power to agree that an employee shall have certain stock for his services. *Minshull v. New Jersey, etc. R.*, 76 N. J. L. 684 (1908). The president has no authority to compromise a suit. *Thomson v. Central, etc. Ry.*, 85 Atl. Rep. 201 (N. J. 1912). The president has no authority to modify a contract. *Mausert v. Christian Feigenspan*, 68 N. J. Eq. 671 (1906). The president has no authority to give up a right which the corporation has in a lease to purchase the property. *Lister, etc. v. Selby*, 68 N. J. Eq. 271 (1904). The



that have been authorized by the board of directors has led to an enlargement of his importance as a corporate officer. Hence the rule

president has no inherent power to assign a claim. *Cogan v. Conover*, etc. Co., 69 N. J. Eq. 358 (1905). A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent, where statute prohibits assignments after insolvency. *Bennett v. Keen*, 59 N. J. Eq. 634 (1899). The president has no power to confess judgment for the corporation. *Raub v. Blairstown Creamery Assoc.*, 56 N. J. L. 262 (1893). One who is president, treasurer and general manager cannot confess judgment for the company, even though he owns all but two shares of the stock. *Stokes v. New Jersey*, etc. Co., 46 N. J. L. 237 (1884). The president of a railroad cannot sell its bonds. "In the absence of anything in the act of incorporation bestowing special power upon the president, he has from his mere official station no more control over the corporate property and funds than any other director." *Titus v. Cairo*, etc. R. R., 37 N. J. L. 98 (1874). The president and cashier have no power to execute a mortgage. *Leggett v. New Jersey*, etc. Co., 1 N. J. Eq. 541 (1832).

*North Carolina*: Although two corporations have the same officers, one is not liable for the wages of an employee of the other, discharged by such officers. *Holder v. Cannon Mfg. Co.*, 138 N. C. 308 (1905). The spokesman of a corporation at a stockholders' meeting does not bind it by his statement that the corporation does not care for certain property covered by a deed about to be made to it. *Pinchback v. Bessemer*, etc. Co., 137 N. C. 171 (1904). A bank may reclaim money paid by the cashier on overdrafts of the president to pay his private debts, such overdrafts not having been authorized by the board of directors. *Dowd v. Stephenson*, 105 N. C. 467 (1890).

*Oregon*: Where the general manager of a fair corporation agrees with its vice-president that the former should be paid a salary, and he does

the work, the corporation is liable. *Wehrung v. Portland*, etc. Assoc., 61 Oreg. 48 (1912). The president has no authority to buy merchandise for the company. *Harding v. Oregon-Idaho Co.*, 57 Oreg. 34 (1910). The president and secretary have no power to execute a note for the corporation, and even though they are two of the five directors, and two other directors know of the note and do not object, yet the note is not enforceable. *Crawford v. Albany Ice Co.*, 36 Oreg. 535 (1900). The president has no power to mortgage, even though he has been given power to pledge notes and contracts. *Currie v. Bowman*, 25 Oreg. 364 (1894). The president of a railroad company cannot give a chattel mortgage on one of its engines, even though he is also its "business and financial agent." *Luse v. Isthmus*, etc. Ry., 6 Oreg. 125 (1876).

*Pennsylvania*: The president has no power to purchase real estate for the corporation. *McKibbin v. Hulton*, etc. Co., 227 Pa. St. 153 (1910). The president and secretary have no implied power to issue corporate notes, and the company is not liable on them unless it received the money. *Monongahela*, etc. Bank v. Harmony, etc. Co., 226 Pa. St. 440 (1910). In Pennsylvania it is held that the oral promise of the president of a railroad in taking a deed of a right of way, that a certain crossing would be built, will be enforced, even though it changes the writing, it having been made at the time and used to procure the execution of the writing. *Perkiomen R. R. v. Bromer*, 217 Pa. St. 263 (1907). Where the president of a railroad agrees that it will erect a siding if a person will erect a saw mill and this is done and continues for nine years, the railroad cannot then claim that it was not bound by its president's action. *Pannebaker v. Tuscarora*, etc. Co., 219 Pa. St. 60 (1907). The president of a slate company has no power to make a time contract with a railroad to ship the product of the company over such road, and



has arisen in New York that a contract, which apparently is a corporate contract, being signed by the president, is presumed to be a corporate

knowledge of such contract by the president is not notice to the corporation. *Bangor, etc. Ry. v. American, etc. Co.*, 203 Pa. St. 6 (1902). The president of a street railway company has no authority to indorse its name to a note given by a construction company in payment for machinery. *Worthington v. Schuylkill, etc. Ry.*, 195 Pa. St. 211 (1900). The president has no power to sell goods unless he is specially authorized or has made similar sales without objection. *Pittsburgh Melting Co. v. Reese*, 118 Pa. St. 355 (1888). A president of a bank may bind it by his agreement with an indorser of a note that the maker of a note will not give a mortgage, and that the indorser will not be held liable. *Cake v. Pottsville Bank*, 116 Pa. St. 264 (1887). The president of a national bank cannot bind it by his purchase of bonds and stock for it. *First Nat. Bank v. Hoch*, 89 Pa. St. 324 (1879). Brokers employed by the president cannot hold the corporation liable even though the corporation has had the benefit of their services, the board of directors having no knowledge thereof. *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 269 (1883); *Allegheny County Workhouse v. Moore*, 95 Pa. St. 408 (1880); in the last case the superintendent joined in employing the broker. The president may accept a conditional subscription to stock. *Pittsburgh, etc. Co. R. R. v. Stewart*, 41 Pa. St. 54 (1861).

*Rhode Island*: The president of a bank has no power to release a claim. *Olney v. Chadsey*, 7 R. I. 224 (1862).

*South Dakota*: The president has no authority to consent to a decree foreclosing a mortgage on the corporate property. *Frederick Milling Co. v. Frederick, etc. Co.*, 20 S. Dak. 335 (1906). The president and secretary have no power to buy machinery for the corporation. *Des Moines, etc. Co. v. Tilford, etc. Co.*, 9 S. Dak. 542 (1897).

*Texas*: In a suit on a note it is insufficient to prove the signatures of the president and treasurer. Proof

must be given that they had authority to sign. *Henderson, etc. Co. v. First Nat. Bank*, 100 Tex. 344 (1907). The president has no power to waive the purchase-money mortgage of the corporation upon land sold by the corporation. *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416 (1893). The president cannot be held personally liable for plans which he orders for the corporation, unless want of authority to give the order is shown. *Johnson v. Armstrong*, 83 Tex. 325 (1892). The president of a national bank has power to take property in payment of a debt and bind the bank to pay off a lien on it. *Panhandle Nat. Bank v. Emery*, 78 Tex. 498 (1890). A corporate deed by the president conveying what he owns personally does not estop him from claiming the property. *Carothers v. Alexander*, 74 Tex. 309 (1889).

*Virginia*: The president has no inherent authority to contract for the corporation or control its property. *Clement v. Adams, etc. Co.*, 75 S. E. Rep. 294 (Va. 1912). The representations of the president of a bank that the bank would not enforce notes given with collateral consisting of stock in a company in which the president was interested, do not bind the bank. *Baker v. Berry Hill, etc. Co.*, 112 Va. 280 (1911). In the case *Irvine v. Randolph, etc. Corporation*, 111 Va. 408 (1910) a judgment obtained by a director on a corporate note indorsed by him, the judgment being confessed by the president, was sustained as against another corporate creditor. "The office itself, however, confers no power to bind the corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or through its board of directors, formally expressed or implied from a habit or custom of doing business." Quoted and approved in *Taylor v. Sutherlin, etc. Co.*, 107 Va. 787 (1908). Neither the president, general manager nor agent of a land company have



contract until the want of authority of the president is shown by the corporation.<sup>1</sup>

power to dedicate a part of its land for a street. *Town of West Point v. Blank*, 106 Va. 792 (1907). The president cannot collect an amount paid by him on a note to which he had indorsed the company's name without authority. *Triplett v. Fauver*, 103 Va. 123 (1904). The president of a bank has no power to transfer its paper. *Smith v. Lawson*, 18 W. Va. 212, 228 (1881); *Hodges v. First Nat. Bank*, 22 Gratt. (Va.) 52 (1872). Misrepresentations of the president as to property which the company sells are not binding upon it. *Crump v. U. S. Min. Co.*, 7 Gratt. (Va.) 352 (1851).

*Vermont*: The president of a literary and biblical institution has no power to buy lumber for it, and it is not liable therefor although it has used it, where some of the directors had agreed among themselves to pay for the lumber. *Lyndon Mill Co. v. Lyndon, etc. Inst.*, 63 Vt. 581 (1891). The president cannot increase the pay allowed to a director by a vote of the directors. *Hodges v. Rutland, etc. R. R.*, 29 Vt. 220 (1857).

*Washington*: A bank is not liable for misrepresentations made by a person to whom the president of the bank referred a party, inquiring about the solvency of an institution with which he was about to deal. *Simons v. Cissna*, 52 Wash. 115 (1909). Where the president apparently has authority, he may bind the company to pay the hospital expense of an injured employee. *Russell v. Schade, etc. Co.*, 49 Wash. 362 (1908). A president has no power to contract for the corporation. *Lawson v. Black, etc. Co.*, 44 Wash. 26 (1906). The president may waive notice of an application for a receiver. *Davis v. Consolidated Coal Co.*, 41 Wash. 480 (1906). The public statement of the president as to what the corporation will do is not binding on it. *Lewiston, etc. Co. v. Brown*, 42 Wash. 555 (1906).

*Wisconsin*: It is presumed that the president or vice-president of a trust company has authority to sign its name on the back of a note running

to it. *Milwaukee, etc. Co. v. Van Valkenburgh*, 132 Wis. 638 (1907), the court saying that any other rule would obstruct and judicially handicap operations. In *Ford v. Hill*, 92 Wis. 188 (1896), the court held that the president had no inherent power to confess judgment, but that under the circumstances of the case the court would not set the judgment aside. A president authorized to execute a mortgage cannot insert the usual terms — such as that the principal sum should become due at the option of the bondholder in case of non-payment of interest. *Jesup v. City Bank, etc.*, 14 Wis. 331 (1861). A railroad president cannot sell its ties. *Walworth, etc. Bank v. Farmers', etc. Trust Co.*, 14 Wis. 325 (1861); s. c., 16 Wis. 629.

In general see *Wood, Railw. Law*, pp. 436-439.

As to the declarations of admissions of the president, see § 726, *infra*.

<sup>1</sup> Quoted and approved in *Varney & Evans v. Hutchinson, etc. Co.*, 70 W. Va. 169 (1911). "Where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified." *Patterson v. Robinson*, 116 N. Y. 193 (1889); *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189 (1881); *Lee v. Pittsburgh Coal, etc. Co.*, 56 How. Pr. 373 (1877); *aff'd*, 75 N. Y. 601. Where a bank and a mill company have the same individual as president, his action as representing the bank in regard to the application of moneys to particular paper due from the mill to the bank is valid and binding on the bank, if fair and reasonable. *Patterson v. Robinson*, 116 N. Y. 193 (1889). The signature of the president and secretary of a religious corporation does not raise any presumption as to its being the vote of the corporation. *Columbia Bank v. Gospel Tabernacle*, 127 N. Y. 361 (1891). Although a note is signed by the president, secretary, and treas-



In Illinois the courts go still further and hold that the president,

urer of a religious corporation, yet it may be shown that they were not authorized by the board of trustees to sign. *People's Bank v. St. Anthony's, etc. Church*, 109 N. Y. 512 (1888). The president has no power to sell treasury stock. *Re Utica, etc. Co.*, 154 N. Y. 268 (1897). A tender of calls on stock may be made to the president in order to avoid a forfeiture. *Mitchell v. Vermont, etc. Co.*, 67 N. Y. 280 (1876). The company is liable to an architect who has done work at the instance of the president and two directors. *Hooker v. Eagle Bank*, 30 N. Y. 83 (1864). A president of a trust company has no authority to make a contract by which it guarantees the sale of the securities of a shipbuilding company and proof that the board of directors authorized such a contract must be very clear to sustain it. *Gause v. Commonwealth T. Co.*, 124 N. Y. App. Div. 438 (1908); *aff'd*, 196 N. Y. 134. A corporation is liable for money paid to its president by a subscriber for stock where the president has embezzled the money. *Higginbotham v. International Trust Co.*, 141 N. Y. App. Div. 535 (1910). Although in the sale of corporate real estate the agreement of the president and treasurer with the real estate broker that he shall have all that he gets for the property above a certain sum, is not binding on the company, yet it may be for the jury to decide what the broker shall be paid. *Lyon v. West Side, etc. Co.*, 132 N. Y. App. Div. 777 (1909). A person dealing with a brewing company has a right to assume that notes issued by it and signed by its president and treasurer were authorized. *Bacon v. Montauk Brewing Co.*, 130 N. Y. App. Div. 737 (1909), the court stating that the decision in *Bangs v. International, etc. Co.*, 15 N. Y. App. Div. 522, had not been adhered to. The president is presumed to have power to employ a person on a salary and commission. *Norman v. Loomis, etc. Co.*, 123 N. Y. App. Div. 739 (1908). A bank is not bound by the acts of its president in dealing in its behalf with himself. *Fowler v.*

*Walch*, 119 N. Y. App. Div. 542 (1907). Where the president and treasurer are held out as having authority to do the business of the company and they contract in the name of the company to sell land and the treasurer receives the advanced payment therefor the company may be compelled to fulfill. *Davidson v. Cannabis, etc. Co.*, 113 N. Y. App. Div. 664 (1906). Where the president makes a personal bill of sale of property belonging to the corporation, a receiver of the latter may sue to recover the property, even though the president owned most of the stock. *Palmer v. Ring*, 113 N. Y. App. Div. 643 (1906). A president who sells the property of the corporation without authority from the board of directors is liable in damages for conversion. *Giebler Mfg. Co. v. Kranenberg*, 102 N. Y. App. Div. 470 (1905). A corporation is bound by its president's agreement borrowing money and turning over to the lender the accounts receivable and giving the lender a lien upon present and future assets, such agreement having been carried out for a year, but such agreement may be void under the bankruptcy act, where possession is taken within four months prior to the bankruptcy. *Mathews v. Hardt*, 79 N. Y. App. Div. 570 (1903). A corporation may demand a bill of particulars in order to ascertain what officers executed a contract which the corporation denies was ever authorized. *Fruin, etc. Co. v. Marks*, 48 N. Y. App. Div. 51 (1900). The president of a corporation engaged in conducting a large department store has power to make a contract with a pattern publishing company in regard to the pattern department of the store, there being but five stockholders in the corporation. *Standard, etc. Co. v. Siegel-Cooper Co.*, 44 N. Y. App. Div. 121 (1899). A national bank which sells securities to a person by means of misrepresentations of its president as to the character of the securities and by means of a breach of trust on his part is liable for the money so paid to it. *Carr v. National Bank, etc.*



by virtue of his office, has power to transact business for the corpora-

43 App. Div. 10 (1899); *aff'd*, 167 N. Y. 375. The president has no authority to make an assignment for the benefit of creditors. *Schaefer v. Scott*, 40 N. Y. App. Div. 438 (1899). Where the president, who is also managing director, presents for discount a note running to himself and indorsed both by him and the corporation, and states that the proceeds are to be used to pay a corporate obligation, the purchaser of the note is protected. *Orvis v. Warner & Co.*, 75 N. Y. App. Div. 463 (1902). A telegram from the president authorizing an agent to contract is insufficient proof of authority. *Felton v. McClave*, 46 N. Y. Super. Ct. 53 (1880). Where the president of a bank receives money on deposit from himself as attorney and subsequently withdraws it and misappropriates it, the bank is liable. *Smith v. Anderson*, 57 Hun, 72 (1890). The president has no power to modify a resolution of the board that certain notes shall be subject to the joint order of himself and the secretary. *Tradesmen's Nat. Bank v. Manhattan Lumber Co.*, 18 N. Y. Supp. 920 (1892). "It is not within the authority of the president of a bank, when he discounts paper for the bank, to promise the maker that he need not pay it." *First Nat. Bank v. Tisdale*, 18 Hun, 151 (1879); *aff'd*, 84 N. Y. 655. The president cannot borrow money for the company unless the charter or the board of directors authorizes him. *Life & F. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. 31 (1831). In *Powers v. Schlicht, etc. Co.*, 23 N. Y. App. Div. 380 (1897), *aff'd* 165 N. Y. 662, the court stated that the president of a business corporation has implied power to make contracts in its behalf. The president of a national bank has no power to bind it to accept drafts in the future drawn by a railroad company, where the party relying thereon knew that the bank directors objected. *Stallcup v. National Bank*, 15 N. Y. St. Rep. 39 (1888). The president and secretary cannot issue drafts in the company's name. *Dabney v. Stevens*, 40 How. Pr. 341 (1870). A resolution authorizing the president to sign checks, drafts, etc., does not authorize an indorsement of commercial paper by him in the company's name and in its behalf. *Hitchings v. St. Louis, etc. Co.*, 68 Hun, 33 (1893). A corporation is not liable for commissions promised by its president to a broker, even though a sale resulted. *Bright v. Canadian, etc. Co.*, 83 Hun, 482 (1895). The president of a manufacturing company cannot buy goods for it. *Westerfield v. Radde*, 7 Daly, 326 (1877). *Cf. Silva v. Metropolitan, etc. Co.*, 42 N. Y. Super. Ct. 307 (1877). Where a contract to build a railroad is made by contractors with a committee of directors duly authorized to make it, a provision against subletting cannot be waived by the president of the railroad and a director. *Western R. v. Bayne*, 11 Hun, 166 (1877); *affirmed*, 75 N. Y. 1. A bank receiving funds from its president in payment of his debts to it, which funds he had fraudulently obtained from another bank by using his standing as president of the former, is bound to pay over the same to the defrauded bank, where such president had complete control of the former bank. *City Nat. Bank v. National Park Bank*, 32 Hun, 105 (1884). A president authorized by resolution of the board of directors to sell bonds cannot loan them; if he does so it is a conversion of the property of the corporation. *Second Ave. R. R. v. Mehrback*, 46 N. Y. Super. Ct. 267 (1883). The president of an insurance company cannot indorse and transfer notes. *Marine Bank, etc. v. Clements*, 31 N. Y. 33 (1865), *rev'g* on another point, 3 Bosw. 600 (1858). But in an earlier case it was held that the indorsee in good faith was protected. *Caryl v. McElrath*, 3 Sandf. 176 (1849). A bank president has no implied authority from the bank to agree to pay interest on a particular deposit, there being no evidence of special authority nor of a bank custom to that effect. The president of a corporation has no implied author-



tion,<sup>1</sup> and there are some scattering decisions in other states to the same effect.<sup>2</sup> A person taking a company's note from the president in pay-

ity to check corporate funds out of the bank unless there is an established usage to that effect. *Fulton Bank v. New York, etc. Canal Co.*, 4 Paige, 127 (1833). The president, secretary, and general agent cannot issue the corporate notes. *McCullough v. Moss*, 5 Denio, 567 (1846). Cf. *Moss v. Rossie, etc. Co.*, 5 Hill, 137 (1843). A railroad president cannot contract to pay a commission to a promoter who induces a contractor to build the road. *Risley v. Indianapolis, etc. R. R.*, 1 Hun, 202 (1874); rev'd on other points, 62 N. Y. 240. The president cannot increase the pay of a director. *Bailey v. Buffalo, etc. R. R.*, 14 Hun, 483 (1878). See also *De Bost v. Albert Palmer Co.*, 35 Hun, 386 (1885).

<sup>1</sup> The president and general manager may together bind an insurance company to an agreement that its mortgagor may redeem even after foreclosure. *Union Mut. etc. Ins. Co. v. White*, 106 Ill. 67 (1883). The president of a railroad company has power to contract for the transportation of railroad iron. *Chicago, etc. R. R. v. Coleman*, 18 Ill. 297 (1857). A deed of land executed by the president and secretary is valid where all the stockholders join also in the deed. *Hull v. Glover*, 126 Ill. 122 (1888). The president of a railroad company may assign notes and mortgages given to it to aid in constructing the road. *Irwin v. Bailey*, 8 Biss. 523 (1879); s. c., 13 Fed. Cas. 114. A judgment note of a corporation may be executed by its president and secretary. It is good as a mere note, even though not as a judgment note. *Matson v. Alley*, 141 Ill. 284 (1892). A corporate note signed by the president and secretary, giving the payee the right to enter judgment, is sufficient to sustain such a judgment although the note was not under seal. *Snyder Bros. v. Bailey*, 165 Ill. 447, (1896). A duly executed contract of a corporation to give a judgment note is authority to the president to give that note. *McDonald v. Chisholm*, 131

Ill. 273 (1890). The president has no power to agree that an absolute subscription for stock shall be changed so as to be conditional. *Morgan County v. Thomas*, 76 Ill. 120 (1875). The president has power to offer a reward for the arrest of a defaulting teller. *Bank v. Griffin*, 168 Ill. 314 (1897). The president is presumed to have authority to assign a chattel mortgage. *Anderson v. South, etc. Co.*, 173 Ill. 213 (1898). In Illinois a president has power to give a corporate judgment note. *Anderson Transfer Co. v. Fuller*, 174 Ill. 221 (1898). A sale of land by the president and secretary of a building association binds the company, unless the purchaser knows that they have no authority. *Domestic, etc. Assoc. v. Guadiano*, 195 Ill. 222 (1902). The vice-president has no inherent power to make an assignment for the benefit of creditors, even though the president is dead, and even though the vice-president owns most of the stock. *Friedman v. Leshner*, 198 Ill. 21 (1902). The president is presumed to have had authority to execute a contract which he did execute. *Lloyd & Co. v. Matthews, etc.*, 223 Ill. 477 (1906). Where a corporation acquiesces in its president agreeing in its name to an arbitration, it is bound. *White Star, etc. Co. v. Hultberg*, 220 Ill. 578 (1906). A provision in a contract of a corporation that notice should be given to it of the performance of a condition, within a certain time, is fulfilled if its president and secretary acknowledged the condition as being fulfilled, even though no formal notice was given. *Merchants', etc. Co. v. Chicago, etc. Co.*, 210 Ill. 26 (1904). The president is presumed to have authority to waive reports from a licensee. *Jones v. Crary*, 234 Ill. 26 (1908). The president of a college is not authorized to execute a note in its name even in Illinois. *St. Vincent College v. Hallett*, 201 Fed. Rep. 471 (1912).

<sup>2</sup> Where the president is apparently in charge of the business, he may bind the corporation by a contract



ment of an individual debt is bound to inquire into the regularity of the issue of the note.<sup>1</sup>

A president, however, may employ an attorney for the company and authorize him to prosecute or defend a case.<sup>2</sup> The

made by him in its behalf. *Meating v. Tigerton, etc. Co.*, 113 Wis. 379 (1902). The court in this case follows the Illinois rule and declares that even where the president assumes the right to act as general agent a *bona fide* contractor with the corporation through him is protected. A bank president may assign a judgment held by bank. *Guernsey v. Black, etc. Co.*,<sup>\*</sup> 99 Iowa, 471 (1896). In Iowa it is held that the president is presumed to have authority to act in all matters arising in the ordinary course of the corporate business. *White v. Elgin, etc. Co.*, 108 Iowa, 522 (1899). The agreement of a president of a bank, who has had entire charge of the bank, that if a creditor will not sue for six months to enforce the liability of the bank as a stockholder the bank will not set up the statute of limitations, is legal. *Wells, etc. Co. v. Enright*, 127 Cal. 669 (1900). Where a steam railroad is interfering with the rights of a street railroad, and the latter does not apply for an injunction, relying on the promise of the steam railroad to the president of the street railroad that the steam railroad would pay all the damages, such promise is binding, and the street railroad cannot thereafter maintain an ejectment. *Fresno, etc. R. R. v. Southern Pac. R. R.*, 135 Cal. 202 (1901). The president and secretary of a corporation are presumed to have authority to execute a promissory note in the name of the corporation, and the holder of such note will not be affected by the fact that such authority did not exist unless he is shown to have had notice thereof. *American, etc. Bank v. Oregon, etc. Co.*, 55 Fed. Rep. 265 (1892). The president is presumed to have authority to issue notes. *Dexter Sav. Bank v. Friend*, 90 Fed. Rep. 703 (1898). The fact that the president of a corporation indorsed and transferred in its behalf its negotiable paper

does not prevent the indorsee being a *bona fide* holder, without proof of the authority of the president to so transfer the paper. *Jones v. Stoddart*, 8 Idaho, 210 (1902). Where a contract consists of letters, the fact that they are signed by the president does not prevent this signature being considered that of the company. *Towers v. Stevens, etc. Co.*, 83 Minn. 243 (1901). Where the holder of a mortgage sends it to a bank to collect, and the mortgagor buys and sends a draft payable to the president individually, followed by the letters "Pt.," and he embezzles the funds, the mortgagor is released. *Griffin v. Erskine*, 131 Iowa, 444 (1906). The president has implied authority to collect accounts and sell them for their face value. *Cogan v. Conover Mfg. Co.*, 69 N. J. 816 (1906).

<sup>1</sup> *Wilson v. Metropolitan, etc. Ry.*, 120 N. Y. 145 (1890). See also § 293, *supra*.

<sup>2</sup> *Beebe v. George-H. Beebe Co.*, 64 N. J. L. 497 (1900); *American Ins. Co. v. Oakley*, 9 Paige, 496 (1842); *Mumford v. Hawkins*, 5 Denio, 355 (1848); *Potter v. New York Inf. Asylum*, 44 Hun, 367 (1887). He may also employ special counsel. *Davis v. Memphis, etc. Ry.*, 22 Fed. Rep. 883 (1883); *Recamier Mfg. Co. v. Seymour*, 5 N. J. Supp. 648 (1889), holding that he may do so, though the suit is by the corporation against the board for fraud. Where attorneys state in a letter to the corporation what they will charge for their services, and the president then instructs them what to do, the corporation is liable, and a variation of the agreement by the secretary is not binding. *Scott v. New York, etc. Co.*, 79 N. J. L. 231, (1910). *Contra*, *Bright v. Metaire Cem. Assoc.*, 33 La. Ann. 58 (1881). The president has no power to cause a suit to be instituted. *Jeanerette, etc. Co. v. Durocher*, 123 La. 160 (1909). *Pardee Co. v. Alfrey Heading Co.*,



president has no inherent authority to foreclose a mortgage running to his company, but if the corporation then brings an action to obtain possession of the land it ratifies his acts.<sup>1</sup> And in all cases the president binds the corporation by his acts and contracts when he is expressly authorized so to act or contract,<sup>2</sup> or when he

129 La. 749 (1911). Suit instituted by authority of the president is properly instituted if ratified by the board of directors, even though such ratification is after the commencement of the suit. *Massachusetts, etc. Co. v. Kidd*, 142 Fed. Rep. 285 (1905). The oral agreement of the president of a corporation to pay the attorney's fees and expenses of a person who is negotiating for a contract with the corporation is enforceable against the president personally. *Manary v. Runyon*, 43 Oreg. 495 (1903). The president may bring a writ of entry to foreclose a mortgage. *Smith Charities v. Connolly*, 157 Mass. 272 (1892). The president cannot authorize an attorney to accept service where the board of directors were accustomed to vote on the employment of attorneys. *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556 (1859). The case *Ashuelot, etc. Co. v. Marsh*, 55 Mass. 507 (1848), holds that the president cannot cause an action to be commenced. Where the president is dead the vice-president may employ an attorney. *Coleman v. West, etc. Co.*, 25 W. Va. 148 (1884). A hold-over president and manager for sixteen years may institute a suit in behalf of the corporation. *Lucky Queen Min. Co. v. Abraham*, 26 Oreg. 282 (1894). The president and general manager may engage an attorney to give advice in company's matters. *Dallas, etc. Co. v. Crawford*, 18 Tex. Civ. App. 176 (1898). A bank president has no power to employ an attorney. *Pacific Bank v. Stone*, 121 Cal. 202 (1898). In winding up, the president has authority to institute suits. *Kalb v. American Nat. Bank*, 11 Ohio Circuits, 437 (1901). The president has no authority to consent to a receiver being appointed. *Nesbit v. North Georgia, etc. Co.*, 156 Fed. Rep. 979 (1907).

<sup>1</sup> *New England, etc. Co. v. Wing*, 191 Mass. 192 (1906).

<sup>2</sup> Where the president is given full management, the company is bound by its note given by him, even though he embezzled the proceeds. *Chestnut, etc. Co. v. Record Pub. Co.*, 227 Pa. St. 235 (1910). Where by-laws authorize the president and secretary to sign checks, they may delegate that authority by power of attorney. *First Nat. Bank, etc. v. Fleming, etc.*, 226 Pa. St. 416 (1910). Even though a by-law requires that notes signed by the treasurer should be "countersigned" by the president, yet if he is accustomed to sign them in advance and in blank, the forgery of his name to a note signed by the treasurer binds the company. *Eliot Nat. Bank v. Woonsocket, etc. Co.*, 31 R. I. 57 (1910). Where the directors authorize the president to execute and deliver bonds, this authorizes him to sell them. *McCormick v. Unity Co.*, 239 Ill. 306 (1909). The president of an insurance company, even though the by-laws give him the general direction and superintendence of its affairs, has no power to make an oral contract with a general agent that in case his business does not amount to a certain figure at a certain time the company would pay him annually for the remainder of his life an amount sufficient to support him. *Rennie v. Mutual, etc. Co.*, 176 Fed. Rep. 202 (1910). Where the president has power to conduct the business he may raise the salary of an employee. *Model, etc. House v. Hirsch*, 42 Ind. App. 270 (1908). A by-law giving the president power to sign notes subject to the control of the directors gives him power to sign a note in payment of a debt incurred by authority of the board of directors. *Peek v. Skelley Lumber Co.*, 59 Oreg. 374 (1911). Where the president is authorized to sell unissued stock at par he may pay a



has been permitted by the corporation for some time to act and con-

commission of seven and a half per cent. to a broker. *Henderson v. Western, etc. Co.*, 8 Cal. App. 247 (1908). Where the president is authorized to purchase timber land he may sell trees and logs already cut upon it. *Jefferson, etc. Co. v. Iowa, etc. Co.*, 122 La. 983 (1909). Where a by-law gives the president power to manage the business, and the stockholders and directors in writing assent to certain accounts being transferred, his assignment of them is legal. *Union, etc. Co. v. Union Naval Stores Co.*, 157 Ala. 645 (1908). A president who is authorized to sign the corporate name to all papers pertaining to business, may sell to a broker the product for five years. *Gilmore & Co. v. Samuels & Co.*, 135 Ky. 706 (1909). Where the president and secretary are authorized by the board of directors to give an option the president alone cannot extend the option. *Lochwitz v. Pine Tree, etc. Co.*, 37 Utah, 349 (1910). While the board of directors cannot give the president their entire authority, they may give him large discretionary powers. *Taylor v. Prairie, etc. Co.*, 61 Fla. 455 (1911). Where the president is permitted to manage the business the company is bound by a lease made by him. *Potts-Thompson, etc. Co. v. Potts*, 135 Ga. 451 (1910). The president may be expressly authorized to act, or his authority may arise from his having acted, or from the corporation accepting benefits. *Wharton v. Washington, etc. Bank*, 153 S. W. Rep. 699 (Tex. 1913). Where the by-laws give full authority to the president, and he and his family own practically the whole capital stock, and he conducts the business, a sale of land by him is binding on the company. *Minnesota, etc. Co. v. Hewitt Inv. Co.*, 201 Fed. Rep. 752 (1913). The board of directors may, of course, authorize the president to sign the company's name to a promissory note. *McCormick v. Stockton, etc. R. R.*, 130 Cal. 100 (1900). A resolution authorizing the president to execute a chattel mortgage does not authorize him to give a chattel mort-

gage which can be foreclosed on ten days' notice and which gives other executory powers to the mortgagee. *Monroe, etc. Co. v. Arnold*, 108 Ga. 449 (1899). Even though the president has full power to sell corporate property, yet where he refers the party to the superintendent and the latter makes the sale, it is not binding on the company, even though the president stated that the superintendent had full authority to sell. He could not so delegate his authority. *Trent v. Sherlock*, 24 Mont. 255 (1900). Under express power to have full control of the business, the president may purchase materials. *Castle v. Belfast, etc. Co.*, 72 Me. 167 (1881). Under power to adjust and pay losses he may transfer papers. *Baker v. Cotter*, 45 Me. 236 (1858); *Aspinwall v. Meyer*, 2 Sandf. 186; s. c., 3 N. Y. 290 (1850), where the express power was very general. Express authority, of course, may be given to the president to sell and assign the securities of the corporation. *Mitchell v. Deeds*, 49 Ill. 416 (1867). Authority to the president to borrow includes authority to give ordinary securities, i.e., bonds, notes, acceptances, and collaterals. A person dealing with him may rely on it. He is not bound to know that the president's authority has been revoked. *Hatch v. Coddington*, 95 U. S. 48 (1877). Where the president has, by by-laws, authority to make a contract, and does make one, and it is signed by him as such, though no corporate seal is affixed and no resolution is recited, the president may compromise and release the same. Six months' delay by directors in repudiating the compromise after knowledge is a fatal delay. *Rolling Mill v. St. Louis, etc. R. R.*, 120 U. S. 256 (1886). The president who is authorized to obtain land patents for the company may make contracts in regard to obtaining them. *Wood v. Saginaw, etc. Co.*, 20 S. Dak. 161 (1905). Parol authority to the president suffices to enable him to pay out money. *New Orleans Bldg. Co. v. Lawson*, 11 La. 34 (1837). Although



tract for it.<sup>1</sup> Thus where the president has been allowed to transact all the business of the company he may give a chattel mortgage or

the president is given power to make a contract, yet the directors may make it, and their action overrules his. *East, etc. Co. v. Brower*, 80 Ga. 258 (1888). Authority to sell gives authority to contract to sell. *Augusta Bank v. Hamblet*, 35 Me. 491 (1853). Officers authorized to give a note cannot agree to pay attorney fees. *Hardin v. Iowa, etc. Co.*, 78 Iowa, 726 (1889). The authority of a president to sell or lease gives him power to point out and make representations as to the boundaries. *Holmes v. Turner's Falls Co.*, 150 Mass. 535 (1890). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re George T. Smith, etc. Co.*, 86 Mich. 149 (1891). The authority of the president to buy property gives authority also to buy on credit. *Arapahoe, etc. Co. v. Stevens*, 13 Colo. 534 (1889). Under a by-law giving him authority the president may purchase on credit. *Siebe v. Joshua, etc. Works*, 86 Cal. 390 (1890). An assignment of a corporate claim by the manager and president in the regular course of business, and with the knowledge and consent of the board of directors, is sufficient. *Greig v. Riordan*, 99 Cal. 316 (1893). Under a broad power given to the president to make contracts he may take a lease of property. *Hawley v. Gray, etc. Co.*, 106 Cal. 337 (1895). The president and secretary authorized to execute a mortgage have no authority to insert a provision to pay the attorney fee in case of foreclosure. Ratification of the mortgage by the directors without knowledge of such provision is not ratification thereof. *Pacific, etc. Mill v. Dayton, etc. Ry.*, 5 Fed. Rep. 852 (1881).

<sup>1</sup> Quoted and approved in *Union Bank, etc. Co. v. Long, etc. Co.*, 74 S. E. Rep. 674 (W. Va. 1912). Where the president of a construction company takes entire charge of its business, and is allowed so to do by the directors, the company is bound by notes given in the

corporate name by him for the company's business. "The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they objected to it." *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98, 109 (1890). Where the president has been accustomed to exercise power without the dissent of the company and with its acquiescence, the law implies that he has such power. *Chambers v. Lancaster*, 160 N. Y. 342 (1899). As to the evidence necessary to prove that the officers of a corporation consented and acquiesced in acts of the president, see *Corn, etc. Bank v. American, etc. Co.*, 163 N. Y. 332 (1900). A sale of all the property by the president and general manager will be sustained where they have been allowed to take entire charge of the company and the directors did not repudiate the sale. *Northwestern, etc. Co. v. Lee*, 102 Wis. 426 (1899). Where the president is allowed for several years to carry on all the business of the corporation and sign its name to contracts, notes, etc., a note signed by him in the name of the corporation is valid, especially where he and another stockholder, who sign the note, own nearly all of the stock. The same rule applies to a mortgage executed by him in the name of the corporation. *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); *aff'd*, 95 Fed. Rep. 23. It may be left to the jury to decide whether the president had an implied power to make a contract as its managing agent, if it is shown that he was at the office and talked with people who called on business. *West v. Prather & Co.*, 7 Cal. App. 1 (1907). The president may hire for a year a general sales manager where he has hired him for several years past. *Arkadelphia Lumber Co. v. Asman*, 85 Ark. 568 (1907). Where one family



pledge the corporate property.<sup>1</sup> And where the president is allowed to conduct the entire business and issue notes the company is bound.<sup>2</sup>

own all the stock of a mercantile corporation and one of them is president and has entire control and management of its affairs and he wilfully fires the property in order that the insurance may be collected, the insurance company is not liable. *Meily Co. v. London, etc. Co.*, 142 Fed. Rep. 873 (1906); *aff'd*, 148 Fed. Rep. 683. A letter of the president employing a person for the company may be binding on the company where it paid the salary called for and it is shown that the president exercised general authority in conducting the corporate affairs. *Egbert v. Sun Co.*, 126 Fed. Rep. 568 (1903). By usage the president, secretary, and treasurer of a trust company may bind the company by acts which they ordinarily have not authority to enter into. *Carrington v. Turner*, 101 Md. 437 (1905). Customary action may be authority for the president to sign a petition to a city. *Eddy v. City of*

*Omaha*, 72 Neb. 550 (1905). Where the president and his wife and daughter own all the stock and he transacts all the business, the delivery of a deed from the corporation, which had been deposited in escrow, may be made by him with their consent. *Rubie, etc. Co. v. Princes, etc. Co.*, 31 Colo. 158 (1903). Where the president has been accustomed to borrow money for the company, the company is liable for a similar loan, even though he converted the money. *Martin & Co. v. Logan*, 99 S. W. Rep. 648 (Ky. 1907). Where the president has been accustomed to act he binds the corporation by his employment of a manager. *Berlin v. P. L. Cusachs*, 114 La. 744 (1905). The president of a manufacturing corporation is presumed to have authority to transfer notes which are received in payment, where he has previously transferred similar ones. *Iowa Nat. Bank v. Sherman, etc.*, 17 S. Dak. 396 (1903). Where the

<sup>1</sup> *Tyler Estate v. Hoffman*, 146 Mo. App. 510 (1910).

<sup>2</sup> *Scherer & Co. v. Everest*, 168 Fed. Rep. 822 (1909). Where the president of a bank has conducted its affairs for a long time a rediscount by him binds the bank. *Citizens' Bank, etc. Co. v. Thornton*, 174 Fed. Rep. 752 (1909). It is for the jury to say whether the president had authority to pass upon questions relative to a building for the company when he was present during the progress of the work directing and supervising. *Loh v. Broadway Realty Co.*, 77 N. J. L. 112 (1908). The president of a brick manufacturing company in charge of the plant and business may purchase machinery needed in the plant. *Denver, etc. Co. v. Young*, 49 Colo. 498 (1911). Where there are but two directors and they are the president and secretary, and he is accustomed to issue notes with the president's approval, such notes are binding on the company. *National Bank, etc. v. Puget Sound, etc. Co.*, 61 Wash. 192 (1910).

Where the president has conducted the business he may compromise a negligence suit. *Nelson, etc. Co. v. Pitts*, 141 Ky. 242 (1910). Where the president has had entire control of the business and has borrowed money for the company, a loan secured by a chattel mortgage executed by him binds the company. *Buchwald, etc. Co. v. Hurst*, 111 Md. 572 (1909). Where the president and treasurer own all the stock except one share and have conducted the business without meetings of the board of directors, they may sell for the company its land. *South Florida, etc. Co. v. Waldin*, 61 Fla. 766 (1911). If the president has been accustomed to transact the corporate business, the corporation is bound even though in a particular contract the party did not rely on that fact. *Murphy v. Cane*, 82 Atl. Rep. 854 (N. J. 1912). Where the president is in charge of the business he is presumed to have authority to engage necessary employees. *Vincent v. Alexander Sons Co.*, 85 Conn. 512 (1912).



So also the company is bound when it ratifies or accepts the contract after it is made, or accepts the benefit of the contract.<sup>1</sup> Hav-

president has controlled the entire business he may confess judgment for the corporation. *Gilman v. Heitman*, 137 Iowa, 336 (1907). The authority of the president to sign notes may be implied from the acquiescence of the company or its managers in the general course of business. *Crossley v. St. Philip Neri*, 74 N. J. L. 653 (1907). The president if in entire control of the company may employ and give authority to an agent. *Wales-Riggs Plantations v. Caston*, 152 S. W. Rep. 282 (Ark. 1912). If the president is held out as having authority the company is bound. *Handley Mfg. Co. v. International, etc. Co.*, 60 S. Rep. 557 (Ala. 1912). A corporation is bound by the acts of its president if he has been allowed to conduct its business. *Tewis v. Hammersmith*, 81 N. E. Rep. 614 (Ind. 1907). Where a corporation has recognized the authority of its president to make certain contracts, this is *prima facie* evidence of his authority to make another contract of that kind. *Scribner v. Flagg, etc. Co.*, 175 Mass. 536 (1900). Where the president has been allowed by the board of directors to carry on all the business as though it was his own, a mortgage in the name of the corporation executed by him on the corporate property is valid. *National, etc. Bank v. Sanford, etc. Co.*, 157 Ind. 10 (1901). Where the president is also general manager and practically the whole corporation, a bill of sale of corporate property by him is good. *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87 (1900). Where the corporation allows all its affairs to be conducted by its president, without observing legal formalities, a note and mortgage executed by him is valid, it being shown that such note had been renewed several times. *G. V. B. Min. Co. v. First Nat. Bank, etc.*, 95 Fed. Rep. 23 (1899). Where the president had been accustomed to act and contract for the company without express

authority, and his acts had always been accepted, his order to a contractor to stop work binds the company. *Leroy, etc. R. R. v. Sidell*, 66 Fed. Rep. 27 (1895). 141 N. W. Rep. 396.

A note signed by the president and secretary is binding, if they have been accustomed to sign notes, especially where a corporation obtains the benefit of the note. *Bullen v. Milwaukee, etc. Co.*, 109 Wis. 41 (1901). Where the president of a national bank manages its business he may, for the benefit of the bank, rediscount paper held by the bank. *Hanover, etc. Bank v. First, etc. Bank*, 109 Fed. Rep. 421 (1901). Where the president of a railroad has been accustomed to sign notes without action of the board of directors, a note signed by him is enforceable, even though he used the money for his own purposes. *Texarkana, etc. Ry. v. Bemis, etc. Co.*, 67 Ark. 542 (1900). Where the board of directors of a bank allow the president to transact all the business of the bank the bank is bound. *Tourtelot v. Whitehed*, 9 N. Dak. 407 (1900). The president has no inherent power to contract for the company, but where he has been allowed to carry on the whole business of the corporation, the company is bound by a contract within the ordinary business of the corporation, such as selling timber land on time. *St. Clair v. Rutledge*, 115 Wis. 583 (1902). Where a corporation allows certain officers to manage its business it is responsible for their contracts, unless it is shown that such contracts were unauthorized. *Anderson v. Wallace, etc. Co.*, 30 Wash. 147 (1902). The president binds the company when he does all the business with the knowledge and consent of the directors. *McComb v. Barcelona, etc. Assoc.*, 134 N. Y. 598, 608 (1892), *aff'g* 10 N. Y. Supp. 546. Where for eight years the president has been allowed to manage and carry on the whole business of the company,

<sup>1</sup> Quoted and approved in *Black v. Harrison Howe Co.*, 155 Cal. 121 (1909).  
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ing knowingly received the benefit of a contract made and carried out by the president, even without authority, the corporation must

and to indorse its name to notes in order to raise money for the business, and the company had no cash capital and no other way of obtaining money, it is for the jury to say whether the company is bound by such an indorsement by him. *Fifth Nat. Bank v. Navassa, etc. Co.*, 119 N. Y. 256 (1890). Cf. *National Bank v. Navassa Phosphate Co.*, 56 Hun, 136 (1890). Where for many years the president has managed a company, the company's note executed by him binds the company without special authority. *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890), aff'g 44 Hun, 130 (1887). Where the president for several years has run the company, borrowed money for it, and given its notes, etc., and the by-laws give him "general supervision over the property and affairs of the corporation," the company's note made by him, and an assignment of "\$150,000 of such good and collectible accounts now existing or that shall hereafter accrue or be acquired in the conduct of the business," are valid. *Preston Nat. Bank v. George T. Smith, etc. Co.*, 84 Mich. 364 (1890). A president who has been accustomed to issue corporate notes may bind the corporation by a similar note. *McDonald v. Chisholm*, 131 Ill. 273 (1890).

A general understanding that the president and secretary shall manage the business and make contracts, and their open and public assumption of that power, with the knowledge and acquiescence of the directors, are equal to a vote of the directors authorizing them to make contracts. *Sherman, etc. Co. v. Morris*, 43 Kan. 282 (1890). Where the president and secretary of a mining company have for a long time signed checks, and they have been paid by a bank, they may continue to draw checks and the bank must pay them. The corporation is liable for overdrafts caused thereby. *Mining Co. v. Angelo, etc. Bank*, 104 U. S. 192 (1881). A uniform practice of a company for several months previous to the transfer

of a corporate note by its president, in cases of notes negotiated for the purpose of raising money to carry on its legitimate business, where such notes were payable to the company, to have them indorsed by the president, is sufficient authority for his indorsement. *Marine Bank v. Clements*, 31 N. Y. 33 (1865). See also, in general, *Chicago, etc. Ry. v. James*, 24 Wis. 388 (1869); *First Nat., etc. Bank v. North, etc. Co.*, 86 Mo. 125 (1885), where the president and secretary were accustomed to make notes. Where the board of directors for three years relinquishes to the president the exclusive management of the business of the corporation and the purchase of all classes of articles, giving corporate notes, bills, and securities therefor, and then the directors took charge and for several years continued business without repudiating his acts, his purchase of locomotives and giving corporate notes therefor while he was in charge binds the corporation. *Olcott v. Tioga R. R.*, 27 N. Y. 546 (1863). If accustomed so to do, the president may settle an account and take a due-bill in payment. *Dougherty v. Hunter*, 54 Pa. St. 380 (1867). Where the president has been accustomed to make and indorse paper, the corporation will be bound, even though the directors supposed that all business had been stopped. *National Park Bank v. German, etc. Co.*, 53 N. Y. Super. Ct. 367 (1886). Where the president has several times been authorized to pledge corporate securities, and now does so without special authorization, and a majority of the directors ratify the act, not in meeting, but separately, the pledge is legal. *Bibb v. Hall*, 101 Ala. 79 (1893). Where the president owns practically all the stock, and for years has managed the business without any meeting of the board of directors, a sale of the corporate property by him is legal. *McElroy v. Minnesota, etc. Co.*, 96 Wis. 317 (1897). The authority of the president to discharge mortgages may be shown by



perform on its part.<sup>1</sup> The authority of the president of a railroad to take a lease of a hotel in behalf of the company may be inferred

the fact that he has done so many times before. *Swasey v. Emerson*, 168 Mass. 118 (1897). The power of a president of a bank to rediscount paper may arise from his having done so for a long time to the knowledge of the board of directors. *U. S. Bank v. First Nat. Bank*, 79 Fed. Rep. 296 (1897). Where the president of a bank is practically manager, he may settle a claim by taking an assignment of a judgment. *First Nat. Bank v. New*, 146 Ind. 411 (1896). Long usage may give the president authority. *Estes v. German Nat. Bank*, 62 Ark. 7 (1896); *Missouri Pac. Ry. v. Sidell*, 67 Fed. Rep. 464 (1895). Where the president, who is also general manager and financial agent, is accustomed to borrow money for the corporation, he binds the company by a loan, even though he misapplies the proceeds. *Kraft v. Freeman, etc. Co.*, 87 N. Y. 628 (1881). If he has been accustomed for a long time to sign notes, a person taking a note without his signature is not protected. *Davis, etc. Co. v. Best*, 105 N. Y. 59 (1887). The president has no implied power to sell the lands of the company, and the power given by usage to former presidents to sell and take a purchase-money lien does not give power to sell without retaining that lien. *Fitzhugh v. Franco-Tex. Land Co.*, 81 Tex. 306 (1891). The president, even though he is also manager, head, and majority stockholder, cannot bind the corporation by his statement that the corporation was to indemnify him from loss on certain indorsements made by him. *Minneapolis Trust Co. v. Clark*, 47 Minn. 108 (1891). Where the board of directors allows one of its officers the exclusive management of its affairs, the company is bound by its acts. *Davies v. New York Concert Co.*, 13 N. Y. Supp. 739 (1891); *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531 (1891). Although the president has been accustomed to issue corporate notes, yet, if the bank taking the note in question knew that the proceeds were to be used by him

in his private business, the note cannot be enforced. *Third Nat. Bank v. Marine Lumber Co.*, 44 Minn. 65 (1890).

<sup>1</sup> Quoted and approved in *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320 (1902); *Pittsburgh, etc. Ry. v. Keokuk Bridge Co.*, 131 U. S. 371 (1889). A corporation obtaining property illegally by act of its president cannot deny his right to rectify the injury by reconveying the title. *Sprague, etc. Co. v. Fuller*, 158 Fed. Rep. 588 (1908). Where the president bought railroad iron without authority so to do, but the directors stood by and allowed the corporation to use it, the company is liable for the price. *Scott v. Middletown, etc. R. R.*, 86 N. Y. 200 (1881). Where the board of directors ratifies an unauthorized indorsement of a note and the company receives the money, the company is bound, the president having made the indorsement. *Beacon T. Co. v. Souther*, 183 Mass. 413 (1903). Where the company accepts the benefit of a contract made by its president it is bound thereby. *Owyhee, etc. Co. v. Tautphas*, 121 Fed. Rep. 343 (1903). Even though unissued capital stock is issued by the president to himself without authority, yet if the company thereafter recognizes it, that is sufficient. *O'Dea v. Hollywood, etc. Ass'n.*, 154 Cal. 53 (1908). Where for seven months a corporation knowing of a contract made by its president and secretary does not object, it is bound. *Dickinson v. Zubiate Min. Co.*, 11 Cal. App. 656 (1909). The president of a bank has authority to sell a note held by the bank, and even if the bank required such indorsement to be signed by the cashier or other officer, yet if the bank receives and retains the proceeds of the sale, it cannot object. *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373 (1909). A traction company cannot disavow liability for a boat which its officers purchase, rebuild and operate. *Indiana, etc. Co. v. Scribner*, 47 Ind. App. 621 (1911). The directors by accepting the services of a man



from the facts of his signing, sealing, and delivering the instrument, and of the company's entering into possession under the lease and exer-

employed by the president ratifies his action. *De Forest v. Northwest, etc. Co.*, 236 Pa. St. 125 (1912). Accepting the benefits of the president's contract for years is a ratification. *Coney Island Co. v. McIntyre, etc. Co.*, 200 Fed. Rep. 901 (1912). Even though the president of a mining company has extended the time for the sale of corporate property without authority, yet if for five months the corporation with full knowledge of the fact stands by and allows other companies to act in reliance thereon, it is bound. *Common Sense, etc. Co. v. Taylor*, 152 S. W. Rep. 5 (Mo. 1912). Where for a year a corporation accepts and acts on a contract made by its president it is bound thereby. *Michigan Central R. R. v. Chicago, etc. Ry.*, 132 Mich. 324 (1903). Acquiescence in the acts of the president and treasurer of a trust company in accepting a trust may bind the company. *Smith v. Bank of New England*, 72 N. H. 4 (1903). A corporation suing on a contract need not show that the president was authorized to sign it, no issue being raised as to his authority. *Mebius, etc. Co. v. Mills*, 150 Cal. 229 (1907). Where the president and secretary of an insurance company receive bank stock as the purchase price of a claim against an insolvent corporation, and the directors treat the stock as a part of their assets, they ratify the transaction. *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa, 591 (1905). Allowing the president to make a contract to employ an engineer and accepting his services may bind the company. *Rowland v. Carroll, etc. Co.*, 44 Wash. 413 (1906). Even though the president borrows money and gives a note to the corporation without authority, yet if the corporation uses the money and the directors do not return it when the transaction is called to their attention, the corporation is bound by the note. *Third Nat. Bank v. Laboring-man's, etc. Co.*, 56 W. Va. 446 (1904). Where the president of a bank obtains a bond from a surety company for the

fidelity of the cashier, the bank is bound by representations made by him as to the duties of the cashier. *Warren, etc. Bank v. Fidelity, etc. Co.*, 116 Ky. 38 (1903). Even though a mortgage deed of trust is executed by the president without authority, yet, if the corporation afterwards obtains a release of some of the property from the mortgage, it ratifies the same. *Clark v. Elmendorf*, 78 S. W. Rep. 538 (Tex. 1904). Where the president dedicates corporate land for a street and the company allows the street to be constructed, it is too late then to object. *City of West End v. Eaves*, 152 Ala. 334 (1907). Even though the president of a company obtains a loan from a bank in order to loan it to his company, yet if he gives his individual note, the company is not liable. *Andrews Co. v. National Bank, etc.*, 129 Ga. 53 (1907), distinguishing *Third Nat. Bank v. Van Haagen Mfg. Co.*, 141 Pa. St. 214. If a corporation retains and uses money borrowed for it by its officer in excess of his authority, it ratifies the transaction, and is liable. *Willis v. St. Paul Sanitation Co.*, 53 Minn. 370 (1893). Even though a mortgage is not authorized at a formal meeting of the directors, nevertheless if the directors knew and approved of the same and the corporation accepted the benefits, the mortgage will be enforced, it having been signed by the president and secretary and the corporate seal having been attached. *Nevada, etc. Syndicate v. National, etc. Co.*, 96 Fed. Rep. 133 (1899). Where one person is president and general manager and owns all the stock, a note executed by him in the name of the corporation is valid, the proceeds being used in the corporate business. *Africa v. Duluth, etc. Co.*, 82 Minn. 283 (1901). Where a corporation accepts the benefit of a lease made by the president it is bound thereby. *Alexander v. Culbertson, etc. Co.*, 61 Neb. 333 (1901). Proof that a corporation carried out a contract and accepted the benefits of it is



cising acts of ownership and control over the demised premises, even if

sufficient to show that it was duly authorized, it having been signed by the president. *Neosho, etc. Co. v. Hannum*, 10 Kan. App. 499 (1901). A chattel mortgage executed by the president and secretary of an insolvent corporation, with the knowledge and consent of all the stockholders, is valid. *Kalamazoo, etc. Co. v. Winans, etc. Co.*, 106 Mich. 193 (1895). Even though the president sells property without authority, yet if the board of directors receive the interest on a note given in part payment they ratify the sale. *Poche v. New Orleans, etc. Co.*, 52 La. Ann. 1287 (1900). Where a corporation ratifies its president's contract it is bound by his declarations as to the meaning of the contract. *Balfour v. Fresno, etc. Co.*, 123 Cal. 395 (1899). Where but one meeting of the board of directors was ever held and then the charter was forfeited, and the president, with the consent of the directors, individually, and of all the stockholders, conveyed away the property, and creditors were not injured, the transaction is legal. *Aransas, etc. Co. v. Manning*, 94 Tex. 558 (1901). A corporate creditor cannot attack a sale of all the assets of the corporation for a valuable consideration and in good faith, even though such sale was not formally authorized by the board of directors or stockholders. *Magowan v. Groneweg*, 14 S. Dak. 543 (1901). See s. c., 16 S. Dak. 29. The board of directors may ratify an act of the president without a formal resolution being spread on the minutes. *Texas, etc. Ry. v. Davis*, 54 S. W. Rep. 381 (Tex. 1899); *rev'd*, on another point in 93 Tex. 378. A note guaranteed by a corporation through its president, the act being within the corporate power, is binding if the corporation had the benefit, even though the president had no authority to make such indorsement. *Hunt v. Northwestern, etc. Co.*, 16 S. Dak. 241 (1902). Where the president agrees to pay an employee a certain percentage of the profits of the business and the corporation acquiesces in the contract and

has been benefited by it, the corporation is bound. *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320 (1902). If the board of directors by their acts accept a modification made by the president in a contract, the company is bound, although there was no formal ratification. *Taylor, etc. Co. v. Wood*, 119 Fed. Rep. 966 (1903); *aff'd*, 125 Fed. Rep. 337. A pledge of bonds by the president is ratified by the directors knowing thereof and accepting the proceeds. *Prentiss, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). A bank is liable for money received, and used by it in its business, even though the president was not authorized to borrow it. *Blanchard v. Commercial Bank*, 75 Fed. Rep. 249 (1896). A bank cannot enforce notes which its president obtains for it by misrepresentations inducing the maker of the notes to give them in exchange for the notes of a worthless party. *Wilson v. Pauly*, 72 Fed. Rep. 129 (1896). The president may release a mortgage where a majority of the directors separately authorized it, and the stockholders in meeting assembled gave him general authority. *Smith v. Wells, etc. Co.*, 148 Ind. 333 (1897). By acquiescence of the board of directors the president's contract employing an editor and manager of a newspaper may bind the company. *Jones v. Williams*, 139 Mo. 1 (1897). Allowing the contract to be completed cures any defect of power on the part of the president to make the contract. *Omaha, etc. Co. v. Burns*, 49 Neb. 229 (1896). Accepting the benefit of the president's contract cures any defect in his authority. *Davies v. Harvey Steel Co.*, 6 N. Y. App. Div. 166 (1896). By accepting a deed of a right of way a corporation accepts written covenants which its president made in connection therewith. *Mobile, etc. Ry. v. Gilmer*, 85 Ala. 422 (1888). Where the president, as the financial manager, pledges the company's bonds, and for more than a year such pledge continues without objection, the pledge is ratified. *Illinois T. & S. Bank v. Pacific Ry.*, 117



the minutes of the company failed to disclose such authority expressly given.<sup>1</sup>

Cal. 332 (1897), holding also that although the by-laws require notes to be signed by the secretary, yet by acquiescence a note signed by the president alone may bind the corporation. A chattel mortgage given by the president and treasurer, without previous authority from the directors, may be validated by the corporation accepting the benefit of the same. *Edelhoff v. Horner, etc. Co.*, 86 Md. 595 (1898). A contract made by the president without authority may be considered ratified by the fact that the directors individually knew of the same, although they did not act upon the matter as a board. *Henry v. Colorado, etc. Co.*, 10 Colo. App. 14 (1897). A railroad contractor may enforce his construction contract with a railroad corporation, although he made it with the president, and the board of directors did not pass upon it, where the contractor proceeded to perform. The contractor was justified in stopping work when he was not paid according to the contract. *Cunningham v. Massena, etc. R. R.*, 63 Hun, 439 (1892); *aff'd*, 138 N. Y. 614. Acquiescence in sales by the president, where a vendor's lien was retained, does not sustain a sale by him without retaining such a lien. *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306 (1891). Although the president accepts in the corporate name a draft drawn on him personally, yet where the bank of the corporation pays the draft and charges it to the corporation, and the latter acquiesces for nine months, it cannot hold the bank liable. *McLaren v. First Nat. Bank*, 76 Wis. 259 (1890). The president's contract with an attorney may be ratified. *Merrill v. Consumers' Coal Co.*, 114 N. Y. 216 (1889). A transfer of all the property by the president is valid where the directors and all the stockholders knew of it and assented to it. *Fort Worth Pub. Co. v. Hitson*, 80 Tex. 216 (1890). The company, by accepting and using property purchased by the president without authority, thereby ratifies the purchase. *West Salem Land Co. v. Montgomery Land Co.*, 89 Va. 192 (1892). That stockholders may ratify and validate notes and mortgages given by the president, see *Martin v. Niagara, etc. Mfg. Co.*, 122 N. Y. 165 (1890). The contracts of the president may be ratified subsequently by the board of directors. *Wehrhane v. Nashville, etc. R. R.*, 4 N. Y. St. Rep. 541 (1886). For a clear statement of this principle, see *Dabney v. Stevens*, 40 How. Pr. 341 (1870). Rates as advertised by the president bind the railroad when it continues to accept them. *Hilliard v. Goold*, 34 N. H. 230 (1856). The president's unauthorized contracts, when known to and acted upon by the directors and corporation, are binding. *Perry v. Simpson, etc. Co.*, 37 Conn. 520 (1871).

Where the president of a bank instructs its correspondent bank to charge to the former a debt due by him to the latter bank, and the accounts of the latter to the former bank showed to that effect, and no objection is made, the former bank is bound. *Burton v. Burley*, 13 Fed. Rep. 811 (1880). A lease by the president and treasurer without authority may be ratified by the stockholders. *Mount Washington Hotel Co. v. Marsh*, 63 N. H. 230 (1884). A bank is liable on an agreement of its president to give a person ten shares of stock if he would deposit with it, the deposits having been made. *Rich v. State Nat. Bank*, 7 Neb. 201 (1878). Where the company acquiesces in work done by contract with the president it is liable. *Grape Co. v. Small*, 40 Md. 395 (1874). The company may ratify a mortgage given by the president. *Krider v. Western College*, 31 Iowa, 547 (1871); *Sherman v. Fitch*, 98 Mass. 59 (1867), where all but one of the di-

<sup>1</sup> *Jacksonville, etc. Nav. Co. v. Hooper*, 160 U. S. 514 (1896).



There may be a personal liability on the part of the president if he acts without authority. Thus, the president and secretary signing a corporate note without authority are liable for breach of implied warranty of authority, even though they are not liable as makers or indorsers.<sup>1</sup> Where the president of a land company agrees with an adjoining owner that an excavation will be made in a certain way and so agrees without authority, and the excavation is not made in that way and damage is done, he is personally liable.<sup>2</sup> And where the president refuses to deliver up goods which have been converted by the corporation he is personally liable.<sup>3</sup> If the president of a bank sells its securities without authority he is liable to it for any loss incurred thereby.<sup>4</sup> The president cannot be held personally liable for plans which he orders for the corporation, unless want of authority to give

rectors knew and acquiesced. The acquiescence of a minority of the directors is insufficient. *Yellow, etc. Co. v. Stevenson*, 5 Nev. 224 (1869). Acceptance of the property purchased, with knowledge, is ratification. *Dent v. North, etc. Co.*, 49 N. Y. 390 (1872). The failure of the president to repudiate at once an agent's unauthorized act is ratification. *First Nat. Bank v. Fricke*, 75 Mo. 178 (1881); *Alabama, etc. R. R. v. Kidd*, 29 Ala. 221 (1856). See also § 727, *infra*, on notice. Ratification of a president's acts may arise by long use of the results, even though the directors expressly repudiated the acts, but did not notify the other party. *Belleville Sav. Bank v. Winslow*, 35 Fed. Rep. 471 (1888). It is a sufficient ratification if the directors discuss the matter at a meeting, though they take no action. *Walworth, etc. Bank v. Farmers', etc. Co.*, 16 Wis. 629 (1883). A corporate agent with full powers may ratify the president's act. *Perry v. Simpson, etc. Co.*, 37 Conn. 520 (1871). Acquiescence of the board of directors may cure the omission of a previous resolution as required by the charter in the issue of the bonds. *Curtis v. Leavitt*, 15 N. Y. 9 (1857), the court saying of the board (p. 49): "They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized

transaction, and so put it out of their power to dispute its validity."

<sup>1</sup> *M'Donald v. Luckenbach*, 170 Fed. Rep. 434 (1909). The president is not personally liable on a purchase made by him for the company, even though he had no authority, and the company is not bound. *Standard, etc. Co. v. Southern, etc. Co.*, 134 S. W. Rep. 429 (Tex. 1911). The vice-president of a corporation having a large business cannot be held liable for the frauds of subordinates on the ground that he was bound to know of them. *Ray County, etc. v. Hutton*, 224 Mo. 42 (1909). Even though a mortgage purports to cover land when in fact it merely covers the coal underlying the land, yet the president who executes the mortgage and the stockholders who authorize it are not liable for deceit to a bondholder, although they knew the facts when they acted; neither can they be held liable in equity to make the representations good or on the ground of rescission, inasmuch as they are not parties to the transaction as individuals and did not receive the consideration paid for the bonds. *Slater Trust Co. v. Gardiner*, 183 Fed. Rep. 268 (1910). See also § 682, *supra* and § 831, *infra*.

<sup>2</sup> *Malone v. Pierce*, 231 Pa. St. 534 (1911).

<sup>3</sup> *McCrea v. McClenahan*, 131 N. Y. App. Div. 247 (1909).

<sup>4</sup> *First Nat. Bank v. Lucas*, 21 Neb. 280 (1887).



the order is shown.<sup>1</sup> A president who sells the property of the corporation without authority from the board of directors is liable in damages for conversion.<sup>2</sup> A president authorized by resolution of the board of directors to sell bonds cannot loan them; if he does so it is a conversion of the property of the corporation.<sup>3</sup> The president of a newspaper corporation is not personally liable in damages for a libel published in the newspaper, even though he was editor-in-chief and the principal stockholder, it appearing that he had no personal knowledge of the publication before it was made.<sup>4</sup> Where the president has been authorized to make an *ultra vires* contract he incurs no personal liability by so doing.<sup>5</sup> In some cases there may be a criminal liability.<sup>6</sup> The stockholders of a corporation at a special meeting duly called may amend the by-laws so as to authorize the board of directors to remove the president and treasurer, and the board of directors may subsequently make such removal under the amended by-laws.<sup>7</sup> Stockholders may amend the by-laws so as to increase the number of directors, and may at the same meeting elect the additional directors.<sup>8</sup>

The same rules apply to a vice-president that apply to the president on this subject.<sup>9</sup> A stockholder cannot act as temporary presi-

<sup>1</sup> Johnson v. Armstrong, 83 Tex. 325 (1892).

<sup>2</sup> Giebler Mfg. Co. v. Kranenberg, 102 N. Y. App. Div. 470 (1905).

<sup>3</sup> Second Ave. R. R. v. Mehrback, 46 N. Y. Super. Ct. 267 (1883).

<sup>4</sup> Folwell v. Miller, 145 Fed. Rep. 495 (1906).

<sup>5</sup> Hermitage, etc. Co. v. Dyer, 142 S. W. Rep. 1117 (Tenn. 1911). Cf. § 682, *supra*. A president is not liable personally on an accommodation note to which he signs the corporate name, he supposing the corporation had power to sign. Wolfe & Sons v. McKeon, 2 Ala. App. 421 (1911).

<sup>6</sup> The president of an incorporated bank is not criminally liable for the act of the receiving teller in receiving a deposit when such teller knew that the bank was insolvent. The statute rendering a bank officer liable for knowingly receiving such a deposit applies only to the officer actually receiving the deposit. *Ex parte* Rickey, 31 Nev. 82 (1909). The president, treasurer, and secretary of a newspaper corporation is not its "manager" within the meaning of a statute making the latter criminally liable for libel. People v. Warden of City Prison,

144 N. Y. App. 24 (1911). An indictment against the president as principal of a bucket shop corporation on account of its acts is not good; neither can he be held liable on the ground that the incorporators were clerks in a lawyer's office and had no real interest in the company. State v. Miner, 233 Mo. 312 (1911).

<sup>7</sup> *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); *aff'd*, 63 N. J. L. 357 (1899). A discharged general manager cannot maintain a bill to be reinstated and to remove the president. Dimmick v. Stokes, 151 Ala. 150 (1907). The retiring president who has turned over the keys and records to the new president legally elected, cannot thereafter by forcibly ejecting the new president and taking possession of the office exercise the powers of the president. Kline Bros. & Co. v. Royal Ins. Co., 192 Fed. Rep. 378 (1911), *rev'd* on another ground in 198 Fed. Rep. 468.

<sup>8</sup> Gold Bluff, etc. Co. v. Whitlock, 75 Conn. 669 (1903).

<sup>9</sup> The vice-president of a trust company has no power to bind it by a contract under seal whereby the trust company guarantees to the owner of



dent of the board of directors where he has never been elected a director.<sup>1</sup>

certain stocks and bonds that such stocks and bonds can be sold within a specified period at a certain price, the purpose being to protect the price. The authority of the trust company to buy and sell stock and bonds did not authorize it to engage in promoting schemes for the sake of large profits. *Gause v. Commonwealth, etc. Co.*, 196 N. Y. 134 (1909). The vice-president of a trust company which is trustee of the sixth mortgage on a property cannot bind the trust company by a representation to a purchaser of the bonds that the mortgage was a first mortgage, the trust company having no interest in the property or the sale of the bonds and no authority to make representations. *Davidge v. Guardian T. Co.*, 203 N. Y. 331 (1911). The vice-president acts for the president and his contract is the same as the president's contract. *Village of Prairie, etc. v. Schoening-Koenigs, etc. Co.*, 248 Ill. 57 (1910). Where the vice-president is accustomed to transact the business of the company a corporate note issued by him is valid. *Jefferson Bank v. Chapman, etc. Co.*, 122 Tenn. 415 (1909). Even though three out of five directors have been ousted by the court, yet if one of the remaining two is vice-president and has been given all the powers of the president, a receiver will not be appointed under the New York statute. *Ehret v. Ringler Co.*, 144 N. Y. App. Div. 480 (1911). Where a corporation owns certain personal property and a creditor of the vice-president levies on it, relying on the statement of the vice-president that it belonged to him, the corporation is not bound. *Gregmoore Orchard Co. v. Gilmour*, 159 Mo. App. 204 (1911). A vice-president cannot apply corporate property to pay his own debt. *Clow-Schaaf, etc. Co., v. Kass*, 138 N. W. Rep. 1120 (S. Dak. 1912). A vice-president who is author-

ized to sell municipal bonds owned by a railroad company may represent that the bonds were legally issued. *Union Bank v. Oxford, etc. R. R.*, 143 Fed. Rep. 193 (1906). A vice-president has no inherent power to repudiate in behalf of the corporation an unauthorized sale of the corporate property by the secretary. *Alaska, etc. Co. v. Solner*, 123 Fed. Rep. 855 (1903). The vice-president may call a special meeting of the board of directors in the absence of the president where the by-laws provide for the president calling such meeting, and the president is deemed absent, even though he is within four or five hours' travel. *Bell v. Standard, etc. Co.*, 146 Cal. 699 (1905). The assignment of a claim owned by a corporation is not good where it was merely signed by the vice-president and the seal was not attached and there was no evidence that the vice-president was authorized to sign it. *Allen v. Alston*, 147 Ala. 609 (1906). In the absence of the president the vice-president may employ counsel. *Fernald v. Spokane, etc. Co.*, 31 Wash. 672 (1903). Where a corporation authorizes the issue and sale of bonds, without specifying any officer to make the sale, the president is not personally liable for such bonds, even though he turned them over to the vice-president to sell and the vice-president kept the proceeds. *Owego, etc. Co. v. Boyer*, 111 N. Y. App. Div. 140 (1906). The power of a vice-president to indorse and sell a corporate note is shown sufficiently where the company received the proceeds. *Jones v. Evans*, 6 Cal. App. 88 (1907). Where a chattel mortgage statute requires an affidavit by the mortgagee or his agent or attorney stating certain facts, and the mortgagee is a corporation, the affidavit may be made by its vice-president without reciting his authority.

<sup>1</sup> *Benson v. Keller*, 37 Oreg. 120 (1900). A national bank may by by-law provide that the president shall be elected from the directors. *Rankin v. Tygard*, 198 Fed. Rep. 795 (1912).



§ 717. *Secretary and treasurer — Their power to contract for the corporation.* — The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it.<sup>1</sup> The secre-

American, etc. Co. v. Stolzenbach, 75 N. J. L. 721 (1908). The mere fact that a deed is executed by the vice-president instead of the president does not require additional proof as to why the vice-president signed it instead of the president doing so. Ellison v. Branstrator, 153 Ind. 146 (1899). It is legal for the board of directors to authorize the vice-president to execute a deed. American, etc. Bank v. Ward, 111 Fed. Rep. 782 (1901). The unauthorized action of the vice-president in delivering a note which had been duly indorsed by the corporation is ratified by the corporation receiving the benefit therefrom. Johnson v. Weed, etc. Co., 103 Wis. 291 (1899). A lumber company is not liable for transactions of its vice-president with outsiders, where such vice-president had no power to represent it. Shavaliere v. Grand Rapids, etc. Co., 128 Mich. 230 (1901). The vice-president of a bank may, by reason of having for a long time conducted the business of the bank, have power to assign a judgment owned by the bank. Cox v. Robinson, 82 Fed. Rep. 277 (1897). The vice-president may sign a corporate deed if the president refuses to do so. Smith v. Smith, 62 Ill. 492 (1872). The fact that a vice-president swears to a complaint does not raise a presumption that the company authorized its service. American Water-works Co. v. Venner, 18 N. Y. Supp. 379 (1892). The vice-president may make an assignment for the benefit of creditors, where he is authorized "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interest of the association, and to use the corporate seal for such purpose." Huse v. Ames, 104 Mo. 91 (1891). The vice-president has no power to sell the bonds of the company, even though he is a director, member of the executive committee, and one of the two persons who "run"

the company. The purchasers are not *bona fide*. American L. & T. Co. v. St. Louis, etc. Ry., 42 Fed. Rep. 819 (1890). It may be proved that the vice-president had authority to accept a draft, although drawn by himself upon the company. Rumbough v. Southern Imp. Co., 106 N. C. 461 (1890). A suit is presumed to be authorized where the vice-president swears to the pleading. Lacaze v. Creditors, 46 La. Ann. 237 (1894). The vice-president's contracts may be ratified by the directors. Dallas v. Columbia, etc. Co., 158 Pa. St. 444 (1893). The vice-president may, in certain circumstances, employ counsel. Streeten v. Robinson, 102 Cal. 542 (1894). The vice-president has no power to sign notes. Morris v. Griffith, etc. Co., 69 Fed. Rep. 131 (1895). As to the powers of a vice-president, see also Missouri, etc. Ry. v. Faulkner, 88 Tex. 649 (1895).

<sup>1</sup> "Quoted and approved in Taylor v. Sutherland, etc. Co., 107 Va. 787 (1908). A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." City of Chicago v. Stein, 252 Ill. 409 (1911). Hence a receipt by the secretary that certifies of stock had been actually lodged in the corporate office for transfer does not bind the corporation where they were not actually lodged, and the receipt was a part of a fraud. George Whitechurch, Ltd. v. Cavanagh, [1902] A. C. 117. A corporation is not liable on checks forged by its secretary, even though he is the son of one of the directors and his father knew that the son had forged his name several years prior thereto. Lewes, etc. Co., Ltd. v. Barclay & Co., Ltd., 95 L. T. Rep. 444 (1906). A secretary has no power to cancel a lease. Harris v. Congress, etc. Co., 76 N. J. L. 367 (1908). The secretary of a brewing company has no power to bind the company to a guarantee of



tary is one of the corporate officers, but he has practically no authority.<sup>1</sup>

the rent for five years of a saloon keeper who buys beer from the company. *McBroom v. Cheboygan*, etc. Co., 162 Mich. 323 (1910). The secretary has no power to agree to pay a commission. *Carroll v. Mangnese*, etc. Co., 111 Md. 252 (1909). The secretary has no power to agree to pay employees of a lessee. *Curry v. Congress*, etc. Co., 75 N. J. L. 735 (1909). The secretary of an incorporated mutual fire insurance company has no power to waive a by-law canceling policies where the premiums are not paid. *Lamb & Co. v. Merchants'*, etc. Co., 18 N. Dak. 253 (1909). The secretary of a corporation is presumed to have authority to indorse and dispose of a note running to it. *Swedish*, etc. Bank *v. Koebernick*, 136 Wis. 473 (1908). A bank loaning money to a paper company to purchase its own stock, may hold liable the vendor for the loan if the vendor's secretary made a false report to the secretary of state as to the financial condition of the paper company as a director thereof. *Dime Savings Bank v. Fletcher*, 158 Mich. 162 (1909). The secretary cannot waive a lien of the corporation on stock unless he actually transfers it. *Moore v. Royal Oak*, etc. Co., 137 N. W. Rep. 270 (Mich. 1912). The secretary has no power to cancel a contract. *Blair v. Brownstone*, etc. Co., 17 Cal. App. 471 (1911). The secretary cannot bind the corporation by entries made in the corporate books by himself to the effect that he is interested in certain stock. *Fletcher v. Kidder*, 127 Pac. Rep. 73 (Cal. 1912). A secretary has no implied authority to make contracts for a corporation. *Donaldson v. Orchard*, etc. Co., 6 Cal. App. 641 (1907). The secretary of a hotel company has no authority to issue its promissory note. *First Nat. Bank*, etc. *v. Abilene Hotel Co.*, 46 Tex. Civ. App. 595 (1907). The secretary has no power to compromise a debt. *Oscar*, etc. Co. *v. Pennsylvania R. R.*, 150 Cal. 658 (1907).

The secretary has no power to sell any of the property of the company. *California*, etc. Corp. *v. Sciaroni*, 139 Cal. 277 (1903). Neither the secretary nor the assistant secretary of the corporation can render it liable for malicious prosecution by reason of their arresting a person. *Beiswanger v. American*, etc. Co., 98 Md. 287 (1904). The mere fact that the secretary states that he has authority to notify a party to stop work under a contract is not evidence of such authority. *Bradford*, etc. Co. *v. Gibson*, 68 Ohio St. 442 (1903). The secretary cannot make a contract. *Ross*, etc. Co. *v. Eastham*, 73 Kan. 464 (1906). A person dealing with an agent of the corporation is bound at his peril to ascertain the extent of the agent's authority and is chargeable with knowledge thereof, and if the agent gives a warrant which he is not authorized to give, the secretary's ratification of the same is not binding on the company. *Reid v. Alaska*, etc. Co., 47 Oreg. 215 (1905). The secretary has no inherent power. *Farrell v. Gold Flint*, etc. Co., 32 Mont. 416 (1905). The secretary has no power to indorse the company's name on a note, especially an accommodation note. *Wheeling*, etc. Co. *v. Conner*, 61 W. Va. 111 (1906). The secretary has no inherent power to sell real estate. *Cobb v. Glenn*, etc. Co., 57 W. Va. 49 (1905). A letter from the secretary approving a sale of property is not binding on the corporation. *Mexican*, etc. Co. *v. Frank*, 154 Fed. Rep. 217 (1907). Where the secretary wrongfully deposits another person's money to the credit of the company, and then checks it out for his private debts, the company is not liable therefor. *Glendale*, etc. Assoc. *v. Harvey*, etc. Co., 114 Wis. 408 (1902). The secretary has no power to assign the company's claims for goods sold by it. The assignee's rights are not perfected by the directors' resolution

<sup>1</sup> *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473 (1893).



The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made.<sup>1</sup> A corporation may maintain replevin to recover its records

made after he sues on the account. *Read v. Buffum*, 79 Cal. 77 (1889). The secretary of a religious corporation cannot contract for paving for the corporation. *Thomason v. Grace*, etc. Church, 113 Cal. 558 (1896). The secretary has no implied power to bind the company. *Wolf v. Davenport*, etc. R. R., 93 Iowa, 218 (1895). He cannot sell and assign its notes. *Blood v. Marcuse*, 38 Cal. 590 (1869); nor sign a draft for it, *First Nat. Bank v. Hogan*, 47 Mo. 472 (1871); nor purchase iron for it, *Williams v. Chester*, etc. R. R., 15 Jur. 828 (1850); nor accept a bill of exchange, *Neale v. Turton*, 4 Bing. 149 (1827); nor bind it to pay a debt of an old company whose property it purchased upon a reorganization, *American*, etc. Ry. v. Miles, 52 Ill. 174 (1869); nor rent a place for the company, *Ridley v. Plymouth*, etc. Co., 2 Exch. 711 (1848); nor accept accommodation paper, *Farmers', etc. Bank v. Empire*, etc. Co., 5 Bosw. 275 (1859); nor purchase, *Kingsbridge Flour Mill Co. v. Plymouth*, etc. Co., 2 Exch. 718 (1848). Where the assistant secretary signs a mortgage instead of the secretary, it is sufficient to prove that he was the *de facto* assistant secretary. *Augusta*, etc. R. R. v. Kittel, 52 Fed. Rep. 63 (1892). The secretary has no power to execute a note. *Thompson v. Des Moines*, etc. Park, 112 Iowa, 628 (1900); *Sanders v. Chartrand*, 59 S. W. Rep. 95 (Mo. 1900). A letter signed by the secretary employing a person is not sufficient to prove a contract. *Hallenbeck v. Powers*, etc. Co., 117 Mich. 680 (1898). 131 Pac. 328.

<sup>1</sup> Quoted and approved in *City of Chicago v. Stein*, 252 Ill. 409 (1911), and *Cobb v. Glenn*, etc. Co., 57 W. Va. 49 (1905), and *Taylor v. Sutherlin*, 107 Va. 787 (1908). Apparent authority given to the secretary may be sufficient to bind the corporation. *Eels v. Gray Bros. & Co.*, 13 Cal. App. 33 (1910). It may be for the jury to decide whether a company has ratified

a sale of land by its assistant secretary. *Matteson v. United States*, etc. Co., 112 Minn. 190 (1910). Where a company receives a consideration for a note signed by its secretary and pays interest it is bound. *Sesnon v. Lindenberg*, 66 Wash. 1 (1911). The fact that the assistant secretary has been allowed to insure some of the property from time to time does not give him authority to agree to give a certain party all the insurance for three years. *Pennsylvania*, etc. Co. v. Cressey, 191 Fed. Rep. 337 (1911). Where the secretary is put in full charge and transacts the business and the stockholders ratify the transaction, the company is bound. *Parker v. Hill*, 68 Wash. 134 (1912). Where the assistant secretary of a foreign corporation opens a bank account in the corporate name and uses it, and the corporation checks up the account from time to time it is bound. *Hennessy*, etc. Co. v. Memphis, Nat. Bank, 129 Fed. Rep. 557 (1904). A corporation is bound by a contract made in its behalf by its secretary for the sale of its treasury stock, where the directors knew that he was acting as agent and had formerly approved a previous sale of stock by him. *Bauersmith v. Extreme*, etc. Co., 146 Fed. Rep. 95 (1906). Even though the secretary has sold the corporate property without authority, yet if the money has been used by the corporation, the amount must be tendered back before the transfer can be set aside. *Alaska*, etc. Co. v. Solner, 123 Fed. Rep. 855 (1903), holding also that if the board of directors do not disaffirm a sale of corporate property by the secretary, but acquiesce therein and retain the proceeds, the corporation is bound. Where the directors separately assent to the employment of a physician to attend an injured employee and acquiesce in the secretary so employing him, the corporation is bound. *Scott v. Superior*, etc. Co., 144 Cal. 140 (1904). Even though



and seal from one who claims to be its secretary,<sup>1</sup> but *mandamus* is the usual and more summary remedy.<sup>2</sup>

The treasurer of a corporation has no power, merely by reason of his office as treasurer, to contract for the corporation.<sup>3</sup> But if the

the secretary employs an attorney without authority, yet if the company received the benefit of his services, it may be liable therefor. *Kelly v. Ning, etc. Assoc.*, 2 Cal. App. 460 (1905). Where a secretary has been accustomed to transact the business the corporation is bound. *Ring v. Long Island, etc.*, 93 N. Y. App. Div. 442 (1904); *aff'd*, 184 N. Y. 553. As to the proof necessary to show the secretary's authority to indorse a note, see *Karsch v. Pottier, etc. Co.*, 82 N. Y. App. Div. 230 (1903). A note signed by the president and secretary is good even though the secretary had at that time been succeeded by another. *Houts v. Sioux City, etc.*, 134 Iowa, 484 (1907). See also *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833), where the secretary was authorized to affix the corporate seal; *New England, etc. Ins. Co. v. De Wolf*, 25 Mass. 56 (1829), where the company accepted the benefits. A note signed by the corporate secretary as directed by the president, the money therefor being used by the corporation, is enforceable against it. *Jansen v. Otto Stietz, etc. Co.*, 1 N. Y. Supp. 605 (1888). Although corporate notes given by the secretary to a bank are unauthorized, yet if the money was used regularly in the business of the company it is liable. *Pauly v. Pauly*, 107 Cal. 8 (1895). Where the secretary has been permitted to sell the notes of the corporation, a transfer of a note by him to a bank makes the latter a *bona fide* purchaser, the corporation being the payee. *Commercial Nat. Bank v. Brill*, 37 Neb. 626 (1893). The secretary has power to indorse the company's note for discount or sale where for a long time he has been allowed to do so. *Blake v. Domestic, etc. Co.*, 64 N. J. Eq. 480 (1907). By allowing the secretary to conduct the business the company is bound by his contracts. *Hess v. Sloane*, 66 N. Y.

App. Div. 522 (1901); *aff'd*, 173 N. Y. 616. Where a corporation pays the expense of collecting notes owned by it and assigned by its secretary, it thereby ratifies such assignment. *McCormick v. Bittinger*, 13 Colo. App. 170 (1899). A person who loans a sum of money to a corporation on the agreement of its directors that he was to be assistant secretary at a specified salary, may recover back the money. *Meridian, etc. Co. v. Eaton*, 41 Ind. App. 118 (1907). A person who by agreement is to be made secretary, but who acts as such before he is elected, is nevertheless a *de facto* officer. *Welker v. Anheuser, etc. Assoc.*, 103 Minn. 189 (1908).  
<sup>1</sup> *Stovell v. Alert, etc. Co.*, 38 Colo. 80 (1906).

<sup>2</sup> *Mandamus* will lie at the instance of a foreign corporation to compel its former secretary who resides in the state to turn over to his successor the books and papers of the company, even though incidentally the title to the office may be involved, it appearing that the foreign corporation cannot obtain service on the secretary in the state in which it is incorporated. *Potomac Oil Co. v. Dye*, 10 Cal. App. 534 (1909). *Mandamus* lies at the instance of a foreign corporation to compel its resident secretary to turn over its seal, books, and papers to his successor. *State v. Guertin*, 106 Minn. 248 (1909). *Mandamus* lies to compel an outgoing corporate officer to deliver the corporate books and papers to the new one. *People v. Powers*, 145 N. Y. App. Div. 693 (1911).

<sup>3</sup> Quoted and approved in *Taylor v. Sutherlin, etc. Co.*, 107 Va. 787 (1908). The treasurer of a car manufacturing company has no power to pay a commission on a sale. *Pollock v. Standard Steel Car Co.*, 230 Pa. St. 136 (1911). The president and treasurer of a charitable corporation have no right to execute its note unless specially authorized. *People's Nat.*



treasurer has been accustomed to make certain contracts for the corporation, and the corporation has acquiesced in them, it is bound by a

*Bank v. New England Home, etc.*, 209 Mass. 48 (1911). The treasurer has no implied authority to make a corporate note. *Jacobus v. Jamestown, etc. Co.*, 149 N. Y. App. Div. 356 (1912). The secretary and treasurer of two companies has no power to assign the notes of one to the other company. *Guthrie v. Huntington Chair Co.*, 76 S. E. Rep. 795 (W. Va. 1912). The treasurer has no power to borrow money and give the corporate note therefor, and the company is not liable where the money was paid into the corporate treasury and immediately embezzled by the treasurer. *Craft v. South Boston R. R.*, 150 Mass. 207 (1889). Even though the treasurer of a corporation presents to the registrar of the bonds of another corporation, in which the former company owns bonds registered in the former's name, a copy of the resolution of the directors of the former authorizing a transfer, and also the power of attorney apparently containing the signatures of the president and secretary and the corporate seal, yet if these were not authorized, and a transfer is made, the corporation issuing the bonds is liable. *Clarkson Home, etc. v. Missouri K. & T. R. R.*, 182 N. Y. 47 (1905). In a suit by a corporation on a promissory note, the contract leading to the note cannot be introduced as a defense unless it is proved that the treasurer who signed the contract in behalf of the corporation, had authority to do so, the contract not being sealed. *Coney Island, etc. R. R. v. Boyton*, 87 N. Y. App. Div. 251 (1903). Even though the treasurer and president of a brewing company are also treasurer and a director of a trust company in which the former company deposits its funds, the trust company is not liable for embezzlement of such funds by the treasurer. *Elk, etc. Co. v. Neubert*, 213 Pa. St. 171 (1906). A corporation may repudiate a fraudulent agreement of its president and treasurer to take a worthless note in pay-

ment of rent. *National, etc. Co. v. Chicago Ry. etc.*, 226 Ill. 28 (1907). In a suit on a note it is insufficient to prove the signatures of the president and treasurer. Proof must be given that they had authority to sign. *Henderson, etc. Co. v. First Nat. Bank*, 100 Tex. 344 (1907). The treasurer has no authority except to keep the corporate funds and disburse them when properly authorized so to do. *Albro Min. etc. Co. v. Chinn*, 20 Colo. App. 238 (1904). The treasurer has no power to indorse the corporate name to corporate notes. *Pelton v. Spider, etc. Co.*, 112 N. W. Rep. 29 (Wis. 1907). A treasurer has no power to sign the corporate name to promissory notes unless he is expressly given that power. If the note is made payable to his own order, the purchaser of it must take notice that it was issued without authority. *Chemical Nat. Bank v. Wagner*, 93 Ky. 525 (1892). Notes of a cattle company purporting to be signed by it through its treasurer are presumed to have been authorized. *Corcoran v. Snow Cattle Co.*, 151 Mass. 74 (1890). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee upon a sale of the stock by the latter. *Holden v. Metropolitan Nat. Bank*, 151 Mass. 112 (1890); s. c., 138 Mass. 48. The treasurer cannot, upon the sale of a note held by the company, indorse the note so as to render the company liable, even though a trustee was aware thereof, the opening of an account with the bank being unknown to the company. *Columbia Bank v. Gospel Tabernacle*, 57 N. Y. Super. Ct. 149 (1889). A treasurer has no power to issue corporate notes, and where he does so, the proceeds being used to pay his personal debt to the corporation, the notes are not binding on the company. *First Nat. Bank v. Council Bluffs, etc. Co.*, 56 Hun, 412 (1890). The corporate indorsement of a note by the treasurer without authority and for accommodation does not bind



new contract of that kind entered into by him.<sup>1</sup> Thus, if the treasurer is allowed to indorse commercial paper his act binds the corporation.<sup>2</sup> And where the secretary and treasurer of a land company is allowed to contract for the sale of land the company is bound.<sup>3</sup> It is for the jury to decide whether such a custom exists.<sup>4</sup> A treasurer has no power to indorse the company's note for discount or sale, but if allowed to do so for a long time such indorsements are legal.<sup>5</sup> If the treasurer is accustomed to act as the managing agent of the corporation he can

the corporation. *Wahlig v. Standard, etc. Co.*, 9 N. Y. Supp. 739 (1890). The treasurer has no inherent authority to indorse. *Security Bank v. Kingsland*, 5 N. Dak. 263 (1895). The treasurer has no implied power to make a corporate note. *Oak, etc. Co. v. Foster*, 7 N. M. 650 (1895). The treasurer of a manufacturing corporation has no implied power to bind the corporation as an accommodation indorser, and a person taking the note with notice cannot enforce such indorsement. *Usher v. Raymond Skate Co.*, 163 Mass. 1 (1895). An arbitration agreed to by the treasurer was sustained in *Remington Paper Co. v. London Assur. Corp.*, 12 N. Y. App. Div. 218 (1896). A demand for rent may properly be made on the secretary and treasurer. *State v. Felton*, 52 N. J. L. 161 (1889). He cannot compromise or relinquish its claims, *Carver Co. v. Manufacturers', etc. Co.*, 72 Mass. 214 (1856); nor sell and indorse its paper. *Bradlee v. Warren, etc. Bank*, 127 Mass. 107 (1879); *Holden v. Upton*, 134 Mass. 177 (1883). *Contra*, *Perkins v. Bradley*, 24 Vt. 66 (1851); nor assume the debt of a third person, *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144 (1861); nor sell and assign a mortgage owned by the corporation, even though he uses the corporate seal. *Jackson v. Campbell*, 5 Wend. 572 (1830). He may employ an attorney to collect unpaid bills. *Bristol, etc. Bank v. Keavy*, 128 Mass. 298 (1880). He cannot give a release under seal. *Dedham Inst. v. Slack*, 60 Mass. 408 (1850). He may accept money. *Brown v. Winnissimmet Co.*, 93 Mass. 326 (1865). The treasurer of a manufacturing corporation is presumed to have authority

to indorse and sell to a bank a note running to the corporation. *Standard, etc. Co. v. Windham Nat. Bank*, 71 Conn. 668 (1899). The secretary and treasurer is presumed to have authority to indorse a note of the company. *Stubbs v. Fourth Nat. Bank*, 77 S. E. Rep. 893 (Ga. 1913). As to admissions by him, see § 726, *infra*.

<sup>1</sup> The treasurer has no inherent power to sign and indorse corporate notes, but long usage may constitute such authority. *Page v. Fall River, etc. R. R.*, 31 Fed. Rep. 257 (1887); *Lester v. Webb*, 83 Mass. 34 (1861), where the treasurer indorsed a note; *Bank of Attica v. Pottier, etc. Co.*, 1 N. Y. Supp. 483 (1888); *Partridge v. Badger*, 25 Barb. 146 (1857); *Foster v. Ohio, etc. Co.*, 17 Fed. Rep. 130 (1883), where he gave a note. Where the secretary and treasurer have been accustomed to manage the entire business and make contracts, a contract entered into by them for the company is legal and enforceable. *Moore v. H. Gaus Co.*, 113 Mo. 98 (1892).

<sup>2</sup> *First National Bank v. Colonial, etc. Co.*, 226 Pa. St. 292 (1910).

<sup>3</sup> *Curtis, etc. Co. v. Interior, etc. Co.*, 137 Wis. 341 (1908).

<sup>4</sup> *Foster v. Ohio, etc. Co.*, 17 Fed. Rep. 130 (1883); *Fifth, etc. Bank v. First Nat. Bank*, 48 N. J. L. 513 (1886), where the treasurer pledged securities.

<sup>5</sup> *Blake v. Domestic, etc. Co.*, 64 N. J. Eq. 480 (1897). Where the corporation has allowed the secretary and treasurer to indorse notes received by it, such indorsements are legal. *Black v. First Nat. Bank*, 96 Md. 399 (1903).



sell its property,<sup>1</sup> and borrow money and give security.<sup>2</sup> Where the treasurer conducts the entire business he may increase an employee's salary,<sup>3</sup> or assign moneys to become due to it from another.<sup>4</sup> The treasurer binds the corporation by a contract which he is expressly authorized to make.<sup>5</sup> The secretary and treasurer cannot even conjointly bind the corporation by their purchases of the article in which it deals;<sup>6</sup> nor can they borrow money for the

<sup>1</sup> *Phillips v. Campbell*, 43 N. Y. 271 (1870).

<sup>2</sup> *Fay v. Noble*, 66 Mass. 1 (1853); *Fifth, etc. Bank v. First Nat. Bank*, 48 N. J. L. 513 (1886). Where the treasurer has been accustomed to handle the finances of the corporation, a judgment note with warrant of attorney by him is valid. *Chicago, etc. Co. v. Chicago Nat. Bank*, 176 Ill. 224 (1898). Where the secretary and treasurer and a director have been allowed to transact the business of the company and they borrow money for the company and give the company's bond and mortgage therefor, and produce a certified copy of a resolution passed by the board of directors, the lender may rely on such certified copy, even though it afterwards turns out to have been unauthorized. *Hutchison v. Rock Hill, etc. Co.*, 65 S. C. 45 (1902).

<sup>3</sup> *Ridenour v. Dexter Chair Co.*, 209 Mass. 70 (1911).

<sup>4</sup> *Cope v. Walton*, 77 N. J. Eq. 512 (1910).

<sup>5</sup> *Odd Fellows v. Bank of Sturgis*, 42 Mich. 461 (1880), where the authority was oral; *Gafford v. American, etc. Co.*, 77 Iowa, 736 (1889). Funds drawn out by the treasurer on the express authority of the directors and kept apart from his funds are held by him at the risk of the corporation. *Butler v. Duprat*, 51 N. Y. Super. Ct. 77 (1884). Where a corporation authorizes its agent to pledge its bonds the agent may make the pledge on the usual terms as to selling the bonds in case of default. *Morris, etc. v. East Side Ry.*, 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13. Where a corporation keeps two accounts in the same bank, and in one account the checks are to be signed by the

president and the treasurer, and in the other by the treasurer alone, a check on the first account signed by the treasurer alone is not good, and the bank is liable if it pays it. *Shoe, etc. Co. v. Western Nat. Bank*, 70 N. Y. App. Div. 588 (1902). Where an officer is authorized to issue notes, a note issued by him is legal if in the hands of a *bona fide* holder, though the purpose was unauthorized. Hence he cannot be held personally liable, and the notes are binding on the corporation. *Dexter Sav. Bank v. Friend*, 90 Fed. Rep. 703 (1898). Where the treasurer of a land company is authorized to purchase realty he may sell it for the corporation. *Henry v. Black*, 210 Pa. St. 245 (1904). Where a vice-president and treasurer have authority to make a contract and the treasurer makes it alone but the vice-president with knowledge thereof accepts for the corporation the benefit of the contract, the company is bound. *Peach River, etc. Co. v. Ayers*, 41 Tex. Civ. App. 334 (1906). Even though the board of directors authorizes a sale of the company's bonds by the president and treasurer, and a sale is made by the treasurer alone and he embezzles the proceeds, a *bona fide* purchaser from him is protected. *Doty v. Oriental, etc. Co.*, 28 R. I. 372 (1907). Where the treasurer has power to make notes, and he is also secretary, and signs a note as secretary, the note is good. *National Bank, etc. v. Sancho, etc. Co.*, 186 Fed. Rep. 257 (1911).

<sup>6</sup> *Alexander v. Cauldwell*, 83 N. Y. 480 (1881), where a coal company was held not liable for coal so purchased, there being no evidence that the corporation authorized it, or used it, or ratified it. *Cf. Alexander v. Brown*, 9 Hun, 641 (1877). The sec-



corporation;<sup>1</sup> nor release the maker of a note to the corporation;<sup>2</sup> nor subscribe for stock in another corporation.<sup>3</sup> But if the company acquiesces in a contract made by either or both of these officers it is bound.<sup>4</sup> By usage the treasurer may have power to sell goods.<sup>5</sup> In

retary and treasurer has no power to sell machinery of the company. *Winsted, etc. Co. v. New Britain, etc. Co.*, 69 Conn. 565 (1897).

<sup>1</sup> *Adams v. Mills*, 60 N. Y. 533 (1875). The secretary and treasurer of a coal company has no implied power to borrow money for it. *Alabama, etc. Bank v. O'Neil*, 128 Ala. 192 (1901). The secretary and treasurer has no authority to agree to pay a commission to an agent for selling property belonging to the corporation. *Extension, etc. Co. v. Skinner*, 28 Colo. 237 (1901). A *bona fide* purchaser of a promissory note executed by the officers of a private trading corporation is protected in assuming that the officers have not exceeded their authority in issuing the note. *National, etc. Co. v. Rockland Co.*, 94 Fed. Rep. 335 (1899). Merely proving the signature of a corporation to a note by proving that it was signed by the president, secretary, and treasurer is not sufficient. *Gould v. Gould & Co.*, 134 Mich. 515 (1903).

<sup>2</sup> *Moshannon, etc. Co. v. Sloan*, 7 Atl. Rep. 102 (Pa. 1885). The secretary and treasurer of a company organized to deal in mortgages may authorize a debtor of the company to transfer real estate to one of the company's creditors in settlement of both claims. *First Nat. Bank v. Garretson*, 107 Iowa, 196 (1899).

<sup>3</sup> The secretary and treasurer of a cotton trading company has no power to subscribe in the name of the company for stock in a cotton manufacturing company. *Wells Co. v. Avon Mills*, 118 Fed. Rep. 190 (1902). See same case, 198 U. S. 177.

<sup>4</sup> *St. James' Parish v. Newburyport, etc. R. R.*, 141 Mass. 500 (1886), where the treasurer gave an obligation under seal and reported it in his reports, and a committee ap-

proved. A corporation is bound by its notes issued by its treasurer where it received the money and renewed the notes with knowledge. *First Nat. Bank, etc. v. American, etc. Co.*, 229 Pa. St. 27 (1910). The acceptance by the board of directors or executive committee of the purchase money of land sold by the treasurer is not necessarily a ratification of his sale. *Bishop v. Burke*, 207 Mass. 133 (1910). A person employed by the treasurer by the week and who continues in the employ for five months, may collect his wages. *Fallon v. Clifton Mfg. Co.*, 207 Mass. 491 (1911). If the company ratifies a contract made by the president and secretary, the company may compel its officers to give it the benefit of the contract. *Church v. Sterling*, 16 Conn. 388 (1844). Accepting the benefit of an insurance contract made by the secretary and president accepts the contract itself. *Emmet v. Reed*, 8 N. Y. 312 (1853). Where the secretary and treasurer has power to execute and carry out a lease he may agree to a cancellation of the same. *Commercial Hotel Co. v. Brill*, 123 Wis. 638 (1905). An indorsement by the secretary, with the knowledge and acquiescence of the directors, is binding. *Williams v. Cheney*, 69 Mass. 215 (1855). So, also, where he pledges bonds with their knowledge and acquiescence. *Darst v. Gale*, 83 Ill. 136 (1876). And see *Durar v. Hudson, etc. Ins. Co.* 24 N. J. L. 171 (1853), in insurance contracts; and *Conover v. Mutual Ins. Co.*, 1 N. Y. 290 (1848), where he was accustomed to contract for the company; *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 453 (1872); *Talladega Ins. Co. v. Peacock*, 67 Ala. 253 (1880), where the secretary was accustomed to sign notes. Where a corporation uses a wharf under a contract made by its

<sup>5</sup> *Nashua, etc. Co. v. Chandler, etc. Co.*, 166 Mass. 419 (1896).



Massachusetts it is held that the treasurer of a trading or manufacturing company has implied power to execute notes in behalf of the corporation, and the *bona fide* holder of such notes may enforce them. This rule was also applied to a gas-light company.<sup>1</sup> And in Vermont it is held that the treasurer has power to buy, where the company's letterheads direct that all correspondence be addressed to him.<sup>2</sup> Where the treasurer of a corporation uses its money for his own purposes he may be sued therefor, even though he continues to be treasurer.<sup>3</sup> The treasurer of a grocer's association may deposit its funds with a trading corporation of which he is president and he is not personally liable, even if the latter fails, unless the by-laws prescribe otherwise.<sup>4</sup> Where the by-laws provide that checks shall be signed by the president and treasurer it is conversion for the treasurer to check the money out on his sole signature.<sup>5</sup> Where the treasurer issues a check signed by him as treasurer, he is personally liable if there are no funds of the corporation to pay the check.<sup>6</sup> A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity.<sup>7</sup> A treasurer sued by the corporation for money held by him as treasurer cannot offset a debt due from the corporation to him individually.<sup>8</sup> Where

treasurer, it is liable for the contract price. *Taylor v. Albemarle, etc. Co.*, 105 N. C. 484 (1890). Taking the benefit of a piece of statuary for advertising purposes binds it to pay therefor, though the treasurer made the contract. *Ellis v. Howe, etc. Co.*, 9 Daly, 78 (1880). The secretary and treasurer may bind the company by being allowed to do all the business of the company. *Colorado, etc. Co. v. American, etc. Co.*, 97 Fed. Rep. 843 (1899). Where the secretary and treasurer has managed the business as though the property was his own, a sale of all the property with the consent of ninety-five per cent. of the stockholders to an innocent purchaser for value is legal, even though no meeting of the directors or stockholders authorized the sale. *Magowan v. Groneweg*, 14 S. Dak. 543 (1901). See s. c., 16 S. Dak. 29. Where the treasurer signs the company's name to a note without authority, but the company uses the money, it is liable on the note. *Wayne, etc. Co. v. Schuylkill, etc. Ry.*, 191 Pa. St. 90 (1899). Where the treasurer has had entire management of the business, an extension of the company's notes by him

is legal. *Franklin Sav. Bank v. Cochran*, 182 Mass. 586 (1903).

<sup>1</sup> *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505 (1893).

<sup>2</sup> *Woodbury Granite Co. v. Mulliken*, 66 Vt. 465 (1894).

<sup>3</sup> *Marlborough Assoc. v. Peters*, 179 Mass. 61 (1901).

<sup>4</sup> *Re Smith, etc. Co.*, 170 Fed. Rep. 900 (1909).

<sup>5</sup> *Sanitary, etc. Co. v. Mullins*, 86 N. Y. App. Div. 450 (1903).

<sup>6</sup> *Eastern, etc. Co. v. Cunningham*, 103 Me. 455 (1908).

<sup>7</sup> *Hunter v. Robbins*, 117 Fed. Rep. 920 (1902). See also § 648, *supra*. A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands, and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account. *Consolidated, etc. Works v. Brew*, 112 Wis. 610 (1902). A suit to recover money improperly disposed of by the treasurer may be in equity. *Hawkeye, etc. Co. v. State Bank, etc.*, 157 Fed. Rep. 253 (1907), *rev'd* on another point in 177 Fed. Rep. 164.

<sup>8</sup> *Oregon, etc. Co. v. Schmidt*, 60 S. W. Rep. 530 (Ky. 1901).



a treasurer has been expelled by the board of directors for irregularities in his accounts, the corporation may maintain *quo warranto* to oust him from office and obtain possession of its money and books.<sup>1</sup> *Mandamus* lies to compel an outgoing corporate officer to deliver the corporate books and papers to the new one.<sup>2</sup> A peremptory *mandamus* granted without notice is not the proper remedy to compel the treasurer of the corporation to pay a debt in accordance with the order of the executive committee.<sup>3</sup> The treasurer, secretary, and all other minor officers of a business corporation may be removed by the board of directors at any time, the same as any other employee.<sup>4</sup> A secretary and treasurer elected for a year cannot be arbitrarily removed and his salary stopped, if the salary is by the year.<sup>5</sup> The president, treasurer, and secretary of a newspaper corporation is not its "manager" within the meaning of a statute making the latter criminally liable for libel.<sup>6</sup>

§ 718. *Cashier*—*The extent of his powers.*—The cashier of a bank has greater inherent powers than any other corporate officer.<sup>7</sup> By virtue of his office he performs many and important acts for the bank. He may pledge the bank's securities;<sup>8</sup> and sell and assign its paper;<sup>9</sup> and extend the payment of a note;<sup>10</sup> and certify

<sup>1</sup> Commonwealth v. Jankovic, 216 Pa. St. 615 (1907).

<sup>2</sup> People v. Powers, 145 N. Y. App. Div. 693 (1911). A secretary and treasurer who has resigned may be compelled by *mandamus* to turn over the books and papers to his successor. Coldwater, etc. Co. v. Gillis, 135 N. W. Rep. 901 (Mich. 1912).

<sup>3</sup> Horton v. State, 60 Neb. 701 (1900).

<sup>4</sup> Brindley v. Walker, 221 Pa. St. 287 (1908). Where the statute prescribes that officers and agents shall hold their places during the pleasure of the board, the board may oust the secretary and treasurer at any time. Darrah v. Wheeling, etc. Co., 50 W. Va. 417 (1901).

<sup>5</sup> Even if he takes part in selling out the company, yet if it is understood that the new company was to continue him he may collect the salary. Daspit v. Holmes Co., 120 La. 86 (1907). Where a person makes a contract with a corporation to sell a certain amount of its preferred stock, and in return he is made treasurer at a monthly salary for a

year, and indefinitely thereafter, and he actually takes some of the stock himself and pays for it, but is discharged because he does not sell the stock as agreed, he can recover on his contract, the company having refused to return the money he has paid. Hinchman v. Matheson, etc. Co., 151 Mich. 214 (1908).

<sup>6</sup> People v. Warden of City Prison, 144 N. Y. App. Div. 24 (1911).

<sup>7</sup> Quoted and approved in McBoyle v. Union Nat. Bank, 162 Cal. 277 (1912).

<sup>8</sup> Coats v. Donnell, 94 N. Y. 168 (1883); Barnes v. Ontario Bank, 19 N. Y. 152 (1859); Donnell v. Lewis County Sav. Bank, 80 Mo. 165 (1883). As to the power of the cashier to borrow money for the bank, compare Coats v. Donnell, 94 N. Y. 168 (1883), with Western Nat. Bank v. Armstrong, 152 U. S. 346 (1893). A cashier may borrow money for the bank and pledge its assets. Citizens' Bank v. Bank, etc., 126 Ky. 169 (1907).

<sup>9</sup> "It is now well settled that the executive officers of national banks may legitimately, in the usual course

<sup>10</sup> Wakefield Bank v. Truesdell, 55 Barb. 602 (1864).



checks;<sup>1</sup> and may bind the bank by various other acts.<sup>2</sup> But a cashier cannot authorize a person to loan money to the bank, and deliver it to an agent to carry it to a distant city;<sup>3</sup> nor any other act which is not in the

of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use." *Cherry v. City Nat. Bank*, 144 Fed. Rep. 587 (1906); *aff'd*, 208 U. S. 541. *Smith v. Lawson*, 18 W. Va. 212, 227 (1881); *Wild v. Bank*, 3 Mason, 505 (1825); s. c., 29 Fed. Cas. 1215; *Lafayette Bank v. State Bank*, 4 McLean, 208 (1847); s. c., 14 Fed. Cas. 939; *Everett v. United States*, 6 Port. (Ala.) 166 (1837); *Crocket v. Young*, 9 Miss. 241 (1843). He may indorse paper in a private bank after banking hours. *Bissell v. First Nat. Bank*, 69 Pa. St. 415 (1871).

<sup>1</sup> *Merchants' Bank v. State Bank*, 10 Wall. 604 (1870); *Cooke v. State Nat. Bank*, 52 N. Y. 96 (1873). A *bona fide* holder of a certificate of indebtedness issued by him is protected. *Citizens', etc. Bank v. Blakesley*, 42 Ohio St. 645 (1885).

<sup>2</sup> The cashier of a national bank may sell stock which the bank has taken in payment for a doubtful debt. *McBoyle v. Union Nat. Bank*, 162 Cal. 277 (1912). A bank may be liable for the fraud of its cashier in the transaction of its business where it received the benefit of the transaction. *First Nat. Bank, etc. v. Exchange Bank*, 90 Neb. 225 (1911). A bank is liable for the embezzlement by a cashier of a special deposit of bonds. *First Nat. Bank v. Dunbar*, 118 Ill. 625 (1886). See also *Caldwell v. National Mohawk Bank*, 64 Barb. 333 (1869), and § 682, *supra*. He may sell assets to pay a debt, and may guarantee the priority of a mortgage. *Peninsular Bank v. Hammer*, 14 Mich. 208 (1866). He may employ an attorney. *Root v. Olcott*, 42 Hun, 536 (1886); *aff'd*, 115 N. Y. 635; *Potter v. New York Inf. Asylum*, 44 Hun, 367 (1887); *Western Bank v. Gilstrap*, 45 Mo. 419 (1870), where the other officers were absent; *Mumford v. Hawkins*, 5 Denio, 355 (1848). The

president and cashier are presumed to have authority to compromise a debt. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189 (1881). A cashier who is authorized to wind up the bank may compromise a claim. *Metzger v. Southern Bank*, 98 Miss. 108 (1910). A cashier has no power to release an indorser or compromise a claim unless specially authorized or allowed so to do. *Farmers', etc. Bank v. Clancy*, 163 Mich. 586 (1910). Where an agreement is signed by the president and cashier of a bank concerning a matter which is within the regular business of the bank, the authority of these officers to execute the contract is presumed. *Nat. Bank Commerce v. Atkinson*, 8 Kan. App. 30 (1898). The president and cashier of a bank have inherent power to sell or mortgage land owned by the bank. *Steinke v. Yetzer*, 108 Iowa, 512 (1899). The cashier may transfer stock held in pledge. *Matthews v. Massachusetts Nat. Bank*, 1 Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113. A *bona fide* holder may enforce accommodation paper indorsed by him. *City Bank v. Perkins*, 29 N. Y. 554 (1864); *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312 (1859); *Faneuil Hall Bank v. Bank of Brighton*, 82 Mass. 534 (1860). A receiver of a bank who sues a surety company on a bond given in behalf of an employee of the bank is bound by representations of the assistant cashier of the surety company made in connection with the bond. *Willoughby v. Fidelity, etc. Co.*, 16 Okla. 546 (1906). Where the cashier steals collateral the bank is liable even though the cashier was also an indorser on the note. *First Nat. Bank v. Sing Sing, etc. Co.*, 120 N. Y. App. Div. 542 (1907); *aff'd*, 194 N. Y. 580. The cashier has no inherent power to agree to make a loan for the bank. *Swindell & Co. v. Bainbridge, etc. Bank*, 3 Ga. App. 364 (1908).

<sup>3</sup> In no case has the term "ordinary



regular course of business.<sup>1</sup> A bank may be a *bona fide* pledgee of stock from its cashier, even though such stock is in the name of a third person and is indorsed by the latter.<sup>2</sup> A bank may borrow money, but it is so unusual that the loaner must inquire into the authority of the officer or agent acting for the bank which borrows the money. Special authority or ratification by the board of directors must be shown.<sup>3</sup> A bank has no power to buy stock in an insurance company, and the cashier of the bank has no authority to take stock in payment of a debt.<sup>4</sup> Where a director of a bank delivers bonds to the cashier as security for a debt, and the cashier pledges them to the bank to secure his own debt, the court will hold that the bank holds the bonds as security for the creditor's debt and not for the cashier's debt.<sup>5</sup> The cashier of a bank, in answering an inquiry as to the responsibility of a third person, need not disclose the fact that the bank has a mortgage on the property of such person.<sup>6</sup> A cashier has no right to agree that a note discounted by another bank for a company in which he is personally interested shall be charged up to his bank

business" "been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it even been decided that a cashier could purchase or sell the property or create an agency of any kind for a bank which he had not been authorized to make by those to whom had been confided the power to manage its business, both ordinary and extraordinary." *U. S. v. City Bank of Columbus*, 21 How. 356 (1858).

<sup>1</sup> He cannot bind the bank by indorsing the bank's name as an accommodation indorser to his own note. *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557 (1877). A cashier may indorse bank paper to any one except himself. *Preston v. Cutter*, 64 N. H. 461 (1888). A cashier has no power to make the bank a surety on a replevin bond for the accommodation of a third person. *Sturdevant v. Farmers', etc. Bank*, 62 Neb. 472 (1901). The mere fact that the cashier of the bank acts as intermediary in the purchase and sale of stock in the bank does not

make the bank liable for his conversion of a certificate of stock. *Preston v. Marquette County, etc. Bank*, 122 Mich. 696 (1900). A cashier has no power to give a mortgage on the bank property or transfer its assets. *Bank of Gloster v. Hindman*, 95 Miss. 742 (1909). See 61 S. Rep. 951.

<sup>2</sup> *Brady v. Mount Morris Bank*, 65 N. Y. App. Div. 212 (1901).

<sup>3</sup> *Western Nat. Bank v. Armstrong*, 152 U. S. 346 (1893). A cashier having power to borrow money for the bank has power to pledge bank securities as collateral. *Sloan v. Kansas City, etc. Bank*, 158 Mo. 431 (1900). The cashier may borrow for the bank and pledge securities where he has been allowed to conduct the bank alone for many years. *First Nat. Bank, etc. v. State Bank, etc.*, 15 N. Dak. 594 (1906).

<sup>4</sup> *Bank of Commerce v. Hart*, 37 Neb. 197 (1893). A bank cashier has no power to allow a note due the bank to be paid in work for a railroad. *First Nat. Bank, etc. v. Alexander*, 152 Ala. 585 (1907).

<sup>5</sup> *Detroit, etc. Co. v. Third, etc. Bank*, 111 Mich. 407 (1897).

<sup>6</sup> *First Nat. Bank v. Marshall, etc. Bank*, 83 Fed. Rep. 725 (1897).



in case of non-payment.<sup>1</sup> Although a cashier does an act in excess of his powers, yet if the board of directors ratify it or accept its benefits the corporation is bound.<sup>2</sup> By long usage a cashier may be given larger powers than are apparent in his office.<sup>3</sup> A person who merely receives money in a branch of the business is not the cashier. The cashier is one who has charge of the funds to the exclusion of every other person.<sup>4</sup> A so-called "cashier" of a water-works company has no

<sup>1</sup> *Ft. Dearborn Nat. Bank v. Seymour*, 71 Minn. 81 (1898).

<sup>2</sup> Although the officers of a bank have no power to borrow money from the bank without special authority from the board of directors, yet if for a long time they have been accustomed to do so, this is the same as though express authority has been given. *Armstrong v. Chemical Nat. Bank*, 83 Fed. Rep. 556 (1897); *aff'd*, 176 U. S. 618 (1900). Even though an officer of a bank is not authorized to obtain a loan for the bank from its correspondent bank, yet if he does so and the bank uses the money, it is liable to repay the same. *Aldrich v. Chemical, etc. Bank*, 176 U. S. 618 (1900); *Martin v. Webb*, 110 U. S. 7 (1884), where the cashier had canceled a deed of trust; *Payne v. Commercial Bank*, 14 Miss. 24 (1846); *Bank of Pennsylvania v. Reed*, 1 Watts & S. (Pa.) 101 (1841); *Ryan v. Dunlop*, 17 Ill. 40 (1855), where he satisfied a mortgage; *Kelsey v. National Bank*, 69 Pa. St. 426 (1871), where he offered a reward with the knowledge and acquiescence of the directors; *Medomak Bank v. Curtis*, 24 Me. 36 (1844), where the bank claimed the benefit of a contract; *U. S. Bank v. Dandridge*, 12 Wheat. 64 (1827), where a cashier's bond in possession of a bank was held to have been accepted by the bank, though no vote accepting it was to be found in its records; *Bank of Lyons v. Demmon, Hill & D. Supp.* (N. Y.) 398 (1844), where the president and secretary sold stock and agreed to purchase it if the vendee desired. He cannot assign non-negotiable paper. *Barriek v. Austin*, 21 Barb. 241 (1855). As to the power of the cashier and president together to pledge paper for an antecedent

debt, see *Tennessee v. Davis*, 50 How. Pr. 447 (1874). As to the power of the cashier to take payment in other notes, etc., see *Sandy River Bank v. Merchants', etc. Bank*, 1 Biss. 146 (1857); s. c., 21 Fed. Cas. 356. A cashier has no power to agree with an indorser of a note to a bank that he shall not be liable. *Thompson v. McKee*, 5 Dak. 172 (1888); *Bank of Metropolis v. Jones*, 8 Pet. 12 (1834); *Bank of U. S. v. Dunn*, 6 Pet. 51 (1832). A person taking a note from the cashier on the latter's personal debt cannot hold the bank liable on the latter's indorsement of the note as cashier. *West St. Louis Sav. Bank v. Shawnee, etc. Bank*, 3 Dill. 403 (1874); s. c., 29 Fed. Cas. 831; s. c., 95 U. S. 557. A cashier cannot assign corporate notes to a depositor in payment of a deposit. *Schneitman v. Noble*, 75 Iowa, 120 (1888). He cannot render the charter forfeitable by taking payment on subscriptions in an illegal manner. *State v. Commercial Bank*, 14 Miss. 218 (1846). A bank may be bound by a release of its cashier upon a note signed by the cashier and several others, where the cashier pays his part of the note and erases his name from the note, and such facts become known to the board of directors. *First Nat. Bank v. Shook*, 100 Tenn. 436 (1898).

<sup>3</sup> *National Bank v. Equitable, etc. Co.*, 223 Pa. St. 328 (1909). Where a cashier has been allowed for seven years to conduct the whole bank, the bank cannot hold him liable for losses on loans made without consulting with the directors as required by the by-laws. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469 (1910).

<sup>4</sup> *Eisenhofer v. New York, etc. Co.*, 91 N. Y. App. Div. 94 (1904). The president, treasurer and secretary of



authority to indorse the company's name to checks running to it. The bank crediting him personally with such checks is not protected.<sup>1</sup>

§ 719. *General manager, superintendent, and general agent — Their power to contract for the corporation.* — The general manager of a corporation has no power to make and deliver the promissory note of the company;<sup>2</sup> nor to indorse the company's name on commercial paper,<sup>3</sup> except possibly in payment of debts;<sup>4</sup> nor to change

a newspaper corporation is not its "manager" within the meaning of a statute making the latter criminally liable for libel. *People v. Warden of City Prison*, 144 N. Y. App. Div. 24 (1911).

<sup>1</sup> *Knoxville Water Co. v. East Tennessee Nat. Bank*, 123 Tenn. 364 (1910).

<sup>2</sup> *New York, etc. Mine v. Negaunee Bank*, 39 Mich. 644 (1878), in which case the note was held not enforceable, although the general manager had often drawn drafts on the company. See *Re Cunningham*, L. R. 36 Ch. D. 532 (1887). The general manager of a retail lumber company has no power to borrow money for it and issue its note. *Rizzuto v. R. W. English, etc. Co.*, 44 Colo. 413 (1908). The general manager of a non-trading company, such as a heat supplying company, has no implied power to execute notes in its behalf. *Sedalia Nat. Bank v. Economy, etc. Co.*, 145 Mo. App. 319 (1910). The general manager of a railroad company has no inherent power to execute promissory notes in its name. *Baines v. Coos, etc. Co.*, 45 Oreg. 307 (1904). A general manager of a cattle company has no power to give its note or to postpone payment for an engine at a high rate of interest and a commission. *Sanford, etc. Co. v. Williams*, 18 Colo. App. 378 (1903). The manager of a mining corporation has no inherent power to draw and cash a bill of exchange. *Bank of Commerce v. Baird, etc. Co.*, 13 N. M. 424 (1906). Where a corporation and a firm are practi-

cally one and the same concern, and the same man signs for both, his signature of the corporate name to the firm obligation is binding on the corporation. *National Bank, etc. v. John, etc. Sons*, 33 S. W. Rep. 415 (Ky. 1895). A general manager is presumed to have authority to sign a corporate note. *Citizens' Nat. Bank v. Wintler*, 14 Wash. 558 (1896). The president and general manager has no implied power to issue notes. The fact that he has done so before is immaterial, where all of the directors, excepting one, were ignorant of such acts. *Elwell v. Puget Sound, etc. R. R.*, 7 Wash. 487 (1893). The general manager of a telegraph company has no implied authority to make a note for it and in its name. *Helena Nat. Bank v. Rocky, etc. Tel. Co.*, 20 Mont. 379 (1898). Where the manager for several years has been accustomed to sign notes for the company, the company is bound by such notes. *Cadillac, etc. Bank v. Cadillac, etc. Co.*, 129 Mich. 15 (1901).

<sup>3</sup> The manager of a company has no power to make it a surety or guarantor, nor is he personally liable, he not having expressly agreed to be. *Haupt v. Vint*, 68 W. Va. 657 (1911). The general manager of a lumber company may sell the lumber and take a check in payment from a corporation and may indorse the check for collection. *Perry v. Sumrall, etc. Co.*, 95 Miss. 691 (1909). An indorsement by a corporation of a note running to it, the indorsement being by the presi-

<sup>4</sup> *McKieran v. Lenzen*, 56 Cal. 61 (1880); *Seeley v. San José*, 59 Cal. 22 (1881). A business corporation which intrusts its management to its general manager is bound by his assignment

of a chose in action to a creditor in payment of or security for a debt. *Dollar v. International, etc. Corporation*, 13 Cal. App. 331 (1910).



the terms of a sealed contract of the corporation;<sup>1</sup> nor to employ a person on a three years' contract.<sup>2</sup> But he may give a note in payment of wages due;<sup>3</sup> and he may accept a draft.<sup>4</sup> There is grave doubt as to whether he may borrow money and give a lien or chattel mortgage therefor.<sup>5</sup> The president and general manager of a mining company

dent and general manager in the due course of business, is binding and need not be under seal. *Ramboz v. Stansbury*, 13 Cal. App. 649 (1910). The manager of an insurance company has no inherent power to assume the payment of notes of a company whose business his company has bought out, the contract of purchase containing no such provision. *Greensboro Nat. Bank v. Carolina, etc. Co.*, 74 S. E. Rep. 579 (N. C. 1912). Accommodation acceptances, accepted in the corporate name by the manager of the corporation without the knowledge of the directors, are not enforceable, though the manager had at times drawn notes to meet expenses. *Merchants' Nat. Bank v. Detroit, etc. Works*, 68 Mich. 620 (1888). The power of a manager to borrow money for the company by giving his own note and indorsing the company's name to it is a question for the jury. The books of the company are evidence to prove that the company received the money. The jury may decide that his authority might be "either authority or subsequent ratification, and that it could be evidenced by general course of business as well as by resolution." *Huntington v. Attrill*, 118 N. Y. 365 (1890). A general manager has no power to guarantee in the corporate name the payment of a third person's note. *Dobson v. More*, 164 Ill. 110 (1896). A general manager has no inherent power to indorse the commercial paper coming to the company. The by-laws are admissible on the subject. *Railway Equip. etc. Co. v. Lincoln Nat. Bank*, 82 Hun, 8 (1894). But he may accept a draft if he is accustomed so to do. *Munn v. Commission Co.*, 15 Johns. 44 (1818). And the general agent of a bank may indorse. *Merchants' Bank v. Central Bank*, 1 Ga. 418 (1846). Where there is no treasurer, the general manager or a director may sign the corporate

name to negotiable paper for collection. *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561 (1891). Where the power to indorse notes is given by the by-laws to the president and vice-president, a general manager does not have that power, although he has drawn checks and previously indorsed two notes, but without the knowledge of the board of directors. *Davis v. Rockingham Investment Co.*, 89 Va. 290 (1892). The general manager of a corporation organized to buy and sell products has no power to have it do business gratuitously as an accommodation to a third party, the directors never having authorized the same. *Clark, etc. Co. v. Parker, etc. Co.*, 131 Mich. 139 (1902).

<sup>1</sup> *Boynton v. Lynn, etc. Co.*, 124 Mass. 197 (1878). The president and general manager has no power to modify a lease under seal given by the corporation. *Granite Bldg. Corp. v. Greene*, 25 R. I. 586 (1904).

<sup>2</sup> *Laird v. Michigan, etc. Co.*, 153 Mich. 52 (1908). The general manager of a steamship company may employ a master for two years. *Jenkins S. S. Co. v. Preston*, 186 Fed. Rep. 609 (1911). Where the charter gives the power only to the board of directors to employ and discharge assistants, the manager cannot make a time contract of employment. *Francis v. Spokane, etc. Club*, 54 Wash. 188 (1909). A general manager has no authority to employ a person to take charge of a part of the business on a salary and a percentage of the profits for a term of years. *Wainwright v. Roots Co.*, 97 N. E. Rep. 8 (Ind. 1912).

<sup>3</sup> *Bates v. Keith, etc. Co.*, 48 Mass. 224 (1843).

<sup>4</sup> *Hascall v. Life, etc. Assoc.*, 5 Hun, 151 (1875); *aff'd*, 66 N. Y. 616.

<sup>5</sup> The general agent and treasurer may borrow money and give a chattel mortgage as security. *Fay v. Noble*,



has no power to grant a permit to others to mine on the corporate property.<sup>1</sup> In a suit against a corporation for libel it may be a question for the jury as to whether the officer was acting within the scope of his authority in publishing the libel.<sup>2</sup> A gas company cannot be held liable for letters written by its general manager for publication attacking a former general manager, unless it be shown that such letters were authorized by the corporation itself. A general manager has no such inherent authority.<sup>3</sup> But where the president and manager and attorney of the company illegally cause the arrest of an employee for embezzling corporate funds, the corporation may be held liable for malicious prosecution.<sup>4</sup> A newspaper corporation may be liable on the contract of its managing editor chartering a boat to collect war news, and agreeing to pay the value of the boat in case it is lost.<sup>5</sup>

A general manager or general agent has power at common law to

66 Mass. 1 (1853). The general manager has no power to mortgage the property. *First Nat. Bank v. Kirkby*, 43 Fla. 376 (1901). The superintendent of a mine cannot borrow money for the company. *Union, etc. Co. v. Rocky Mountain Nat. Bank, 1 Colo.* 531 (1872). Where a superintendent borrows money for himself, giving a lien on corporate property as security, the parties loaning the money with knowledge of these facts cannot hold the company liable. *Planters', etc. Co. v. Olmstead*, 78 Ga. 586 (1887). The well-considered case of *Whitwell v. Warner*, 20 Vt. 425 (1848), holds that the general manager cannot give a lien to secure the price of goods which he purchases; but it is held that if the company uses the goods, even without knowledge of the lien, the vendors may pursue the goods or the proceeds realized therefrom. In *Leonard v. Burlington, etc. Assoc.*, 55 Iowa, 594 (1881), it is held that he may borrow money, and the company is liable if it has used the money. A superintendent's mortgage was upheld in *Poole v. West, etc. Assoc.*, 30 Fed. Rep. 513 (1887).

<sup>1</sup> *Integrity, etc. Co. v. Moon*, 109 S. W. Rep. 1057 (Mo. 1908).

<sup>2</sup> *Hardencourt v. North Penn. etc. Co.*, 225 Pa. St. 379 (1909). A newspaper corporation is liable for a libel published under the direction of its manager, the paper having afterwards stated that the publication was true,

and the manager having been continued in office. *Pfister v. Milwaukee, etc. Co.*, 139 Wis. 627 (1909).

<sup>3</sup> *Washington Gas L. Co. v. Lansden*, 172 U. S. 534 (1899). A libelous statement published by the manager of a manufacturing company in connection with its business renders the company liable. *Pattison v. Gulf, etc. Co.*, 116 La. 963 (1906). Even though the general manager prevents the secretary of a corporation performing his duties, yet the secretary cannot collect his salary unless he shows that the corporation ratified the acts of its manager. *Roberts v. Stanton Co.*, 94 Pac. Rep. 647 (Wash. 1908).

<sup>4</sup> *Schwartz v. Van Wie, etc. Co.*, 69 N. Y. App. Div. 282 (1902). A general superintendent who causes the arrest of a person to whom stolen goods have been sold, for which goods the corporation had offered a reward, does not thereby render the corporation liable for false imprisonment. *Lubliner v. Tiffany & Co.*, 54 N. Y. App. Div. 326 (1900). A corporation is not liable for malicious prosecution in the arrest of an employee by the manager for larceny, where it turns out that the manager had given the articles to the employee where he had no authority to give them away. *Hartdorn v. Webb Mfg. Co.*, 75 Atl. Rep. 893 (N. J. 1910).

<sup>5</sup> *Sun, etc. Assoc. v. Moore*, 183 U. S. 642 (1902).



direct and contract in regard to the usual running business of the corporation.<sup>1</sup> A general manager has power to borrow money to meet corporate bills in due course of business.<sup>2</sup> A general manager of a commercial company has no power to sell its real estate.<sup>3</sup> The general manager of a steamship company has no power to sublet its pier nor to engage a broker for that purpose.<sup>4</sup> Neither the president, general manager, nor agent of a land company has power to dedicate a part of its land for a street.<sup>5</sup> The president and general manager of an insolvent corporation has no power to give a preference;<sup>6</sup> nor can he transfer all its assets to one creditor in payment of his claim, even though the by-laws gave him entire charge of the business, subject to the approval of the board of directors.<sup>7</sup> A transfer of a lease of property by the general manager who has exercised all the powers of the company is valid,

<sup>1</sup> *Kansas City v. Cullinan*, 65 Kan. 68 (1902). The general manager has implied authority to transact the usual and ordinary business of the company. *Wainwright v. Roots Co.*, 97 N. E. Rep. 8 (Ind. 1912). The general manager has the most general control over the corporate affairs and is able to act in emergencies on his own responsibility. He may discharge an employee. *Manross v. Uncle Sam Oil Co.*, 128 Pac. Rep. 385 (Kan. 1912). The general manager of a fruit company has implied power to purchase fruit. *Leavens v. Pinkham & McKevitt*, 128 Pac. Rep. 399 (Cal. 1912). It may be for the jury to decide whether a general manager of a land and investment company has authority to purchase an automobile and charge it to the company. *Western, etc. Co. v. First Nat. Bank*, 128 Pac. Rep. 476 (Colo. 1912).

<sup>2</sup> *Rosemond v. Northwestern, etc. Co.*, 62 Minn. 374 (1895). Even though a manager has no power to borrow money for the company, yet if he does so and the company uses it, the company must repay it. *Topeka, etc. Co. v. March*, 10 Kan. App. 40 (1900). A resolution authorizing the manager to conduct the business authorizes him to execute corporate notes where the business requires it. *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242 (1912). Where the general manager pays out his own money on corporate debts he may have recourse to the corporation for repayment.

*Sutton v. Farmers', etc. Co.*, 75 S. E. Rep. 336 (Ga. 1912).

<sup>3</sup> *Calloway v. Stobart, etc. Co.*, 35 Can. S. C. Rep. 301 (1904). A vice-president and general manager of a land company has no power to sell its land. *Hurlbut v. Gainor*, 45 Tex. Civ. App. 588 (1907). A manager of an insolvent corporation has no power to sell its property. *Nelson v. Svea Pub. Co.*, 178 Fed. Rep. 136 (1910). The general manager of a coal company has no power to employ a broker to sell the company's property. *Elk, etc. Co. v. Thompson*, 150 S. W. Rep. 817 (Ky. 1912).

<sup>4</sup> *Lord v. United States, etc. Co.*, 143 N. Y. App. Div. 437 (1911).

<sup>5</sup> *Town of West Point v. Blank*, 106 Va. 792 (1907).

<sup>6</sup> *Dooley v. Pease*, 79 Fed. Rep. 860 (1897). The general manager, secretary and treasurer may agree that judgment creditors may sell certain corporate property and apply the proceeds to their debts. *Lewiston, etc. Co. v. Garvey*, 13 Idaho, 257 (1907).

<sup>7</sup> *Hadden v. Linville*, 86 Md. 210 (1897). A general manager of an insolvent corporation has no power to turn over all the property to one creditor as a preference. *Hadden v. Dooley*, 92 Fed. Rep. 274 (1899). Where the stockholders do not hold meetings, and allow a person to manage the corporation, an assignment by him for the benefit of its creditors will be upheld, and a transfer of all the assets to a person in trust to



even though there is no vote of the stockholders, where such lease does not constitute all the assets of the corporation and the transaction was fair in itself.<sup>1</sup> A general manager may give a mortgage where he has the power to sell the property and carry on the entire business.<sup>2</sup> Where the duties and powers of a general manager are not defined they may be proved by parol evidence.<sup>3</sup>

It has been held that he may waive demand and notice of a note indorsed by the company;<sup>4</sup> may also employ an attorney;<sup>5</sup> may render the company liable for overpayment of a check by mistake of the bank;<sup>6</sup> may contract for the use of a patent;<sup>7</sup> may render the company liable for an illegal use of the word "patented";<sup>8</sup> and may enter into various contracts which pertain to the regular course of the business.<sup>9</sup> Where a corporation is authorized to purchase stock in

sell and pay the debts is such an assignment and is not a mortgage. *Conely v. Collins*, 119 Mich. 519 (1899). The general manager and treasurer has no power to turn over the whole property to a corporate creditor, even though he ran all the business of the company. *First Nat. Bank, etc. v. Asheville, etc. Co.*, 116 N. C. 827 (1895). The power of a general manager to give preferences cannot be questioned by other creditors. *Beaman v. Stewart*, 19 Colo. App. 226 (1903).

<sup>1</sup> *Pennsylvania, etc. Co. v. Pure-Oil Co.*, 195 Pa. St. 388 (1900).

<sup>2</sup> *Thayer v. Nehalem Mill Co.*, 31 Oreg. 437 (1897).

<sup>3</sup> *Clarke v. Lexington Stove-works*, 72 S. W. Rep. 286 (Ky. 1903). A company in proving want of authority in its general manager cannot do so by asking him whether he had the authority. *Nortonville Coal Co. v. Sisk*, 145 Ky. 55 (1911). A real estate agent cannot constitute himself manager of a corporation by merely printing his name as manager on his letterheads without its knowledge. *Berry v. Number, etc. Co.*, 148 N. Y. App. Div. 159 (1911).

<sup>4</sup> *Whitney v. Smith, etc. Co.*, 39 Me. 316 (1855).

<sup>5</sup> *St. Louis, etc. R. R. v. Grove*, 39 Kan. 731 (1888); *Frost v. Domestic, etc. Co.*, 133 Mass. 563 (1882); *Southgate v. Atlantic, etc. R. R.*, 61 Mo. 89 (1875). A general manager may employ an attorney. *Gulf, etc. Ry. v.*

*James*, 73 Tex. 12 (1889). The general manager may execute an appeal bond. *Sarmiento v. Davis, etc. Co.*, 105 Mich. 300 (1895). A manager cannot engage an employee for a long period of time, but may engage an attorney for one year. *Reupke v. D. H. Stuhr, etc. Co.*, 126 Iowa, 632 (1905). The corporation may be liable for the action of the general manager in levying an attachment. *Carey v. Wolff & Co.*, 72 N. J. L. 510 (1906). The general manager of a fraternal society has no power to employ an attorney to obtain control of another corporation in another state. *Red Cross, etc. v. Wayte*, 171 Fed. Rep. 643 (1909).

<sup>6</sup> *Kansas, etc. Co. v. Central Bank*, 34 Kan. 635 (1886).

<sup>7</sup> *Eureka Co. v. Bailey Co.*, 11 Wall. 488 (1870).

<sup>8</sup> *Tompkins v. Butterfield*, 25 Fed. Rep. 556 (1885).

<sup>9</sup> A general manager of a street railway may compromise a damage case. *Trenton, etc. Ry. v. Lawlor*, 74 N. J. Eq. 828 (1908). A manager is presumed to have authority to assign a claim for freight. *Preston v. Central, etc. Co.*, 11 Cal. App. 190 (1909). The general manager of a contracting company may not have power to cancel a purchase upon the company becoming insolvent. *Worthington v. Mack Mfg. Co.*, 175 Fed. Rep. 763 (1909). A general manager of a coal company may employ a person to supervise the business, and the latter



other companies and the board of directors authorize the purchase of certain stock, the president and general manager may make such pur-

is entitled to pay, even though he is also a director. *Ruttle v. What Cheer, etc. Co.*, 153 Mich. 300 (1908). A general manager and resident director, who practically is conducting the corporate affairs of a gas company, may make a time contract with a brick plant for supplying gas and fuel. *Minnetonka Oil Co. v. Cleveland, etc. Co.*, 27 Okla. 180 (1910). Where a water storage company sells water rights and the purchaser agrees to erect certain reservoirs within a certain time, or else forfeit the water rights, the general manager of the company has no power to waive the forfeiture. *Farmers', etc. Co. v. Pawnee, etc. Co.*, 47 Colo. 239 (1910). A vice-president acting as general manager may sell in the ordinary course of trade, and may accept in payment an account which the purchaser has against the president. *Valley Lumber Co. v. McGilvery*, 16 Idaho, 338 (1909). The general manager of a vendee company has no power to disclaim its title at a bankruptcy sale of property. *Asheville, etc. Co. v. Machin*, 150 N. C. 738 (1909). The manager of a corporation organized to buy grain and live stock from producers and sell the same in general market, has no power to speculate in grain and pork. *Farmers', etc. Ass'n v. Adams Grain Co.*, 84 Neb. 752 (1909). A company is bound by an ordinary contract by a person who is allowed to act as general manager. *Crusel v. Houssier-Latreille Oil Co.*, 122 La. 913 (1909). Where a grower of beets, who has agreed to deliver a certain quantity to a sugar company, is about to abandon his crop, the general manager of the latter has power to agree that the company will indemnify him against loss. *Constantine v. Kalamazoo, etc. Co.*, 132 Mich. 480 (1903). A general manager of a corporation owning saloons may sell one of them. *Freyberg v. Los Angeles, etc. Co.*, 4 Cal. App. 403 (1906). Where the directors know that a *de facto* manager has employed a person and they do

not object, the corporation is liable for his services. *Brown v. Crown, etc. Co.*, 150 Cal. 376 (1907). A by-law that no contract shall be made except on a resolution of the directors, does not invalidate the employment of an engineer by the general manager of a mining company, the engineer having no knowledge of the by-law. *Golden Age, etc. Co. v. Langridge*, 39 Colo. 157 (1907). The general manager of a railroad has power to make a contract relative to repairing Pullman cars which are injured by accident. *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700 (1905). The general manager of a mining company has power to buy ordinary articles used in its operation. *Bufalo, etc. Co. v. Troendle*, 99 S. W. Rep. 622 (Ky. 1907). The general manager of a trading corporation is presumed to have authority to sell cotton, that being a part of the corporate business. *Walnut, etc. Co. v. Cohn*, 79 Ark. 338 (1906). A general manager of a railroad may offer a reward for the conviction of persons maliciously placing obstructions on the tracks. *Arkansas, etc. Ry. v. Dickinson*, 78 Ark. 483 (1906). The managing agent of a real estate corporation may bind it on business within the scope of the real estate business. *Harvey v. Sparks Bros.*, 45 Wash. 578 (1907). The general manager of a land company may employ a person to purchase land for the company. *Chilcott v. Washington, etc. Co.*, 45 Wash. 148 (1906). A general agent may authorize another agent to make such settlement of a claim as he deems best. *Russell & Co. v. Stevenson*, 34 Wash. 166 (1904). A representation by the general manager of an irrigation company that the company had a water right at a certain place, may render the company liable if it was false. *Cleghon v. Barstow, etc. Co.*, 41 Tex. Civ. App. 531 (1906). The general manager of a live-stock company has implied power to sell a part of such stock. *Hamm v. Drew*, 83 Tex. 77 (1892). A manager of a



chase without further authority.<sup>1</sup> Where the general manager has authority to make a contract he has authority to accept performance of the contract.<sup>2</sup>

warehouse corporation may issue warehouse receipts to himself for articles properly stored by him in the warehouse. *Riley v. Loma, etc. Co.*, 1 Cal. App. 488 (1905). A manager is one who has the general direction and control of the corporate affairs. He may sign an appeal bond. *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106 (1908). The president, treasurer, and general manager of a plumbing company may employ a person to repair certain buildings on which the company has an option. *Paphro, etc. Co. v. Baty*, 69 N. H. 453 (1899). A general manager may buy land which is necessary or useful to the corporation in conducting its business. *New, etc. Co. v. Shuck*, 50 S. W. Rep. 681 (Ky. 1899). A general manager may employ a superintendent. *Sandberg v. Victor, etc. Co.*, 24 Utah, 1 (1901). Where a firm is turned into a corporation the latter may assume a contract of the former, for the purchase of lumber, by adopting it through its manager. *Pratt v. Oshkosh Match Co.*, 89 Wis. 406 (1895). The president and general manager may agree that the stage company will be co-owner of a stage line with another. *Calvert v. Idaho Stage Co.*, 25 Oreg. 412 (1894). A local manager of a branch store is a general manager to the extent of having power to take a lease of a store for five years. *Phillips, etc. Co. v. Whitney*, 109 Ala. 645 (1896). The general agent of a cattle-feeding company has power to buy feed. *Powder River, etc. Co. v. Lamb*, 38 Neb. 339 (1893). Although the company owes a bank money secured by mortgage, the manager and secretary may deposit the company's money and agree that it may be drawn out free from the mortgage. *Merchants', etc. Bank v. Hervey Plow Co.*, 45 La. Ann. 1214 (1893). Where the general manager

of a corporation owning a mine and reduction mill causes laborers to work in the company's mine and mill, and also to open a mine of his own, all without the knowledge of the company or the employees, who supposed they were working for the company, the company is liable for their wages. *Oro, etc. Co. v. Kaiser*, 4 Colo. App. 219 (1893). A general manager authorized to pay commissions on receipts from sales may agree to pay commissions on sales irrespective of the receipts. *American, etc. Co. v. Maurer*, 10 Atl. Rep. 762 (Pa. 1887). A contract for a corporation by its general superintendent to give right of way to another railroad may become binding by acquiescence. *Alabama, etc. R. R. v. South, etc. R. R.*, 84 Ala. 570 (1887). As to insurance agents, see *Insurance Co. v. McCain*, 96 U. S. 84 (1877). A treasurer of a corporation not authorized to sell any part of its property, but who was its sole managing agent, may pass a valid title of personal property to a vendee as against the claim of one who levied upon it under judgment. *Phillips v. Campbell*, 43 N. Y. 271 (1870). A general manager has implied power to make a reasonable time contract of employment. *Stahlberger v. New Hartford Leather Co.*, 92 Hun, 245 (1895). Long acquiescence in a person's assuming to act for the company is the same as expressly authorizing his action. *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561 (1891). The president and general manager of a lumber company may engage a lawyer for the season. *Ceeder v. Loud, etc. Co.*, 86 Mich. 541 (1891). Where the president carries on the negotiations in regard to a contract, and also the modifications of that contract, and is the manager and in control, and as manager assents to the modifications, the company is

<sup>1</sup> *Adam v. New England, etc. Co.*, 33 R. I. 193 (1911).

<sup>2</sup> *Redwine v. Continental Realty Co.*, 184 Fed. Rep. 851 (1911).



Anything out of the usual course of business, however, must be authorized by the board of directors. The general manager does not displace them, and a person dealing with the corporation is bound to take notice of that fact.<sup>1</sup> Where the president is also general manager

bound thereby. *Nichols v. Scranton Steel Co.*, 137 N. Y. 471 (1893). Where the by-laws give the general manager power to sell, he has power to sell the product for a certain length of time in the future. *Robert, etc. Min. Co. v. Omaha, etc. Co.*, 16 Colo. 118 (1891). For a discussion of what constitutes the appointment of a resident general agent by a corporation, see *Rathbun v. Snow*, 123 N. Y. 343 (1890). Where a superintendent negotiates sales and the president fixes the price, the corporation is responsible for the superintendent's representations. *Decker v. Gutta Percha, etc. Co.*, 61 Hun, 516 (1891).

<sup>1</sup> A surety bond for the fidelity of an officer, if obtained on representations of the general manager, is not enforceable if those representations were untrue. *Issaquah, etc. Co. v. United States, etc. Co.*, 126 Fed. Rep. 89 (1903). A general manager of a lumber company has no power to agree that the company will build a truss bridge across an irrigation ditch to support a flume of the lumber company. *Centerville, etc. Co. v. Sanger, etc. Co.*, 140 Cal. 385 (1903). The managing agent of an insurance company, to which company a note is indorsed, has no power to state to the maker that the company will look to the indorser only. *Muller v. Swanton*, 140 Cal. 249 (1903). Where the by-laws state that the superintendent shall be selected by the directors, a superintendent appointed by the manager cannot collect on a contract, and even if the board has practically ratified the appointment, the company is liable only for what the services were worth, the directors having knowledge of the special contract. *Colpe v. Jubilee, etc. Co.*, 2 Cal. App. 393 (1906). A general manager of a stockyards company has no power to sign a petition to pave a street and thus charge the corporation with a portion of the expense. *Trephagen v.*

*City of South Omaha*, 69 Neb. 577 (1903). A managing director of a saloon corporation has no power to buy another saloon. *Manhattan, etc. Co. v. Magnus & Co.*, 43 Tex. Civ. App. 463 (1906). A general manager of an irrigation company has no inherent power to sign contracts for furnishing water for irrigation. *Tres, etc. Co. v. Eidman*, 41 Tex. Civ. App. 542 (1906). It may be for a jury to decide whether a local superintendent of a foreign corporation, who is practically general manager of a large business, has power to purchase a lighting plant costing \$300. *Grand Rapids, etc. Co. v. Walsh, etc. Co.*, 142 Mich. 4 (1905). The treasurer and general manager has no power to agree to give to the vice-president a commission on purchases and sales by the corporation, but this does not prevent his recovering reasonable compensation therefor. *Waters v. American, etc. Co.*, 102 Md. 212 (1905). A general manager may employ labor. *Forked, etc. Co. v. Shipley*, 80 S. W. Rep. 476 (Ky. 1904). A general manager has no power to engage an employee for five years. *Camacho v. Hamilton, etc. Co.*, 2 N. Y. App. Div. 369 (1896). An executive officer having power to employ persons does not thereby have power to employ a person for life. *Carney v. New York L. Ins. Co.*, 19 N. Y. App. Div. 160 (1897); *aff'd*, 162 N. Y. 453. The managing agent may employ a person, but not for a long time in the future. *Smith v. Co-operative, etc. Assoc.*, 12 Daly, 304 (1884). He cannot employ a broker. *Allegheny, etc. Co. v. Moore*, 95 Pa. St. 412 (1880). The general manager of a mining company has no inherent power to contract for machinery. *Victoria, etc. Co. v. Fraser*, 2 Colo. App. 14 (1892). The president and manager of a milling company cannot purchase flour. *Getty v. Barnes, etc. Co.*, 40 Kan. 281 (1888). The general manager of a mining corporation has no inherent authority to



and has entire charge of the business of a corporation, he may bind it by his contract to pay for promoting expenses,<sup>1</sup> and where the president is general manager and is authorized to carry on the business, he may agree to pay a salary as well as a commission on sales made.<sup>2</sup> The by-laws may give to the general manager power to carry on the business of the company.<sup>3</sup> But where all the corporate powers are by the charter and by-laws vested in the directors they cannot delegate to a manager sole discretion without interference by them.<sup>4</sup> Even though a by-law confers upon the general manager, among other powers, the "general and exclusive charge and management of the business of the company," the by-law is not void, as a whole, and until the general manager illegally exercises power the courts will not interfere.<sup>5</sup> In a suit against the corporation for breach of a general manager's contract of employment, the by-laws defining his authority may be introduced in evidence.<sup>6</sup> But a purchaser of goods from the manager of sales of a manufacturing company is not bound to know of the restrictions on his authority by the by-laws.<sup>7</sup> If the general manager has been allowed to exercise unusual powers for some time the corporation will be bound by a further act by him of the same kind.<sup>8</sup> Although a

grant a right of way for a tramway. *Butte, etc. Min. Co. v. Montana, etc. Co.*, 21 Mont. 539 (1898). A general manager has no power to deed the company's real estate, and a purchaser other than a *bona fide* one from the vendee cannot retain the title. Allowance, however, will be made for improvements. Especially is the deed invalid where the grantee was a director. *Schetter v. Southern, etc. Co.*, 19 Oreg. 192 (1890). 78 S. E. 367.

<sup>1</sup> *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430 (1894).

<sup>2</sup> *Pettibone v. Lake View, etc. Co.*, 134 Cal. 227 (1901). The managing director of a corporation engaged in the selling of merchandise may agree to pay a broker a commission on the sale of real estate, where the sale was authorized by the board of directors. *Henderson v. Raymond Syndicate*, 183 Mass. 443 (1903).

<sup>3</sup> *Burden v. Burden*, 8 N. Y. App. Div. 160 (1896); *aff'd*, 159 N. Y. 287 (1889). A general manager authorized to "take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest," may appoint a local agent and

empower him to hire a barge. *Tennessee River Transp. Co. v. Kavanaugh*, 101 Ala. 1 (1893).

<sup>4</sup> *Horn v. Faulder and Co. Ltd.*, 99 L. T. Rep. 524 (1908).

<sup>5</sup> *Burden v. Burden*, 159 N. Y. 287 (1899).

<sup>6</sup> *Perry v. Noonan Furniture Co.*, 8 Cal. App. 35 (1908).

<sup>7</sup> *Barber v. Stromberg, etc. Co.*, 81 Neb. 517 (1908). The authority of the general manager of a land company cannot be shown to have been limited by a private conversation between him and the president. *Forrester-Duncan, etc. Co. v. Evatt*, 90 Ark. 301 (1909).

<sup>8</sup> Where the general manager is the sole active head of the company and he orders certain work to be done and it is done with the knowledge of the directors, the company is liable therefor. *Mahoney v. Hartford Inv. Corporation*, 82 Conn. 280 (1909). Where the president is also general manager and for six years has exercised all the powers of the company and has express power to sell its land, he may borrow money for it and mortgage its property to secure the loan. *Jenson v. Toltec Ranch Co.*, 174 Fed. Rep. 86 (1909). Where the general



general manager exceeds his authority in agreeing to an arbitration, yet, if the company does not repudiate his agreement promptly, it is bound.<sup>1</sup> Thus, a corporation by filling an order taken by its general

manager and president has been allowed to conduct the business, a corporate note given by him is valid, especially where the corporation received the proceeds. *McKinley v. Mineral, etc. Co.*, 46 Wash. 162 (1907).

A contract by the general manager to pay commissions is binding when the directors knew of it and had authorized practically a similar contract. *Longmont, etc. Co. v. Aldridge*, 36 Colo. 93 (1906). A contract and deed made by the general manager and president is binding on the company where for several years the officers and stockholders, with full knowledge, acquiesced in the same and the corporation has received the benefit thereof. *West, etc. Co. v. Novelty, etc. Co.*, 31 Wash. 435 (1903). A railroad president who by by-law had general supervision of the company, and who managed the business, may execute construction contracts with the knowledge of the directors and acquiescence of the company itself. *Johnson & Sons v. Des Moines, etc. Ry.*, 129 Iowa, 281 (1906). A chattel mortgage executed by the manager may be binding on the company, even though not authorized by the board of directors, where the board of directors had been inactive for a long time and the shareholders acquiesced in the manager doing all the business without action of the board of directors. *Garmany v. Lawton*, 124 Ga. 876 (1906). Although a general manager extends a note without authority, yet if the company continues to pay interest it ratifies his act. *Lyndon, etc. Bank v. International Co.*, 78 Vt. 169 (1905). A secretary who is allowed to manage the business the same as a general manager may bind it by an ordinary contract in the line of the business. *Betts v. Southern, etc.*, 144 Cal. 402 (1904). The general manager who has dealt with the public in selling the product may bind it by a form of contract, which differs from the company's printed form. *Alston v. Broadus Cot-*

*ton Mill*, 152 Ala. 552 (1907). Where a manager has acted for two years in selling the product, a corporation cannot then object. *Mayville, etc. Co. v. Lake Arthur, etc. Co.*, 119 La. 447 (1907).

<sup>1</sup> *Central Trust Co. v. Ashville Land Co.*, 72 Fed. Rep. 361 (1896). Where the manager of a power company agrees to furnish power, and the company endeavors to carry out the contract, this is proof of his authority to make the contract. *Kimball Bros. Co. v. Citizens', etc. Co.*, 141 Iowa, 632 (1908). Where a corporation allows its manager to largely control its business, it is liable on a contract made by him in the name of the company and in the line of its business. *Carri-gan v. Port Crescent Imp. Co.*, 6 Wash. 590 (1893). So also as to its president and secretary. *Duggan v. Pacific Boom Co.*, 6 Wash. 593 (1893). Where a party who buys a mine does not object to a lease thereof made by the superintendent without authority, but on the contrary allows the lessee to proceed and receives the rent, he thereby ratifies the lease. *Bicknell v. Austin Min. Co.*, 62 Fed. Rep. 432 (1894). A stockholder may defend against a statutory liability on the ground that the debt has been taken over by a trust company by the manager of the latter and that his acts have not been repudiated. *First Nat. Bank v. Littlefield*, 28 R. I. 411 (1907). The general manager of a mining company has no power to pay a lessee a sum of money to cancel the lease and his action is not ratified by the directors if they act without full knowledge of the transaction. *Conqueror, etc. Co. v. Ashton*, 39 Colo. 133 (1907). The general manager of a railroad may bind it by a sale of land where the corporation took the money. *West v. Washington, etc. R. R.*, 49 Oreg. 436 (1907). Where a manager employs a real estate agent to sell some of its property, and the company completes the sale, it is liable for the agent's com-



manager ratifies his act.<sup>1</sup> A company receiving and having the benefit of money borrowed for it by the general manager is liable therefor, even though the manager was short in his accounts and borrowed the money to make up the shortage.<sup>2</sup> A general manager occupies a fiduciary relation towards the corporation, and is held to strict observance of good faith.<sup>3</sup> It is a criminal offense in England for any director, manager, or officer of a corporation to publish false statements with intent to induce persons to purchase stock. Under this statute a person is liable as a manager for such acts, if he acted as manager, even though he was never appointed.<sup>4</sup> A manager is an "officer" who may verify a complaint.<sup>5</sup> Where a general manager has been discharged,

missions. *Dillard v. Olalla Min. Co.*, 52 Oreg. 126 (1908).

<sup>1</sup> *Cumberland, etc. Co. v. Wheaton*, 208 Mass. 425 (1911).

<sup>2</sup> *Hireen v. English, etc. Co.*, 46 Colo. 216 (1909). Where a corporation has received money borrowed by its manager it may be a question for the jury as to whether the corporation authorized the manager to borrow. *Alton Mfg. Co. v. Garrett, etc. Inst.*, 243 Ill. 298 (1910). Where the general manager who is also vice-president executes his personal note to the company and indorses the company's guaranty on it and sells it, a *bona fide* purchaser may collect it, one half of the amount having been paid to the corporation and the remaining half being a balance to be paid later by the payee. *Gaston & Ayres v. Campbell Co.*, 140 S. W. Rep. 770 (Tex. 1911). Where a corporation allows its general manager to hold it out as owning and operating a theater and receives the income, it is liable for the debts. *Arkansas, etc. Assoc. v. Higgins*, 96 Ark. 493 (1910).

<sup>3</sup> A general manager has no power to agree that the corporation will assist with its funds a private enterprise in which he is interested. *Leigh v. American, etc. Co.*, 205 Ill. 147 (1903). The general manager cannot render the corporation liable for his own debts. *Barnhardt v. Star Mills*, 123 N. C. 428 (1898). A corporation cannot claim a patent on an invention of its general manager made while he was in its employ. *Johnson, etc. Co. v. Western, etc. Co.*, 178 Fed. Rep. 819 (1910). Where a copartnership is

the general manager and agent of the company and a member of the copartnership is a director and misappropriates the company's property, the company has recourse against his separate estate as well as against the joint estate of the copartnership. *Re MacFadyen*, [1908] 2 K. B. 817. Where the manager, in order to continue a profitable contract which he has with the corporation, keeps up a deadlock in the board of directors, due to there being a vacancy, he is bound to prefer the interests of the company or else to terminate his employment and rely on his contract. *Kane v. Schuylkill*, 199 Pa. St. 198 (1901). Where the general manager attempts to obtain proxies for the purpose of ousting the existing management, and uses methods calculated to deceive the persons giving the proxies, he is guilty of a breach of trust and his contract with the company may be canceled. *Townsley v. Bankers', etc. Co.*, 56 N. Y. App. Div. 232 (1900). Where a general manager transfers corporate property in payment of his personal debt, a purchaser from the vendee is not protected unless he shows that he was not aware of the lack of authority of the manager. *Grooms v. Neff, etc. Co.*, 79 Ark. 401 (1906). Where a director, who is also general manager, presents a claim for his services to the board of directors, he is not to be counted in making up the quorum or in taking the vote. *Paxton v. Heron*, 41 Colo. 147 (1907).

<sup>4</sup> *Rex v. Lawson*, [1905] 1 K. B. 541.

<sup>5</sup> *Stockton, etc. Co. v. Blodget*, 3 Cal. App. 94 (1906).



whether rightfully or wrongfully, he cannot act further and a mandatory injunction is not the proper remedy to obtain the company's books and papers from him.<sup>1</sup> *Mandamus* is the usual and proper remedy to compel an outgoing corporate officer to deliver the corporate books and papers to the new one.<sup>2</sup>

A managing *director* may, by a by-law, be given the powers of the board. An outside party need not inquire as to whether his appointment was validly made, and may assume that such director has the powers which the board might delegate to him.<sup>3</sup> A "business manager" is not very well defined in the law, and hence a note to which he affixes the name of the corporation is not enforceable against it, unless proof is given of his authority.<sup>4</sup> A construction company is liable for the failure of its general foreman to notify an employee of the danger connected with a certain piece of work.<sup>5</sup> A "managing agent" may be one who has charge of a department of the business.<sup>6</sup> A "general

<sup>1</sup> *Maine, etc. Co. v. Alexander*, 115 N. Y. App. Div. 109 (1906). A discharged general manager cannot maintain a bill to be reinstated and to remove the president. *Dimmick v. Stokes*, 151 Ala. 150 (1907).

<sup>2</sup> *People v. Powers*, 145 N. Y. App. Div. 693 (1911). See also § 717, *supra*. A managing agent is subject to removal on the expiration of his term, and by mandatory injunction may be compelled to turn over the books, papers, and property to his successor and to discontinue interfering with the business. *Magpie, etc. Co. v. Sherman*, 23 S. Dak. 232 (1909).

<sup>3</sup> *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93. Even though the by-laws give a managing director wide powers as to the commercial business of the company, this does not give him any powers as to the transfer of stock. *George Whitechurch Ltd. v. Cavanagh*, [1902] A. C. 117. Cf. *Orvis v. Warner, etc. Co.*, 75 N. Y. App. Div. 463 (1902). A managing director may by long usage have sufficient authority to sell property owned by the corporation. *Walker v. Detroit, etc. Ry.*, 47 Mich. 338 (1882). Where a person subscribes for stock in an unincorporated joint-stock association, a part of the transaction being that he shall be employed for a year at a certain salary, and such contract of employment is signed by only one manager

instead of two, as required by statute, he may rescind and demand his money. *Hoyt v. Paw Paw, etc. Co.*, 158 Mich. 619 (1909). 132 Pac. Rep. 83.

<sup>4</sup> *Topeka, etc. Co. v. Remington, etc. Co.*, 61 Kan. 1 (1899). Where the president of a railroad company is also its business manager and makes a contract which the company lives up to for several years, the company is bound. *McKell v. Chesapeake & O. Ry.*, 175 Fed. Rep. 321 (1910); s. c., 186 Fed. Rep. 39. An educational corporation that has accepted and partly paid for goods and has had the benefit thereof cannot repudiate payment of the balance on the ground that its president and business manager was not authorized to purchase them. *Doolittle v. Keuka College*, 129 N. Y. App. Div. 829 (1909). The "business agent" or "business manager" does not have inherent power to borrow money. *Alton Mfg. Co. v. Garrett, etc. Inst.*, 243 Ill. 298 (1910).

<sup>5</sup> *Connolly v. Hall, etc. Co.*, 192 N. Y. 182 (1908).

<sup>6</sup> *Federal, etc. Co. v. Reeves*, 73 Kan. 107 (1906). A managing agent is a person vested with general powers involving the exercise of judgment and discretion, and is distinguished from an agent who acts under the direction and control of superior authority as to the extent and manner of



agent" of an insurance company is not an officer within the meaning of a provision of a contract that its terms shall not be varied except by an officer.<sup>1</sup> A person who is put in charge of corporate business by the stockholders is not a trustee, even though he is called a trustee.<sup>2</sup>

It has been held that a superintendent has not the powers of a general manager.<sup>3</sup> The superintendent of a mining company has no

executing his duty. *Ritchie v. Illinois, etc. R. R.*, 87 Neb. 631 (1910). An unincorporated association to conduct a coöperative store, certificates similar to certificates of stock being issued to the members, is a partnership, and each member is liable for the debts, there being no notice to the creditor of any limitation of liability, and the managing agent who has conducted the affairs may purchase goods on credit and give the association's notes therefor. *Ashley v. Dowling*, 203 Mass. 311 (1909). A managing agent is subject to removal on the expiration of his term, and by mandatory injunction may be compelled to turn over the books, papers, and property to his successor and to discontinue interfering with the business. *Magpie, etc. Co. v. Sherman*, 23 S. Dak. 232 (1909).

<sup>1</sup> *Vardeman v. Penn. etc. Co.*, 125 Ga. 117 (1906).

<sup>2</sup> *Bank of Visalia v. Dillonwood, etc. Co.*, 148 Cal. 18 (1905).

<sup>3</sup> The secretary or superintendent of a water-works company has no power to modify a contract between the company and the city. *Illinois, etc. Bank v. City of Burlington*, 79 Kan. 797 (1909). The company is not liable for a libel published by its superintendent. *Flanagan v. McDermot, etc. Co.*, 132 N. Y. App. Div. 166 (1909). An assistant superintendent having no general supervision has not the powers of a managing agent. *Kramer v. Buffalo, etc. Co.*, 132 N. Y. App. Div. 415 (1909). The president and superintendent of a corporation is not entitled to any salary, neither is he entitled to reimbursement of expenses incurred in inducing people to purchase stock. *Ebner v. Alaska, etc. Co.*, 167 Fed. Rep. 456 (1909). The superintendent of a lumber company cannot agree

that an employee need not work but shall hold himself in readiness to work and is to be paid in the meantime. *Stephens v. Roper, etc. Co.*, 75 S. E. Rep. 933 (N. C. 1912). A superintendent may have power to employ a man for a year. *Slocum v. Seattle, etc. Co.*, 67 Wash. 220 (1912). It may be a question for the jury as to whether a superintendent of a mining company has power to contract for a year for the mining of coal. *Raven, etc. Co. v. Herron*, 75 S. E. Rep. 752 (Va. 1912). The superintendent of a water company has no power to make a contract to supply water for fire purposes when the company has not been furnishing water for that purpose. *Hall v. Passaic Water Co.*, 85 Atl. Rep. 349 (N. J. 1912). A superintendent has no power to agree to continue the employment of a person for life. *Smith v. Crum, etc. Co.*, 208 Pa. St. 462 (1904). A superintendent or general superintendent does not render a company liable for malicious prosecution by reason of a suit instituted by him. *Canon v. Sharon, etc. Ry.*, 216 Pa. St. 408 (1907). A superintendent of a manufacturing company cannot employ medical treatment for one of the employees at the expense of the company. *King v. Forbes, etc. Co.*, 183 Mass. 301 (1903). A superintendent or other managing official of a lumber company has power to contract for the hauling of logs. *Minnesota, etc. Co. v. Hobbs, etc.*, 122 Ga. 20 (1905). A superintendent may employ experts to investigate and testify in behalf of the corporation in certain litigation, especially where the officers ratified his acts. *Lincoln, etc. Co. v. Williams*, 37 Colo. 193 (1906). A manager or general agent has power to make a contract in the ordinary course of business. *Empire, etc. Co. v. Hench*,



power to employ a physician to attend to an injured employee except in an emergency involving life or limb.<sup>1</sup> The superintendent may, of course, be given express power to contract.<sup>2</sup> If the company ratifies the contract or accepts its benefits the contract becomes binding.<sup>3</sup> The testimony of a person that he is the manager of a corporation is not sufficient proof of that fact.<sup>4</sup> A railroad superintendent may em-

219 Pa. St. 135 (1907). A district manager of a manufacturing company with general supervision over a particular branch of its business has the powers of a general agent in that branch. *American, etc. Co. v. Alexandria, etc. Co.*, 218 Pa. St. 542 (1907). The superintendent has no power to attach the corporate seal. *Florida Ry. v. Thomas*, 55 Fla. 287 (1908). *Adrianse v. Roome*, 52 Barb. 399 (1868), holding that the superintendent cannot borrow money and agree to make payment in iron. Where it is customary for a railroad so to do, the superintendent may bind the company by his agreement that the company will give a life job to a person who has been injured by the railroad, and it is for the jury to say whether such promise was made. *Jackson v. Illinois, etc. R. R.*, 76 Miss. 607 (1899). Where the president has power to execute a bill of sale, but instead of doing so allows the superintendent to execute it, it may be a question for a jury as to whether the sale was binding on the corporation. *Trent v. Sherlock*, 26 Mont. 85 (1901), modifying 24 Mont. 255. The superintendent of a mining company has no power to pledge the company's property to secure a debt. *Trent v. Sherlock*, 24 Mont. 255 (1900); s. c., 26 Mont. 85. The authority of a corporate agent to manage the affairs of a company cannot be proved by a question to a witness in the absence of the vote of the directors or proof that the resolution cannot be found. *Hurd v. Hotchkiss*, 72 Conn. 472 (1900). A superintendent has no inherent power to indorse checks of the company. *Jackson, etc. Co. v. Commercial Nat. Bank*, 199 Ill. 151 (1902).

<sup>1</sup> *Cushman v. Cloverland, etc. Co.*, 84 N. E. Rep. 759 (Ind. 1908).

<sup>2</sup> Where the by-laws give the presi-

dent and superintendent power to make a contract, they have power to release that contract. Directors knowing of the release must act promptly if they intend to question its validity. *Indianapolis, etc. Co. v. St. Louis, etc. R. R.*, 26 Fed. Rep. 140 (1886); aff'd, 120 U. S. 256. A general power authorizes the purchase of a house and the giving of a mortgage. *Shaver v. Bear, etc. Co.*, 10 Cal. 396 (1858).

<sup>3</sup> *Kickland v. Menasha, etc. Co.*, 68 Wis. 34 (1887), where the superintendent and a director took a deed and agreed to pay an extra price; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841), where he gave a mortgage and the company received the money; *Lyndeborough, etc. Co. v. Massachusetts, etc. Co.*, 111 Mass. 315 (1873), where he bought glass and the directors acquiesced; *Seeley v. San José, etc. Co.*, 59 Cal. 22 (1881), where he and the president gave a note; *Goodwin v. Union, etc. Co.*, 34 N. H. 378 (1857), where he and the president employed workmen; *Starr v. Gregory, etc. Co.*, 6 Mont. 485 (1887), where he accepted a mill; *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565 (1875); affirmed, 96 U. S. 640, where a loan of the bank's money was made by him and the president. Ratification cannot be by the same persons who assume power to contract. *Tracy v. Guthrie, etc. Soc.*, 47 Iowa, 27 (1877). A superintendent, authorized to sell a steamboat, has authority to pay the usual commissions, especially where the sale is approved by the board of directors, and by the general manager who knew about the commissions. *Hartford, etc. Co. v. Plymmer*, 120 Fed. Rep. 624 (1903).

<sup>4</sup> *Castner v. Rinne*, 31 Colo. 256 (1903). The mere statement from a person that he is an officer of the com-



ploy a physician in cases of accident,<sup>1</sup> and may offer rewards for the conviction of persons obstructing the tracks.<sup>2</sup> A railroad may be liable for exemplary damages for the act of its general superintendent in arresting a man, such an executive officer being different from a subordinate servant.<sup>3</sup> A general freight agent may agree to give rebates.<sup>4</sup>

§ 720. *Subordinate agents — Their power to contract.* — It is a general rule that a corporate agent, like the agent of an individual, can make only such contracts as he is expressly authorized to make, or such contracts as pertain to the duties which the corporation imposes upon him. It is a rule, however, that the corporation may ratify and confirm a contract which an unauthorized agent has made in its name, and this ratification may be by express vote of the directors, or it may be implied by an acceptance of the benefits to the corporation. The subordinate agents of a corporation may be of great variety: tellers, engineers, stewards, station agents, local agents, freight agents, roadmasters, clerks, attorneys, and miscellaneous agents. Various decisions on their powers are given in the notes.<sup>5</sup> These decisions show that a

pany does not sustain a contract made by him for the company. *Interstate, etc. Co. v. Welsh*, 118 La. 676 (1907).

<sup>1</sup> *Pacific R. R. v. Thomas*, 19 Kan. 257 (1877); *Toledo, etc. Ry. v. Rodrigues*, 47 Ill. 188 (1868); *Atlantic, etc. R. R. v. Reiser*, 18 Kan. 458 (1877). *Contra*, *Stephenson v. New York, etc. R. R.*, 2 Duer, 341 (1853); *Shriver v. Stevens*, 12 Pa. St. 258 (1849), holding that the agent of a stage line cannot. A yardmaster cannot employ a physician for the company. *Marquette, etc. R. R. v. Taft*, 28 Mich. 289 (1873). Nor an engineer. *Cooper v. New York, etc. R. R.*, 6 Hun, 276 (1875). Nor a station agent. *Tucker v. St. Louis, etc. R. R.*, 54 Mo. 177 (1873); *Cox v. Midland, etc. R. R.*, 3 Exch. 268 (1849). Unless the superintendent ratifies it by silence upon being notified thereof. *Cairo, etc. R. R. v. Mahoney*, 82 Ill. 73 (1876); *Toledo, etc. R. R. v. Prince*, 50 Ill. 26 (1869). The general manager cannot render the company liable for medical services rendered on an occasion of a private brawl. *Dale v. Donaldson Lumber Co.*, 48 Ark. 188 (1887); *Wood, Railw. Law*, pp. 439-444. The general manager of a mining company cannot bind the company by employing a doctor

for an injured employee. *Spelman v. Gold, etc. Co.*, 26 Mont. 76 (1901). The general manager of a coal company has no power to employ a physician in case of an accident. *New, etc. Co. v. Shaley*, 25 Ind. App. 282 (1900). A general manager has power to render the company liable for hospital services rendered to a sick employee. *Mt. Wilson, etc. Co. v. Burbidge*, 11 Colo. App. 487 (1898). A physician cannot hold a manufacturing corporation or its superintendent liable for professional services rendered to one of its employees at the superintendent's request. *Sourwine v. McRoy Clay Works*, 42 Ind. App. 358 (1908).

<sup>2</sup> *Central, etc. Co. v. Cheatham*, 85 Ala. 292 (1888).

<sup>3</sup> *Wendelken v. New York, etc. Ry.*, 86 Atl. Rep. 377 (N. J. 1913).

<sup>4</sup> *Kansas Pac. Ry. v. Bayles*, 19 Colo. 348 (1894). Even though a railroad agent has no power to advertise, yet if he does so and the bills are submitted to the general passenger agent, who has power and does not object, the company may be bound. *McMahan v. Canadian, etc. Ry.*, 40 Oreg. 143 (1901).

<sup>5</sup> A shipping clerk of a mercantile corporation has no power to accept goods for storage. *Megaarden v. Hartman Furniture, etc. Co.*, 114 Minn.



corporation is bound by its agents' acts only when a partnership would be bound under similar circumstances. There are no arbitrary rules

224 (1911). A slander by insurance solicitors not spoken in the course of their employment does not render the insurance company liable therefor. *Kane v. Boston Mut. etc. Co.*, 200 Mass. 265 (1908). An employee in charge of the main office of a newspaper corporation is not thereby authorized to make a contract employing a person to obtain advertisements. *Adams v. Herald Pub. Co.*, 82 Conn. 448 (1909). A commission merchant selling goods for an individual cannot prove that the latter acted for a corporation by the fact that the individual wrote him on letterheads of the corporation. *Schlessinger v. Forest, etc. Co.*, 78 N. J. L. 637 (1910). The agent of a corporation mortgagee may be a witness. *Stimpson Co. v. Holmes, etc. Co.*, 5 Ga. App. 569 (1909). When an affidavit is required of the corporation it may be made by any officer or agent. *Old Settlers' Inv. Co. v. White*, 158 Cal. 236 (1910). A corporation is liable for the misrepresentations of an agent made with the authority of corporate officers even though they were made in good faith. *Anderson v. American, etc. Corporation*, 155 N. C. 131 (1911). A renting agent has no authority to warn people not to go on corporate property. *Woodruff v. State*, 170 Ala. 2 (1911). An agent of a land company who for five years has been allowed to sell timber on its land binds it by a sale. *Mosley v. Morgan*, 141 Ky. 557 (1911). A sale of ties by an agent of a railroad company is binding where the company's officers received the money with knowledge of the contract. *Henningsen v. Tonopah, etc. R. R.*, 33 Nev. 208 (1910). The purchase of logs by the corporate book-keeper is ratified if the company sends agents to measure and receive them. *Rowley v. Stack, etc. Co.*, 19 Idaho, 107 (1910). A corporation is not liable for a part of a broker's commission on the sale of land to it, even though its agent promised that the commission would be paid. *Turnham v. Calumet, etc. Co.*, 58 Oreg. 453 (1911). Where the president is selling agent and makes representations which are in accordance with its advertisements, and he and his wife own a majority of the stock, the company is bound. *Shertzer v. Hillman, etc. Co.*, 52 Wash. 492 (1909). Where a corporation does not promptly repudiate a contract made without authority by its agent it is bound. *Bittrick v. Consolidated, etc. Co.*, 51 Wash. 469 (1909). An attorney commencing a suit for a corporation is presumed to have authority to do so. *Workingmen's, etc. Ass'n v. Reynolds*, 135 Ga. 5 (1910). A telephone company is not liable for the act of its local manager in beating an employee who when discharged refused to sign a receipt. *Crelly v. Missouri, etc. Tel. Co.*, 84 Kan. 19 (1911). A corporation is not liable for orders given by its lessee, even though the order was given in the name of the former company by the latter as lessee. *Acme, etc. Co. v. Greensboro, etc. Co.*, 72 S. E. Rep. 569 (N. C. 1911). Persons who deal with a corporate agent before notice of a recall of his powers are not affected by the recall. *Union Bank, etc. Co. v. Long, etc. Co.*, 70 W. Va. 502 (1912). A general passenger agent and traffic manager may order a guide book explaining the attractions along the railroad. *Parrot v. Mexican, etc. Ry.*, 207 Mass. 184 (1911). An officer called Eminent Consul of a social organization, if allowed to transact all its business, may bind it in the purchase of badges. *Eminent, etc. v. Benz & Co.*, 76 S. E. Rep. 99 (Ga. 1912). An inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock must be made of officers having authority to speak for the corporation. *Browning v. Hinkle*, 48 Minn. 544 (1892). The financial agent may give notes in accordance with a corporate contract. *Case Mfg. Co. v. Soxman*, 138 U. S. 431 (1891); *Wilson v. Kings, etc. Ry.*, 114 N. Y. 487 (1889). An agent to sell and collect has no



as to the mode of making a corporate contract. A contract may be inferred from corporate acts and customs without a vote or formal act.<sup>1</sup>

authority to overdraw the company's account in the bank. *Merchants' Nat. Bank v. Nichols, etc. Co.*, 223 Ill. 41 (1906). A salesman has no authority to indorse checks and a delay of two years in complaining thereof is not a ratification. *Blum, etc. v. Whipple*, 194 Mass. 253 (1907). Even though an appraiser appointed by the board of directors substitutes some one else in his place, yet if the officers acquiesce therein the corporation is bound. *City of Fayetteville v. Fayetteville, etc. Co.*, 135 Fed. Rep. 400 (1905). A person authorized to attend to the insurance of a corporation cannot delegate his power to another unless the corporation expressly and impliedly consents thereto. *Insurance Co. etc. v. Wisconsin, etc. Ry.*, 134 Fed. Rep. 794 (1905). Where the attorney of the company negotiates its contracts, and questions as to whether contracts should be taken are referred to him for decision the company is bound by a contract made by him. *Kent v. Addicks*, 126 Fed. Rep. 112 (1903). Where the general counsel has general supervision of the litigation of the company his statement that a certain person is authorized to accept service is binding on the company. *Taylor, etc. Co. v. Adams Exp. Co.*, 71 N. J. L. 523 (1904). A purchasing agent of a railroad company may render the company liable to a bank for

advances to sellers if such has been the course of business. *Batavian Bank v. Minneapolis, etc. Ry.*, 123 Wis. 389 (1904).

A corporation is not liable on a note to which its name has been indorsed by its salesman without authority, even though it received the money, it appearing that it knew nothing about the indorsement or note until it was presented for payment, and there had been no previous transaction of that nature. *Wickersham, etc. Co. v. Nicholas*, 2 Cal. App. 18 (1905). Even though a corporate agent is authorized to lease a dredge, and is told not to lease it unless it is insured, the lessor is not bound to know of such limitation of his authority. *California, etc. Co. v. Yuma, etc. Co.*, 9 Ariz. 366 (1906). A local agent of a foreign corporation has no power to turn over a bill of lading to one of its creditors. *Jones v. North Pacific, etc. Co.*, 42 Wash. 332 (1906). A person dealing with an agent of the corporation is bound at his peril to ascertain the extent of the agent's authority and is chargeable with knowledge thereof, and if the agent gives a warrant which he is not authorized to give, the secretary's ratification of the same is not binding on the company. *Reid v. Alaska, etc. Co.*, 47 Oreg. 215 (1905). An agent authorized by a railroad to purchase land may agree to pay

<sup>1</sup> *Bank of Columbia v. Patterson*, 7 Cranch, 299, 306 (1813); *Randall v. Van Vechten*, 19 Johns. 60, 65 (1821); *Haight v. Sahler*, 30 Barb. 218 (1859); *Canal Bridge v. Gordon*, 18 Mass. 297 (1823); *Dunn v. St. Andrew's Ch.*, 14 Johns. 118 (1817); *Mendham v. Losey*, 2 N. J. L. 252 (1808); *Saddle River v. Colfax*, 6 N. J. L. 115 (1821); *Antipæda Bapt. Ch. v. Mulford*, 8 N. J. L. 182 (1825); *Powell v. Newburgh*, 19 Johns. 284 (1821); *Chestnut Hill Turnp. v. Rutter*, 4 Serg. & R. 6 (1818); *American Ins. Co. v. Oakley*, 9 Paige, 496 (1842); *Fister*

*v. La Rue*, 15 Barb. 323 (1853), where a contract was inferred from the acts of the corporate officers; *Bulkeley v. Derby Fishing Co.*, 2 Conn. 252 (1817); *Witte v. Derby Fishing Co.*, 2 Conn. 260 (1817); *Petrie v. Wright*, 6 Sm. & M. (Miss.) 647 (1846); *Lime Rock Bank v. Macomber*, 29 Me. 564 (1849); *Bank of Metropolis v. Gutschlick*, 14 Pet. 19 (1840) (contract inferred from acts of officers); *New York, etc. R. R. v. New York*, 1 Hilt. 562, 587 (1858); *Wood, Railw. Law*, pp. 454-457.



An alleged corporate bond signed in its name by its attorney in fact is not binding unless his authority is shown.<sup>1</sup> It is not necessary that

more therefor than is mentioned in the deed. *Windsor v. St. Paul, etc. Ry.*, 37 Wash. 156 (1905). An agent in charge of a mine may agree that the company will pay its just proportion of the cost of a drain, which is necessary. *Fisk, etc. Co. v. Reed*, 32 Colo. 506 (1903). The cashier and clerk of a lumber company cannot agree to give a customer a carload of lumber in case certain other lumber is not satisfactory. *Delta Lumber Co. v. Williams*, 73 Mich. 86 (1888). Where the assistant to the president of a railroad is sent to hasten bridge work and he increases the compensation of the contractor, it is assumed he had authority if the company does not promptly object. *Freygang v. Vera Cruz, etc. R. R.*, 154 Fed. Rep. 640 (1907). The local manager of a branch bank renders it liable for his embezzlement of depositor's funds which he induces the depositor to give to him to pay a lien of the bank on the property. *Thompson v. Bell*, 26 Eng. L. & Eq. 536 (1854). The receiving teller of a savings bank has no power to bind the bank not to pay out money deposited in one name, except upon the order of three other persons. The bank is protected in paying on the check of a person in whose name the deposit is made. *Riley v. Albany Sav. Bank*, 36 Hun, 513 (1885); *aff'd*, 103 N. Y. 669. A railroad company is liable for a slander by one of its employees in regard to another employee made in the performance of duties, even though the corporation knew nothing about it. *Rivers v. Yazoo, etc. R. R.*, 90 Miss. 196 (1907). If a corporation keeps and uses a part of goods purchased for it by an unauthorized agent, it is bound by the purchase. *Hayward, etc. Co. v. Cox*, 104 S. W. Rep. 403 (Tex. 1907). A

telephone company is liable for hospital and doctor's bill in treating a lineman's injuries as requested by the foreman, but this liability is only during the emergency and not for long-continued treatment. *Salter v. Nebraska, etc. Co.*, 79 Neb. 373 (1907). A general counsel in connection with the president and superintendent has authority to employ local attorneys. *Dublin, etc. Ry. v. Akerman*, 2 Ga. App. 746 (1907). An agent who is accustomed to and has been allowed to purchase for the company may bind it by his purchases. *Fitzgerald, etc. Co. v. Farmers', etc. Co.*, 3 Ga. App. 212 (1907). A teller's certification of a check in bad faith does not bind the bank. *Mussey v. Eagle Bank*, 50 Mass. 306 (1845); unless it is in the hands of a *bona fide* indorsee. *Farmers', etc. Bank v. Butchers', etc. Bank*, 16 N. Y. 125 (1857); *Farmers', etc. Bank v. Butchers', etc. Bank*, 14 N. Y. 624 (1856). As to certification of check, see also *Meads v. Merchants' Bank*, 25 N. Y. 143 (1862); *Cooke v. State, etc. Bank*, 52 N. Y. 96 (1873); in the latter case the certification being by the cashier. Where a depositor sends deposits by the bank's book-keeper without the bank-book, the bank is not liable for the book-keeper's fraud. *Manhattan Co. v. Lydig*, 4 Johns. 377 (1809). A teller may receive a special deposit of valuables. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82 (1880). It may be a question for the jury as to whether the foreman of the works of a foreign corporation may employ workmen on long time. *Tunison v. Detroit, etc. Co.*, 73 Mich. 452 (1889). Where a bank owning railroad bonds allows its agent to exchange them for stock in a reorganized company, it is bound. *Deposit Bank v. Barrett*, 13 S. W. Rep. 337

<sup>1</sup> *Foley, etc. Co. v. Bell & Harrell*, 4 Ga. App. 447 (1908). Where a surety bond in legal proceedings is signed by the attorney in fact of a

corporation his authority should be shown. *Anderson v. Southern Ry. Co.*, 9 Ga. App. 199 (1911).



such assent and acceptance be under seal or in writing or be spread upon the records.<sup>1</sup> The acceptance of the consideration of an unauthorized

(Ky. 1890). A caterer may hold a club responsible for food, etc., furnished to its guests under the authorized contract of the house committee. *Deller v. Staten Island, etc. Club*, 9 N. Y. Supp. 876 (1890).

A corporation is not liable for the malice of its agent in publishing a libel, unless the corporation authorized the libel or ratified it or did something from which such authority or ratification may be implied. *Warner v. Missouri, etc. Ry.*, 112 Fed. Rep. 114 (1901). A corporation is bound by its adoption or acquiescence in the acts of an unauthorized agent the same as an individual is. *German, etc. Bank v. First, etc. Bank*, 59 Neb. 7 (1899). An agent of a corporation may sign its name to a demand of payment of money due, and may serve the same without showing written authority to make such demand. It is sufficient that the company accepted and ratified his action. *Flaherty v. Atlantic, etc. Co.*, 58 N. J. Eq. 467 (1899). A collecting agent has no power to bind the corporation by assuming a mortgage on the property which he takes in payment of a debt. *Bristol Sav. Bank v. Judd*, 116 Iowa, 26 (1902). A corporation sued for a trespass cannot compel the plaintiff to specify what officers committed the trespass. *Commonwealth v. Nunn*, 17 Colo. App. 117 (1902). The attorney of a railroad company has no power to agree that a person injured by the railroad will in settlement of his claim be employed for life by the railroad. *Nephew v. Michigan, etc. Ry.*, 128 Mich. 599 (1901). The general counsel of the corporation has no authority to file papers in another state whereby the corporation is made

a domestic corporation in that state. *Mutual, etc. Assoc. v. Thompson*, 125 N. C. 435 (1899). In South Dakota by statute a corporation is bound by an unauthorized contract of an agent where the corporation accepts the benefit thereof. *Dederick v. Ormsby, etc. Co.*, 12 S. Dak. 59 (1899).

The following decisions are concerning railroad agents: The engineer of a railroad company may have authority to modify a construction contract or enter into a new contract. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260 (1890). The civil engineer of a railroad cannot employ a station agent. *Willis v. Toledo, etc. Ry.*, 72 Mich. 160 (1888). The engineers of a railroad company cannot bind it to an agreement to pay the construction contractors extra pay. *Woodruff v. Rochester, etc. R. R.*, 108 N. Y. 39 (1888). The construction engineer of a railroad has no power to vary the construction contract. *Campbell v. Cincinnati Southern Ry.*, 6 S. W. Rep. 337 (Ky. 1888). A person whom the railroad holds out as the general freight agent of the company may bind it by his contracts relative to freight. *Baker v. Kansas City, etc. R. R.*, 91 Mo. 152 (1887). A roadmaster of a railway has power to purchase such material as he uses, and the company is liable therefor where the material has been used. *Walker v. Wilmington, etc. R. R.*, 26 S. C. 80 (1887). A station agent may contract that goods will be delivered at a certain time. *Blodgett v. Abbott*, 72 Wis. 516 (1888). See also *Wood, Railw. Law*, pp. 444-454.

The following decisions concern miscellaneous agents and powers: An agent with power to give and indorse

<sup>1</sup> *Dedham Bank v. Chickering*, 20 Mass. 335 (1825); *Union Bank v. Ridgeley*, 1 Har. & G. (Md.) 324 (1827); *Burgess v. Pue*, 2 Gill (Md.), 11 (1844); *Apthorp v. North*, 14 Mass. 167 (1817); *Smith v. Bank of Scotland*, 1 Dow, P. C. 272 (1841); *Monu-*

*moi Great Beach v. Rogers*, 1 Mass. 159 (1804); *Amherst Bank v. Root*, 43 Mass. 522, 533 (1841); *Western R. R. v. Babcock*, 47 Mass. 346 (1843), and the many cases, *supra*. See also § 714, *supra*.



contract by the corporation, however, without knowledge of the terms of the contract or of the account upon which it is paid, is not in itself

notes may waive notice of protest, etc. *Whitney v. South*, etc. Co., 39 Me. 316 (1855). A resident agent of a mining company has no implied authority to borrow money on account of the corporation to pay arrears of wages due the workmen in the mines. *Hawtayne v. Bourne*, 7 M. & W. 595 (1841). An agent attending to the daily routine of the business of a corporation cannot create a general lien upon its property to secure a creditor, unless by the approval of the board of directors. *Whitwell v. Warner*, 20 Vt. 425 (1848). An agent employed to promote the interests of a corporation in every way has no authority to purchase land for it. *Bocock v. Alleghany*, etc. Co., 82 Va. 913 (1887). Where a corporation agent buys land for the company at a certain price, and agrees that the company will pay the vendor also one half of its profits upon sale of said land, the company is bound by this latter parol agreement. *Kickland v. Menasha*, etc. Co., 68 Wis. 34 (1887). Persons expending money for a corporation under the direction of authorized corporate officers may hold the corporation liable. *Topeka*, etc. Assoc. v. *Martin*, 39 Kan. 750 (1888). An agent of a lumber company cannot pay debts due the company by boarding them out. *St. John*; etc. Co. v. *Cornwell*, 52 Kan. 712 (1894). A sewing-machine company's agent to sell machines has no power to trade the company's horse, but ratification suffices. *Singer Mfg. Co. v. Belgart*, 84 Ala. 519 (1888). Acts of local insurance agents appointed by the general agent of a foreign insurance company are binding on such company, such acts being within the express powers given by the general agent therein to solicit or take insurance. *Kuney v. Amazon Ins. Co.*, 36 Hun, 66 (1885). In *Rice v. Peninsular Club*, 52 Mich. 87 (1883), *Cooley, J.*, said: "A party dealing with the agent of a corporation must at his peril ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority." The club is not liable for the steward's purchases. The powers of an agent appointed for a special purpose cease when the object of his appointment is accomplished. *Seton v. Slade*, 7 Ves. 265, 276 (1802). A subordinate agent cannot employ an attorney for the company. *Maupin v. Virginia*, etc. Co., 78 Mo. 24 (1883). Nor can he make the corporation liable for the debt of another. *Rahm v. King*, etc. Co., 16 Kan. 277 (1876). Nor make a note for the company. *Benedict v. Lansing*, 5 Denio, 283 (1848). If the purchaser of corporate bonds knows that the agent is selling for his own purposes he is not protected. *Chew v. Henrietta*, etc. Co., 2 Fed. Rep. 5 (1880). Secret instructions to a general insurance agent do not bind a person dealing with him. *Insurance Co. v. McCain*, 96 U. S. 84 (1877). So also as to a cashier. *Merchants' Bank v. State Bank*, 10 Wall. 604, 650 (1870). A grantor to a corporation cannot deny the authority of the corporate agent to accept the deed. *Case v. Benedict*, 63 Mass. 540 (1852). An agent who is accustomed to contract for the company may bind it. *Christian University v. Jordan*, 29 Mo. 68 (1859); *Mead v. Keeler*, 24 Barb. 20 (1857). Acceptance of services known to officers binds the company. *Lee v. Pittsburgh*, etc. Co., 56 How. Pr. 373 (1877); aff'd, 75 N. Y. 601. But the use of a building has been held not to constitute an acceptance of debts incurred in building it. *Ruby v. Abyssinian Soc.*, 15 Me. 306 (1839). Use of goods with knowledge is acceptance. *Smith v. Hull Glass Co.*, 11 C. B. 897, 925 (1852); s. c., 8 C. B. 668 (1849). Even if the agent gave a note which is not binding. *Emerson v. Providence*, etc. Co., 12 Mass. 237 (1815). Acceptance is presumed where a written statement is placed before a directors' meeting. *State Bank v. Comegys*, 12 Ala. 772 (1848). Satisfaction by subsequent officers is good. *Chouteau v. Allen*, 70 Mo.



a ratification of the contract.<sup>1</sup> It is elementary that a corporation may ratify and adopt the unauthorized acts of an agent.<sup>2</sup>

290 (1879). If an agent with authority to give a note embezzles the funds the company is liable. *Bird v. Daggett*, 97 Mass. 494 (1867). A suit on a note is a ratification of its execution. *Planters' Bank v. Sharp*, 12 Miss. 75 (1844). An actuary of a bank, who is accustomed so to do, may give the note of the bank, especially where the directors acquiesce. *Creswell v. Lanahan*, 101 U. S. 347 (1879). As to insurance agents, see *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (1825). Knowledge of the president of drafts by an agent, and acquiescence therein, binds the company. *Gold Min. Co. v. National Bank*, 96 U. S. 640 (1877). See § 727, *infra*, on notice; also *Lindley, Companies*, p. 159, etc. An agent's authority to act for a corporation is not terminated by the fact that the members of the board of directors or other body which appointed him have gone out of office by the expiration of their terms or by removal. *Anderson v. Longden*, 1 Wheat. 85 (1816); *Brown v. Somerset*, 11 Mass. 221 (1814); *Northampton Bank v. Pepoon*, 11 Mass. 294 (1814); *Dedham Bank v. Chickering*, 20 Mass. 335 (1825); *Exeter Bank v. Rodgers*, 7 N. H. 21, 33 (1834); *Thompson v. Young*, 2 Ohio, 334 (1825). It has been held that a mortgage of corporate property which is illegal for want of authority may be rendered valid by subsequent ratification by acts of the legislature. *White Water, etc. Canal Co. v. Vallette*, 21 How. 414 (1858); *Shepley v. Atlantic, etc. R. R.*, 55 Me. 395 (1868); *Richards v. Merrimack, etc. R. R.*, 44 N. H. 127 (1862), where an act authorizing the trustees of a mortgage to sell the mortgaged property was held to be a ratification; *Shaw v. Norfolk County R. R.*, 71 Mass. 162 (1855); *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875), where bonds signed by the treasurer instead of the secretary were held ratified by a subsequent act referring to them as "now a valid lien on said property." Power to act as agent of the corporation

may be conferred by a general resolution. *Elwell v. Dodge*, 33 Barb. 336 (1861).

<sup>1</sup> *Pennsylvania Co. v. Dandridge*, 8 Gill & J. (Md.) 248 (1836); *Christian University v. Jordan*, 29 Mo. 68 (1859); *Hilliard v. Goold*, 34 N. H. 230 (1856), and cases, *supra*. A corporation selling stock which it holds in another corporation is bound by the act of its agent who makes the sale in agreeing that the company will repurchase it on thirty days' notice, even though the by-laws state that no contract shall be binding unless authorized by the board of directors. *Sherman v. Dwight*, 138 N. Y. App. Div. 595 (1910).

<sup>2</sup> *Essex Turnp. Co. v. Collins*, 8 Mass. 292 (1811); *Hayden v. Middlesex Turnp. Co.*, 10 Mass. 403 (1813); *White v. Westport Cotton Mfg. Co.*, 18 Mass. 220 (1822); *Bulkeley v. Derby Fishing Co.*, 2 Conn. 252 (1817); *Peterson v. New York*, 17 N. Y. 449 (1858); *Canal Bridge v. Gordon*, 18 Mass. 297 (1823); *Baker v. Cotter*, 45 Me. 236 (1858); *Bennett v. Maryland F. Ins. Co.*, 14 Blatchf. 422 (1878); s. c., 3 Fed. Cas. 229; *Church v. Sterling*, 16 Conn. 388 (1844); *Pennsylvania Bank v. Reed*, 1 Watts & S. (Pa.) 101 (1841); *Hayward v. Pilgrim Soc.*, 38 Mass. 270 (1838); *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841); *Planters' Bank v. Sharp*, 4 Sm. & M. (Miss.) 75 (1844); *Burrill v. Nahant Bank*, 43 Mass. 167 (1841); *Fox v. Northern Liberties*, 3 Watts & S. (Pa.) 103 (1841); *New Hope, etc. Co. v. Phenix Bank*, 3 Comst. 156 (1850); *Alabama, etc. R. R. v. Kidd*, 29 Ala. 221 (1856); *Everett v. U. S.*, 6 Port. (Ala.) 166 (1837); *Medomak Bank v. Curtis*, 24 Me. 38 (1844); *Whitwell v. Warner*, 20 Vt. 425 (1848); *Trott v. Warren*, 11 Me. 227 (1834); *Detroit v. Jackson*, 1 Doug. (Mich.) 106 (1842); *Merchants' Bank v. Central Bank*, 1 Ga. 428 (1846); *Hoyt v. Bridgewater Copper Co.*, 6 N. J. Eq. 253 (1847); *Durar v. Hudson, etc. Ins. Co.*, 24 N. J. L. 171 (1853); *Moss v. Rossie Lead*



B. THE FORM OF CORPORATE CONTRACTS — THE CORPORATE SEAL IS NECESSARY ONLY WHEN THE SAME INSTRUMENT BY AN INDIVIDUAL MUST BE UNDER SEAL — FORMS OF THE BODY OF THE CONTRACT; ALSO THE METHOD OF SIGNING AND SEALING — LIABILITY OF OFFICERS AND AGENTS ON CORPORATE CONTRACTS WHICH ARE INFORMALLY EXECUTED.

§ 721. *The corporate seal need not be attached to a corporate contract unless a similar contract, when made by an individual, would require a seal.*<sup>1</sup> — This is now the well-established rule, although formerly it was supposed that a corporation could not enter into a contract except by attaching the corporate seal to the contract itself.<sup>2</sup>

Co., 5 Hill, 137 (1843); *Brown v. Winnissimmet Co.*, 93 Mass. 326 (1865); *Sherman v. Fitch*, 98 Mass. 59 (1867); *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315 (1873); *Moss v. Averell*, 6 Seld. 449 (1853); *Olcott v. Tioga R. R.*, 27 N. Y. 546 (1863); *Shaver v. Bear River, etc. Co.*, 10 Cal. 396 (1858).

<sup>1</sup> Quoted and approved in *Fourth Nat. Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257, 260 (1905).

<sup>2</sup> A corporate contract need not be in writing nor under the corporate seal. *Leinkauf v. Calman*, 110 N. Y. 50 (1888); *Mershon & Co. v. Morris*, 61 S. E. Rep. 647 (N. C. 1908). A corporation need not necessarily have or use a seal in making its contracts. *Muscatine Water Co. v. Muscatine Lumber Co.*, 85 Iowa, 112 (1892). A corporate contract does not require the corporate seal except where an individual contract would require the individual's seal. *Griffing Bros. Co. v. Winfield*, 53 Fla. 589 (1907). "The English rule that a corporation cannot expressly bind itself except by deed, unless the act establishing it authorized it to contract in another mode, has been broken in upon, and, indeed, entirely overturned, as a general proposition, throughout the United States; and it is here well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises may as well be implied

from the acts of its agents as if it had been an individual;" citing many cases. *Davenport v. Peoria, etc. Co.*, 17 Iowa, 276 (1864). See also *Bank of U. S. v. Dandridge*, 12 Wheat. 64 (1827); *Gottfried v. Miller*, 104 U. S. 521 (1881); *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Hoag v. Lamont*, 60 N. Y. 96 (1875); *McCullough v. Talladega Ins. Co.*, 46 Ala. 376 (1871); *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291 (1881); *Racine, etc. R. R. v. Farmers' Loan & T. Co.*, 49 Ill. 331 (1868); *Buckley v. Briggs*, 30 Mo. 452 (1860); *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 535 (1865); *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339 (1847); *Muir v. Louisville, etc. Canal Co.*, 8 Dana (Ky.), 161 (1839); *Henning v. U. S. Ins. Co.*, 47 Mo. 425 (1871); *Salem Bank v. Gloucester*, 17 Mass. 1 (1820); *Gloucester Bank v. Salem Bank*, 17 Mass. 33 (1820); *Foster v. Essex Bank*, 17 Mass. 479 (1821); *Smith v. Lowell Meeting-house*, 25 Mass. 178 (1829); *Limerick Academy v. Davis*, 11 Mass. 113 (1814); *Farmington Academy v. Allen*, 14 Mass. 172 (1817); *Amherst Academy v. Cowels*, 23 Mass. 427 (1828); *Kennedy v. Baltimore Ins. Co.*, 3 Har. & J. (Md.) 367 (1813); *Stone v. Berkshire, etc. Soc.*, 14 Vt. 86 (1842); *Episcopal, etc. Soc. v. Needham, etc. Church*, 18 Mass. 372 (1823); *Banks v. Poitiaux*, 3 Rand. (Va.) 136 (1825); *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813); *Randall v. Van Vechten*, 19 Johns. 60 (1821); *Gooday v. Colchester Ry.*, 17 Beav. 132 (1852); *Magill v. Kauffman*, 4 Serg. & R. 317 (1818); *Dunn v. St. Andrew's Church*, 14 Johns. 118



It is settled law that it is not necessary to use a seal in appointing agents or entering into ordinary contracts for the corporation.<sup>1</sup> The

(1817); *Waller v. Bank of Kentucky*, 3 J. J. Marsh. (Ky.) 201 (1830); *Western, etc. Co. v. First Nat. Bank*, 9 N. M. 1 (1897); *Grubbs v. National, etc. Ins. Co.*, 94 Va. 589 (1897). *Crawford v. Longstreet*, 43 N. J. L. 325 (1881), held that, to bind a corporation under a lease for years, execution under its corporate seal is not necessary. See also, in general, *Moss v. Averell*, 10 N. Y. 449 (1853). The corporate seal to a note is superfluous. *St. James's Parish v. Newburyport, etc. R. R.*, 141 Mass. 500 (1886). On this point, see also § 761, *infra*. The word "seal," following the name of a corporation on an insurance policy, does not prevent the suit being in assumption. *Grubbs v. National, etc. Ins. Co.*, 94 Va. 589 (1897). *Contra*, *Benolist v. Carondelet*, 8 Mo. 250 (1843); *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836). The seal may be considered to be the company's signature. *Levering v. Mayor, etc.*, 7 Humph. (Tenn.) 553 (1847). See also § 722, *infra*; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841), a chattel mortgage. The officers' seal to the contract may be disregarded. *Bank, etc. v. Guttchlick*, 14 Pet. 19 (1840); *Eureka Co. v. Bailey Co.*, 11 Wall. 488 (1870); *Dubois v. Delaware, etc. Co.*, 4 Wend. 285 (1830).

<sup>1</sup> *Pennsylvania R. R. v. Vandiver*, 42 Pa. St. 365, 369 (1862); *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813); *Lathrop v. Commercial Bank*, 8 Dana (Ky.), 114 (1839); *Buncombe Turnp. Co. v. McCarson*, 1 Dev. & B. 310 (1835), holding that an appointment need not be under the corporate seal; *Bates v. Bank of Alabama*, 2 Ala. 452 (1841), where the appointment of an agent was by vote of the corporation; *Maine Stage Co. v. Longley*, 14 Me. 444 (1837), holding that the fact of agency may be proved by parol. See also *Union Mfg. Co. v. Pitkin*, 14 Conn. 174 (1841); *State Bank v. Bell*, 5 Blackf. (Ind.) 127 (1839); *Brookville Ins. Co. v. Records*, 5 Blackf. (Ind.) 170 (1839); *Bridgeton v. Bennett*, 23 Me. 420

(1844), retaining an attorney proved by his statement; *Randall v. Van Vechten*, 19 Johns. 60 (1821); *Antipæda Bapt. Ch. v. Mulford*, 8 N. J. L. 182 (1825); *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (1825); *Lathrop v. Scioto Bank*, 8 Dana (Ky.), 115 (1839); *New Haven Sav. Bank v. Davis*, 8 Conn. 191 (1830), vote of directors without evidence under seal; *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813); *Andover Turnp. Co. v. Hay*, 7 Mass. 102 (1810); *Hayden v. Middlesex Turnp. Co.*, 10 Mass. 397 (1813); *Essex Turnp. v. Collins*, 8 Mass. 292 (1811); *Wright v. Lanckton*, 36 Mass. 288 (1837); *Bancroft v. Wilmington, etc.*, 5 Houst. (Del.) 577 (1876); *Dunn v. St. Andrew's Church*, 14 Johns. 118 (1817); *Union Bank v. Ridgley*, 1 Har. & G. (Md.) 324 (1827); *Kennedy v. Baltimore Ins. Co.*, 3 Har. & J. (Md.) 367 (1813); *Garrison v. Coombs*, 7 J. J. Marsh. (Ky.) 85 (1831); *Legrand v. Hampden-Sidney College*, 5 Munf. (Va.) 324 (1817); *Bates v. Alabama Bank*, 2 Ala. 451 (1841); *Stamford Bank v. Benedict*, 15 Conn. 437, 445 (1843); *Detroit v. Jackson*, 1 Doug. (Mich.) 106 (1843); *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192 (1851); *Topping v. Bickford*, 86 Mass. 120 (1862). A contract of employment by a corporation need not be under seal. *Speirs v. Union, etc. Co.*, 174 Mass. 175 (1899). Parol evidence may prove the creation of a debt by the company. *Borland v. Haven*, 37 Fed. Rep. 394 (1888). An appeal bond given by a corporation may be signed without the corporate seal. *Campbell v. Pope*, 96 Mo. 468 (1888). Corporations may enter into contracts through agents duly authorized, and such contracts may be by writing not under seal or by parol, as though made by natural persons. See § 714, *supra*; also *American Ins. Co. v. Oakley*, 9 Paige, 496 (1842); *Watson v. Bennett*, 12 Barb. 196 (1851); *Hamilton v. Lyeoming Ins. Co.*, 5 Pa. St. 344 (1847); *Union Bank v. Ridgley*, 1 Har. & G. (Md.) 324, 413 (1827); *Hayden*



supreme court of Illinois says: "The rule now is that a corporation may bind itself, in a matter within its charter powers, by a writing not under seal to the same extent as an individual may."<sup>1</sup> The corporate seal must be used in deeds and other instruments which would require a seal if they were the deeds or instruments of individuals.<sup>2</sup> A corporate deed twenty-five years old, reciting that it is under seal, is presumed to have been under seal, though none is present.<sup>3</sup> A corporate deed, signed "J., President," is not sufficiently signed. A corporate seal is also necessary.<sup>4</sup> A mortgage may be valid although the corporate seal is not attached thereto.<sup>5</sup>

*v. Middlesex Turnp. Co.*, 10 Mass. 401 (1813); *Shotwell v. McKown*, 5 N. J. L. 828 (1820); and an agent is not personally liable on a note signed by him as agent. *Merrick v. Burlington, etc. P. R. Co.*, 11 Iowa, 74 (1860), a verbal contract made by an agent; *Buckley v. Briggs*, 30 Mo. 452 (1860); *Dunn v. St. Andrew's Church*, 14 Johns. 118 (1817). In England a contrary rule has been upheld. *Homer-sham v. Wolverhampton Waterworks*, 6 Exch. 137 (1851); *Diggle v. London Ry.*, 5 Exch. 442 (1850); *Copper Miners v. Fox*, 16 Q. B. 229 (1851); *Clark v. Cuckfield Union*, 11 Eng. L. & Eq. 442 (1852), citing and reviewing other authorities. In England, by statute 8 & 9 Vict., c. 16, § 97, directors may contract by parol on behalf of a corporation where private persons may make a valid parol contract. See also *Pauling v. London, etc. Ry.*, 8 Exch. 868 (1853). Cf. *Crampton v. Varna Ry.*, L. R. 7 Ch. 562 (1872). After a contract for necessary work or goods is executed by the other party, and accepted by the corporation, it must pay for the same notwithstanding the irregularity. *Clark v. Cuckfield Union*, 11 Eng. L. & Eq. 442 (1852); *Doe v. Tainere*, 12 Q. B. 1011 (1848). Cf. *Lindley, Companies*, p. 220, etc.

<sup>1</sup> *Green Co. v. Blodgett*, 159 Ill. 169 (1895). An abbreviated corporate signature is sufficient and a seal is not necessary if it would not be required in a similar individual contract. *Seiberling v. Miller*, 207 Ill. 443 (1904).

<sup>2</sup> See § 722, *infra*. A deed of a corporation not under seal is not a deed and is void. *Danville Seminary v. Mott*,

136 Ill. 289 (1891). The corporate seal must be used in the conveyance of corporate real estate in Texas. *Shropshire v. Behrens*, 77 Tex. 275 (1890). The corporate seal must be attached to a deed in order to make it a deed. *Allen v. Brown*, 6 Kan. App. 704 (1897). A deed by a corporation must have the corporate seal attached. *Precious, etc. Soc. v. Elsythe*, 102 Tenn. 40 (1899). In *quo warranto* against a turnpike company the burden of proof is on the company to prove its title, and deeds from other companies without seals and not acknowledged as corporate deeds are insufficient. *Lyons, etc. Co. v. People*, 29 Colo. 434 (1902). A power of attorney by a corporation to an agent to execute a deed of land must be under the seal of the corporation or must be accompanied by proof that the agent was authorized to sign for the corporation. *Dodge v. American, etc. Co.*, 109 Ga. 394 (1899). A statute to the effect that private seals need not be used applies to the seal of a private corporation. *Murray v. Beal*, 23 Utah, 548 (1901). A deed from a corporation must be sealed even though by statute private persons need not use a seal. *Littelle v. Creek Lumber Co.*, 99 Miss. 241 (1911).

<sup>3</sup> *Catlett v. Starr*, 70 Tex. 485 (1888).

<sup>4</sup> *Garrett v. Belmont Land Co.*, 94 Tenn. 459 (1895).

<sup>5</sup> *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); *aff'd*, 95 Fed. Rep. 23. See also § 723, *infra*. Even though a corporation does not attach its seal to a mortgage, yet the mortgage is valid, unless it is shown that the corporation had a seal and



Hence the law is that a corporation may become bound by a contract which is executed in any of the following ways: by a written instrument sealed with the corporate seal, and either with or without the corporate name signed thereto;<sup>1</sup> by an unsealed written instrument signed with the corporate name; by a written record of a resolution of its directors;<sup>2</sup> by an unwritten resolution of its directors;<sup>3</sup> by the oral agreements of its authorized agents;<sup>4</sup> or by ratifying, acquiescing in, or accepting the benefits of contracts made in its name by unauthorized agents.<sup>5</sup> Even though a note or bond is sealed with the corporate seal, it may not be considered a sealed instrument.<sup>6</sup>

§ 722. *Method of drafting, signing, sealing, and acknowledging a corporate deed or contract.*—A deed or contract of a corporation should be drawn so that the name of the corporation appears in the body of the instrument, and not the name of the officer or agent who signs, seals, or acknowledges it. The name of the corporation should be signed to the instrument, and this should be followed by the word “by” and by the signature of the officer or person who is executing the instrument in behalf of the corporation.<sup>7</sup>

The courts will hold any device or form to be the corporate seal,

that the board of directors did not authorize its omission. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); *aff'd*, 106 Tenn. 1. See also § 810, *infra*. A chattel mortgage by a corporation in Missouri need not be under the corporate seal. *Strop v. Hughes*, 123 Mo. App. 547 (1907). A seal is not necessary to the legality of a chattel mortgage given by a corporation. *Burkamp v. Healey*, 72 S. W. Rep. 759 (Ky. 1903). A mortgage need not be under seal in Arkansas, a seal not being necessary to a mortgage by an individual. *Fourth National Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905). A mortgage cannot be defeated for want of a corporate seal in a state where no seal is required from an individual in giving a mortgage. *Re Farmers' Supply Co.*, 170 Fed. Rep. 502 (1909).

<sup>1</sup> See § 722, *infra*.

<sup>2</sup> See § 714, *supra*.

<sup>3</sup> See § 714, *supra*.

<sup>4</sup> See §§ 716–720, *supra*, relative to the inherent powers of the president and various other corporate agents to contract. A parol contract with a corporation may be proved although the director with whom it was made

is dead. *South Baltimore Co. v. Muhlback*, 69 Md. 395 (1888).

<sup>5</sup> See §§ 716–720, *supra*.

<sup>6</sup> See § 761, *infra*.

<sup>7</sup> *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836); *Stinchfield v. Little*, 1 Me. 231 (1821); *New Haven Sav. Bank v. Davis*, 8 Conn. 191 (1830); *Hatch v. Barr*, 1 Ohio, 390 (1824); *Brinley v. Mann*, 56 Mass. 337 (1848); *Kinzie v. Chicago*, 3 Ill. 187 (1839), in which it is also held that the mode of executing an instrument by a corporation “is to affix the seal with a declaration that it is the seal of the corporation, and to verify the act by the signature of the president and secretary of the corporation.” *Koehler v. Black River, etc. Co.*, 2 Black, 715 (1862). “The appropriate form of verifying any written obligation is, by affixing the signatures of the president and secretary and the corporate seal.” *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899). A corporation is not bound by a contract for the sale of its property, even though four or five directors and also the owner of the majority of the stock write their names



if there was an intent to bind the corporation, and if the device was intended for the corporate seal.<sup>1</sup> The corporate seal must be attached to a deed or a mortgage of real estate.<sup>2</sup>

on the contract under the word "accepted." Moreover, the statute of frauds applies to the transaction as affecting real estate. *Taylor v. R. D. Scott & Co.*, 149 Mich. 525 (1907). The typewritten signature of the corporation, followed with a blank for the signature of the officer, is not complete unless the officer signs. *Richmond, etc. Co. v. Chesterfield, etc. Co.*, 160 Fed. Rep. 832 (1908). A corporation under its corporate seal and by the signatures of its president and secretary may authorize an attorney in fact to convey its land. *Long v. Powell*, 120 Ga. 621 (1904). A deed from the president and some of the stockholders of land owned by the corporation does not convey title. *Dickinson v. Harris*, 155 Ala. 613 (1908). Even though the statutes of a state provide for corporate deeds being executed by the president, yet they may be executed by two directors acting under authority of the board of directors. *Chambliss v. Simmons*, 165 Fed. Rep. 419 (1908). Even though a corporate obligation to pay money is drawn in the shape of a certificate of stock, yet it is not *quasi*-negotiable like a certificate of stock. *Am. Ex. etc. Bank v. Woodlawn Cemetery*, 194 N. Y. 116 (1909). Notes issued by a corporation to its president may be signed by him as president. *Spencer v. Lowe*, 198 Fed. Rep. 961 (1912).

<sup>1</sup> Where a lease recites that it is given under the corporate seal, "in the absence of evidence to the contrary, the scroll or rectangle containing the word 'seal' will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure. . . . Whether a mark or character shall be held to be a seal depends upon the intention of the executant as shown by the paper." *Jacksonville, etc. Nav. Co. v. Hooper*, 160 U. S. 514 (1896).

"As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation is enough, though some other seal than the ordinary common seal of the company should be used." *District of Columbia v. Camden, etc. Works*, 181 U. S. 453, 460 (1901). The word "seal" placed opposite the signatures of the president and secretary is a sufficient corporate seal, where there is an attestation clause to that effect and a statute makes a scroll or device used as a seal upon a deed sufficient. A statute to the effect that no seal is necessary to a deed applies to a private corporation. *Ismon v. Loder*, 135 Mich. 345 (1904). The word "seal" written at the end of a corporate report and attested by the secretary is presumed to be the corporate seal. *Dart v. Hughes*, 49 Colo. 465 (1910). A mortgage reciting the authorization and sealing and signed by the president and secretary and sealed with "(L.S.)" following their signatures, is presumed to be a corporate mortgage. *Jones v. Ezell & Co.*, 134 Ga. 553 (1910). A corporate deed not under seal may still be good in equity. *Southern Plantations Co. v. Kennedy Heading Co.*, 61 S. Rep. 166 (Miss. 1913). A mortgage signed by an individual, followed by the word "president," and by an individual, followed by the word "secretary," is nevertheless a mortgage of the corporation if the seal is attached and the instrument recites that the corporation has caused it to be signed by the president and secretary. *Rawlings v. New Memphis, etc. Co.*, 105 Tenn. 268 (1900). The company's name may be signed by stamp *per* an officer who signs his name after the "per." *Cadillac, etc. Bank v. Cadillac, etc. Co.*, 129 Mich. 15 (1901). The use by the board of directors of a *fac-simile* of the regu-

<sup>2</sup> See § 721, *supra*.



It is no longer necessary that the impression of a corporate seal shall be made upon wax or other adhesive substance — an impression

lar corporation's seal may be legal. *State v. Manhattan, etc. Co.*, 149 Mo. 181 (1899). Where the attestation clause is complete, a simple "(L.S.\*)" will be considered the seal of the corporation for that occasion. *G. V. B. Min. Co. v. First Nat. Bank, etc.*, 95 Fed. Rep. 23 (1899). A special seal may be used on a special occasion. *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106 (1908). A corporation may adopt for a special occasion a seal different from its usual seal, and the letters "(L.S.\*)" are sufficient. *New York Life Ins. Co. v. Rhodes*, 4 Ga. App. 25 (1908). It is a criminal offense to forge a corporate seal under the New Jersey statute making it a criminal offense to forge a "character." *United States v. Andem*, 158 Fed. Rep. 996 (1908). Where the instrument recites that it is under seal it will be presumed to be a sealed instrument, especially where a seal follows the name of the officer who signs it. So held as regards the statute of limitations. *Rusling v. Union, etc. Co.*, 5 N. Y. App Div. 448 (1896); *aff'd*, 158 N. Y. 737; *Christie v. Gage*, 2 Thomp. & C. 344 (1873), where the private seals of trustees of a church were held to be the corporate seal to a deed of its property. To same effect, *Johnston v. Crawley*, 25 Ga. 316 (1858); *Porter v. Androscoggin R. R.*, 37 Me. 349 (1853); *Taylor v. Heggie*, 83 N. C. 244 (1880). *Cf. Saxton v. Texas, etc. R. R.*, 4 N. M. 201 (1888); *South Baptist Church v. Clapp*, 18 Barb. 35 (1853); *Tenney v. Lumber Co.*, 43 N. H. 350 (1861). See also *Ransom v. Stonington, etc. Bank*, 13 N. J. Eq. 212 (1860); *Milldam Foundry v. Hovey*, 38 Mass. 417 (1839); *Stebbins v. Merritt*, 64 Mass. 27 (1852); *Sherman v. Fitch*, 98 Mass. 59 (1867); *McDaniels v. Flower, etc. Co.*, 22 Vt. 274 (1850); *Benbow v. Cook*, 115 N. C. 324 (1894); *Woodman v. York, etc. R. R.*, 50 Me. 549 (1861), where an imprint in red ink upon bonds was held valid; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant, Ch. (U. C.) 551 (1871), where

simple wafer seals used by corporations in executing a deed were held sufficient in the absence of evidence that they were not their proper corporate seals; *Hamilton v. Dennis*, 12 Grant, Ch. (U. C.) 325 (1866), in which a ribbon woven through slits in the paper, so as to appear at intervals opposite the signatures, was held sufficient; *Bates v. New York Central R. R.*, 92 Mass. 251 (1865), where, however, it was held that a *fac-simile* printed in ink when the blank instrument was printed is a mere scroll and not a valid seal. The *fac-simile* of the seal of a corporation printed on a blank form is not the corporate seal. *McCarthy v. Metropolitan L. Ins. Co.*, 162 Mass. 254 (1894). After a decree of foreclosure, it is too late to claim that a seal printed on the mortgage was not good. *Haven v. Grand Junction, etc. Co.*, 94 Mass. 337 (1866). *Cf. Royal Bank v. Junction, etc. R. R.*, 100 Mass. 444 (1868), in which a seal printed upon bonds by direction of the officers of a corporation after they had been otherwise executed, and which purported to bear the corporate seal, was held valid. *Contra, Mitchell v. Union, etc. Co.*, 45 Me. 104 (1858). The corporation may have several seals. *Bank of Middlebury v. Rutland, etc. R. R.*, 30 Vt. 159 (1858). An official may, while out of the state, cause a new seal to be made and attach it to bonds of the corporation out of the state. *Lynde v. Winnebago County*, 16 Wall. 6 (1872). A blank wafer will do for a seal. *Brinley v. Mann*, 56 Mass. 337 (1848). A scroll has been held good. *Kansas City v. Hannibal, etc. R. R.*, 77 Mo. 180 (1882). A scroll may be a sufficient seal even though the corporation has a regular seal. *Thayer v. Nehalem Mill Co.*, 31 Oreg. 437 (1897). *Contra, Hendee v. Pinkerton*, 96 Mass. 381 (1867). A scroll will do for the corporate seal on an appeal bond. *Sarmiento v. Davis, etc. Co.*, 105 Mich. 300 (1895). The word "seal," following the name of a president, is not a sufficient corporate



upon the paper itself being held sufficient.<sup>1</sup> It is not necessary that express authority, or authority under seal, be given to an officer or agent to affix the corporate seal to an instrument; such powers may be inferred from the general powers of the officer or agent, the usual course of business, and similar circumstances.<sup>2</sup>

The mere affixing of the corporate seal is of itself sufficient execution of a contract or deed, when properly affixed by a person duly authorized. No writing or further signature whatsoever is necessary.<sup>3</sup>

seal in a deed. *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339 (1897). The use of a seal may be a sufficient adoption of it as the corporate seal. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). Any seal is presumed to be the corporate seal, the signature of the agent executing the instrument being proved. *Pennsylvania Nat. Gas Co. v. Cook*, 123 Pa. St. 170 (1889). Where a deed is executed by the president and secretary under their private seals, there is a flaw in the title to the land. *McCroskey v. Ladd*, 28 Pac. Rep. 216 (Cal. 1891).

<sup>1</sup> *Hendee v. Pinkerton*, 96 Mass. 381 (1867), holding that a distinct and visible impression of a corporate seal upon and into the substance of the paper is sufficient and valid; *Pillow v. Roberts*, 13 How. 472 (1851); *Allen v. Sullivan, etc. R. R.*, 32 N. H. 446 (1855); *Corrigan v. Trenton, etc. Co.*, 5 N. J. Eq. 52 (1845). But see, *contra*, *Farmers', etc. Bank v. Haight*, 3 Hill, 493 (1842).

<sup>2</sup> *Union Gold Min. Co. v. Bank*, 2 Colo. 226 (1873); *Merchants' Bank v. Goddin*, 76 Va. 503 (1882); *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833); *Berks, etc. R. R. v. Myers*, 6 Serg. & R. (Pa.) 12 (1820), holding that the question of authority to affix a corporate seal is for the jury; *Haven v. Adams*, 86 Mass. 80 (1862); *Gordon v. Preston*, 1 Watts (Pa.), 385 (1833), saying that power to affix a seal carries with it the power to acknowledge the execution of the instrument. See, however, *Hoyt v. Thompson*, 5 N. Y. 320 (1851), holding that the usual duties and powers of the president and cashier of a bank are not such as will justify them in affixing its corporate seal without express authority from the directors. A corporate officer may

execute a mortgage for it without being authorized under the corporate seal. A mere resolution suffices. *Hopkins v. Gallatin, etc. Co.*, 4 Humph. (Tenn.) 403 (1843); *Fitch v. Lewiston, etc. Co.*, 80 Me. 34 (1888); *New Haven Sav. Bank v. Davis*, 8 Conn. 191 (1830); *Howe v. Keiler*, 27 Conn. 538 (1858); *Hutchins v. Byrnes*, 75 Mass. 367 (1857); *Beckwith v. Windsor*, 14 Conn. 594 (1842). Members of the board of directors may affix the corporate seal to a mortgage and acknowledge the execution. *Gordon v. Preston*, 1 Watts (Pa.), 385 (1833). An employee may be directed to affix the seal. *Royal Bank v. Grand, etc. R. R.*, 100 Mass. 445 (1868), where it was affixed by the printer.

<sup>3</sup> *Union Bridge Co. v. Troy, etc. R. R.*, 7 Lans. 240 (1872); *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836). A corporate mortgage properly worded in the body of the mortgage and with the corporate seal attached is valid, even though it is signed, not in the corporate name, but by the president, secretary, and treasurer. *Edwards v. Snow Hill, etc. Co.*, 150 N. C. 173 (1909). A deed having the corporate seal attached and purporting to be a corporate deed is presumed to be such, even though the corporate name is not signed, but it is signed only by the directors and secretary. *Graham v. Partee*, 139 Ala. 310 (1904). Under the statutes of Florida a mortgage by a corporation need not be witnessed by subscribing witnesses where the seal is attached and attested by the secretary. *International, etc. Co. v. Vause*, 55 Fla. 641 (1908). Affixing the corporate seal is the regular mode of executing a corporate mortgage. *Savannah, etc. R. R. v. Lan-*



When proof is given that an instrument was signed by the corporate officers, and that the seal attached is the corporate seal, the courts will presume that the seal was affixed by proper authority, and that the execution was duly authorized,<sup>1</sup> but this presumption may be over-

caster, 62 Ala. 555 (1878); *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875), where authority was given to the secretary to sign an instrument, and it was held that signature by the treasurer did not render it invalid, since the seal of the corporation was sufficient execution; *McDaniels v. Flower, etc. Co.*, 22 Vt. 274 (1850); *Bason v. King's Mountain Min. Co.*, 90 N. C. 417 (1884), holding that a deed concluding "in witness whereof the said corporation has caused this indenture to be signed by the president and attested by its secretary, and its common seal to be affixed," signed "G. C. W., President," with the seal affixed, is a valid common-law deed; *Shewalter v. Pirner*, 55 Mo. 218 (1874); *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869); *Union Bridge Co. v. Troy, etc. R. R.*, 7 Lans. 240 (1872), saying "*it seems*, a corporate seal being properly affixed, no signature is necessary"; *Lovett v. Steam Saw-mill Assoc.*, 6 Paige, 54, 60 (1836); *Bank of Vergennes v. Warren*, 7 Hill, 91 (1845); *Campbell v. James*, 17 Blatchf. 42 (1879); s. c., 4 Fed. Cas. 1168; rev'd on other grounds, 104 U. S. 357 (1881); *Lamson, etc. Co. v. Russell*, 112 Mass. 387 (1873); *Levering v. Mayor*, 7 Humph. (Tenn.) 553 (1847); *Memphis v. Adams*, 9 Heisk. (Tenn.) 518 (1872). Where three directors, as a committee, are authorized to make a lease, and the lease is signed by two, and the corporate seal is affixed by them, it is sufficient, the third acquiescing. *Union Bridge Co. v. Troy, etc. R. R.*, 7 Lans. 240 (1872). *Mandamus* to an officer to attach the corporate seal will be denied if there is any doubt as to the legal rights of the parties. *People v. Blackhurst*, 11 N. Y. Supp. 675 (1890). At common law a corporation signed a contract by attaching its seal thereto. *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203 (1897). See also § 761, *infra*. But see *Isham v. Ben-*

*nington, etc. Co.*, 19 Vt. 230 (1847), holding that affixing a corporate seal will not excuse default in signing a deed when signing is necessary by statute. A deed of corporate real estate signed by an agent individually does not convey title, even though the seal of the corporation is affixed. *Hutchins v. Barre, etc. Co.*, 74 Vt. 36 (1901).

<sup>1</sup> *Quackenboss v. Globe, etc. Co.*, 177 N. Y. 71 (1903); *Trustees Canandaigua Academy v. McKechnie*, 90 N. Y. 618 (1882); *Chandler v. Hart*, 161 Cal. 405 (1911); *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892); *McDonald v. Chisholm*, 131 Ill. 273 (1890); *Sherman, etc. Co. v. Morris*, 43 Kan. 282 (1890); *Mullanphy Sav. Bank v. Schott*, 135 Ill. 635 (1891); *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892); *Bowers v. Hechtman*, 45 Minn. 238 (1891); *Boyce v. Montauk, etc. Co.*, 37 W. Va. 73 (1892); *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (1893); *Reed v. Bradley*, 17 Ill. 321 (1856); *Blackshire v. Iowa, etc. Co.*, 39 Iowa, 624 (1874); *Southern Cal. Colony Assoc. v. Bustamente*, 52 Cal. 192 (1877); *Wood v. Whelen*, 93 Ill. 153 (1879); *Mickey v. Stratton*, 5 Sawyer, 475 (1879); s. c., 17 Fed. Cas. 268; *Thorington v. Gould*, 59 Ala. 461 (1877); *Morris v. Keil*, 20 Minn. 531 (1874); *Abbott, Tr. Ev.* 35; *Canandaigua Academy v. McKechnie*, 19 Hun, 62 (1879); *Union Gold Min. Co. v. Bank*, 2 Colo. 226 (1873); *Mill-dam Foundry v. Hovey*, 38 Mass. 417, 428 (1839); *Malone v. Crescent, etc. Co.*, 77 Cal. 38 (1888); *Johnson v. Bush*, 3 Barb. Ch. 207 (1848); *Leggett v. New Jersey M. & B. Co.*, 1 N. J. Eq. 541 (1832); *Parker v. Washoe Mfg. Co.*, 49 N. J. L. 465 (1887); *Hoyt v. Thompson*, 5 N. Y. 320 (1851); *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833); *Chicago, etc. R. R. v. Lewis*, 53 Iowa, 101 (1880); *Morse v. Beale*, 68 Iowa, 463 (1886); *Bliss v. Kaweah, etc. Co.*, 65 Cal. 502 (1884); *Goodnow*



thrown by proof that the seal was affixed without proper authority

*v. Oakey*, 68 Iowa, 25 (1885); *Evans v. Lee*, 11 Nev. 194 (1876); *Cincinnati, etc. R. R. v. Harter*, 26 Ohio St. 426 (1875); *Whitney v. Union, etc. Co.*, 65 N. Y. 576 (1875); *President, etc. v. Myers*, 6 Serg. & R. (Pa.) 12 (1820); *Adams v. Creditors*, 14 La. 454 (1840); *Darnell v. Dickens*, 4 Yerg. (Tenn.) 7 (1833); *Burrill v. Nahant Bank*, 43 Mass. 163 (1840); *Flint v. Clinton, etc. Co.*, 12 N. H. 434 (1841); *Indianapolis, etc. R. R. v. Morganstown*, 103 Ill. 149 (1882); *Solomon's Lodge v. Montmoelin*, 58 Ga. 548 (1877); *St. Louis v. Risley*, 28 Mo. 415 (1859); *St. Johns v. Steinmetz*, 18 Pa. St. 273 (1853); *Lovett v. Steam, etc. Assoc.*, 6 Paige, 54 (1836); *Bank of Vergennes v. Warren*, 7 Hill, 91 (1845); *New England, etc. Co. v. Gilbert, etc. R. R.*, 91 N. Y. 153 (1883). Upon proof that the contract was signed by the president and secretary and the seal affixed this raises a presumption that they did not exceed their power. The fact that the seal is affixed is *prima facie* proof that it was properly and not surreptitiously affixed. *Quackenboss v. Globe, etc. Co.*, 177 N. Y. 71 (1903). The production of a corporate deed duly executed in its name by its treasurer with the corporate seal affixed is some evidence of its being authorized. *Bishop v. Burke*, 207 Mass. 133 (1910). A mortgage signed by the vice-president and sealed with a corporate seal raises a presumption that it was authorized by a proper resolution of the board of directors. *Earle v. National, etc. Co.*, 77 N. J. Eq. 17 (1910). The corporate seal raises a presumption that the officers who executed the instrument had authority so to do. *Gay v. Hudson River, etc. Co.*, 190 Fed. Rep. 773 (1911); *s. c.*, 190 Fed. Rep. 812, and 191 Fed. Rep. 828. An assignment of a claim by a corporation under seal signed by the vice-president and attested by the secretary is presumed to have been authorized. *Imbrie v. Schlicht, etc. Co.*, 130 N. Y. App. Div. 675 (1909). A deed under the corporate seal executed in the name of the corporation by its proper officer

raises a presumption that it was authorized. *Cannon v. Gorham*, 136 Ga. 167 (1911). A deed from a bank signed by its cashier is not void even though the deed runs to him individually. *Flint River, etc. Co. v. Smith*, 134 Ga. 627 (1910). Proof that the seal is the corporate seal, and that the persons signing were officers of the corporation, raises a presumption that the execution of the lease was authorized. *Potts, etc. Co. v. Benedict*, 156 Cal. 322 (1909). The corporate signature and seal raises a presumption that the instrument was duly authorized. *Greve v. Echo Oil Co.*, 8 Cal. App. 275 (1908). A presumption that a mortgage was authorized as required by statute does not arise if the mortgage runs to the corporate officers. *Edwards v. Snow Hill, etc. Co.*, 150 N. C. 171 (1909). Neither corporate creditors nor stockholders who had notice of the execution of a mortgage can attack it on the ground that the corporate seal had not been affixed, it appearing that the mortgage recited the affixing of the seal. *Larkin v. Hagan*, 126 Pac. Rep. 268 (Ariz. 1912). A deed by a corporation not sealed passes the equitable title, and a court of equity will protect it. *Hines v. Imperial, etc. Co.*, 58 S. Rep. 650 (Miss. 1912). Proof that the seal attached is the corporate seal and that the officers who executed a deed were the proper officers, raises a presumption that the execution was authorized. *Milton v. Crawford*, 65 Wash. 145 (1911). A corporate seal raises a presumption that the document was executed by corporate authority. *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 144 (1904). The assignment of a corporate claim signed by the president and secretary with the seal attached is presumed to have been authorized. *Watkins v. Glas*, 5 Cal. App. 68 (1907). Where the corporate seal is affixed to an instrument signed by the secretary, it is presumed that the seal is the corporate seal and that the secretary attached it with authority so to do. *Bliss v. Harris*, 38 Colo. 72



from the board of directors or some other duly authorized corporate

(1906). An assignment by a corporation of a mortgage is valid *prima facie* where such assignment is signed by one of its principal officers and the corporate seal has been affixed. *Wilson v. Neu*, 1 Neb. Unof. 42 (1901). A contract under seal and signed in its name by its officers is presumed to have been legally executed. *Wisconsin Lumber Co. v. Greene, etc. Co.*, 127 Iowa, 350 (1904). The corporate seal attached to an instrument raises a presumption that the person signing as president had authority to sign. *Collier v. Alexander*, 142 Ala. 422 (1905). A deed executed in the corporate name and under its seal and by the proper officers raises a presumption that they were authorized to execute it. *Deepwater Council, etc. v. Renick*, 59 W. Va. 343 (1906). Even though by resolution of the board of directors, the signature of the general manager is necessary to a note and the treasurer forges such signature, yet if the secretary attaches the seal and attests to the same, the note is good in *bona fide* hands. *Merchants' etc. Co. v. Lufkin, etc. Bank*, 34 Tex. Civ. App. 551 (1904). Where it is admitted that a sealed instrument is signed for the corporation by its proper officer, the presumption is that the seal was authentic. *Griffing Bros. Co. v. Winfield*, 53 Fla. 589 (1907). A mortgage signed in the corporate name, by the treasurer, with the seal affixed, is presumed to have been authorized. *Nelson v. Spence*, 129 Ga. 35 (1907). The mere fact that corporate officers have executed a deed as authorized by the board of directors does not constitute delivery. *Holmes v. Salamanca, etc. Co.*, 5 Cal. App. 659 (1907). If the corporate name is signed by the president to the contract and the corporate seal affixed by the secretary, this raises a presumption that the contract was legally authorized. *Little, etc. Co. v. Federal, etc. Ry.*, 194 Pa. St. 144 (1899). Proof that the seal attached to a lease is the seal of the corporation raises a presumption that it had been attached with authority. *West*

*Side, etc. Co. v. Connecticut, etc. Co.*, 186 Ill. 156 (1900). Where a contract is executed under the corporate seal and signed by the vice-president and secretary, and is within the powers of the corporation, it is presumed that they were authorized to so sign. *Neosho, etc. Co. v. Hannum*, 10 Kan. App. 499 (1900). Where the seal is attached to a promissory note of a corporation it raises a presumption that the note is legally authorized. *Bullen v. Milwaukee, etc. Co.*, 109 Wis. 41 (1901). An assignment of a cause of action by a corporation is presumed to have been authorized if it is executed by the president and attested by the secretary with the corporate seal affixed. *Texas, etc. Ry. v. Davis*, 54 S. W. Rep. 381 (Tex. 1899); *rev'd on another point in 93 Tex. 378*. Where the name of the corporation as grantor in a deed is signed by a person as treasurer and the seal is attached, it is presumed that the corporation authorized the execution of the deed. *Carr v. Georgia, etc. Co.*, 108 Ga. 757 (1899). On an appeal the corporate seal will be presumed to have been on a deed of the corporation, and hence that the deed was duly executed. *Almand v. Equitable, etc. Co.*, 113 Ga. 983 (1901). A deed which apparently has been executed by a corporation and has been signed and acknowledged by its president and secretary and its seal attached is presumed to have been duly authorized. *Ellison v. Branstrator*, 153 Ind. 146 (1899). An admission that the corporate instrument was duly executed is fatal to a defense that the persons executing it had no authority to do so, and also to the defense that the seal was not the corporate seal. *Woronieki v. Pairskiogo*, 74 Conn. 224 (1901). Where it is proved that a note was signed by the proper officers of a corporation and its seal attached, this raises a presumption that the officers had authority to sign and that the note was duly executed. *Mills v. Boyle, etc. Co.*, 132 Cal. 95 (1901). A chattel mortgage of a corporation signed by its officers and with its seal attached is presumed to have been



agency.<sup>1</sup> The corporation, by ratification and otherwise, may easily

duly authorized. *Sargent v. Chapman*, 12 Colo. App. 529 (1899). A bond executed under the corporate seal and duly acknowledged by the president is presumed to have been authorized, even though no resolutions are found in certain minutes of the board of directors. *Mutual Life Ins. Co. v. Yates Co. Nat. Bank*, 35 N. Y. App. Div. 218 (1898).

The seal is not proof *per se*. The signature of the officer must be proved. *Southern, etc. Assoc. v. Bustamente*, 52 Cal. 192 (1877). The presence of the seal raises the presumption that the contract was duly authorized. *Andres v. Fry*, 113 Cal. 124 (1896). The action of the board authorizing a deed need not be proved where the deed recites that it was executed by order of the board of directors. *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339 (1897). The seal of a corporation, like the seal of an individual, must be proved in establishing the assignment of a mortgage. *Jackson v. Pratt*, 10 Johns. 381 (1813). That the seal is the company's seal must be proved. *Den v. Vreelandt*, 7 N. J. L. 352 (1800); *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313 (1821). "A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by an officer of the corporation or other person thereunto duly authorized." *Osborne v. Tunis*, 25 N. J. L. 633, 658 (1856). A mortgage with the corporate seal attached is presumed to have been regularly sealed. It is not invalidated by proof that the directors passed no resolution authorizing the use of the seal. *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 32 W. Va. 244 (1889). The signature of the president and the seal of the corporation does not prove the deed. It is necessary to prove that it was executed by the president. *Walsh v. Barton*, 24 Ohio St. 28, 41 (1873). The execution and recording of a deed by a corporation is *prima facie* evidence of delivery and acceptance. *Stokes v. Detrick*, 75 Md. 256 (1892). The

presence of the seal is *prima facie* evidence that the corporation duly authorized the contract. *Berks, etc. Turnp. Co. v. Myers*, 6 Serg. & R. (Pa.) 16 (1820); *Parkinson v. Parker*, 85 Pa. St. 313 (1877); and that it was affixed by competent authority. *St. John's Church v. Steinmetz*, 18 Pa. St. 273 (1852); *Solomon's Lodge v. Montmoelin*, 58 Ga. 547 (1877); *Morris v. Keil*, 20 Minn. 531 (1874); *Conine v. Junction, etc. R. R.*, 3 Houst. (Del.) 288 (1866). Where a contract is signed by the second vice-president and assistant secretary, and has the seal attached, it is presumed to have been properly executed. *Gutzeit v. Pennie*, 95 Cal. 598 (1892). Where a corporate deed is not under seal, proof must be given that the corporation authorized the deed. *Barney v. Pforr*, 117 Cal. 56 (1897). In Maine it has been held that the presence of the corporate seal on an instrument does not raise a presumption that the corporation entered into the contract. *Morrison v. Wilder Gas Co.*, 91 Me. 492 (1898). The court evidently overlooked the fact that originally a corporation signed a deed or contract by affixing its seal without any written signature whatsoever, and that consequently, upon proof that such seal was the corporate seal, the presumption arose that it was properly affixed, just as proof of the signature of the maker of a promissory note raises a presumption that the maker signed the note and was bound by it. A chattel mortgage not under the seal of the corporation is not presumed to have been authorized. *First Nat. Bank v. Clifton Armory Co.*, 128 Pac. Rep. 810 (Ariz. 1912). Even though a deed without the corporate seal but with "L. S." following the names of the officers, does not raise a presumption of their authority, yet a subsequent grantee with knowledge of such a deed, cannot attack it where the corporation received the consideration for the deed. *North Georgia, etc. Co. v. Clark*, 76 N. E. Rep. 95 (Ga. 1912).

<sup>1</sup> *Koehler v. Black River, etc. Co.*, 2



cure a defect as to the sealing.<sup>1</sup> The execution and delivery of an instrument by a corporation as a corporation raises the presumption that

Black, 715 (1862); *Parker v. Washoe Mfg. Co.*, 49 N. J. L. 465 (1888), holding also that the testimony of a single officer that he had no knowledge of any authority having been given by the corporation to execute the instrument in suit was not sufficient to overcome the presumption of proper execution raised by the fact that the corporate seal was affixed to it. *Union Gold Min. Co. v. Bank*, 2 Colo. 226 (1873). The execution of a corporate deed, apparently perfect on its face, may be overthrown by proof that the board of directors never authorized it; that the president signed it before the description was filled in; and that the description was to be other than that which was written in. *Vica, etc. R. R. v. Mansfield*, 84 Cal. 560 (1890). Where the seal of a company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. *Lindley on Companies*, 6th edition, p. 273, states the law as follows: "It may be observed that although an instrument sealed with the corporate seal is *prima facie* valid, yet if the seal is essential to its validity, and if it be proved that the seal was improperly affixed, *e.g.*, was affixed by a person having no authority to use it, the

instrument is void as a corporate act. See *Mayor, etc., Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160 (1887); *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389 (1855); *Ex parte Hanly*, 41 Ch. D. 215 (1888); *Colchester v. Lotten*, 1 V. & B. 226, 243, 244 (1813); *D'Arcy v. Tamar, etc. Ry.*, L. R. 2 Exch. 158 (1867). Compare *Ex parte The Contract Corporation*, 3 Ch. App. 105 (1867). But those persons who in practice conduct a company's business have implied authority to use its seal for the purposes of such business. See *Ex parte Contract Corp.*, 3 Ch. App. 105 (1867), and a corporation will be estopped from disputing the authority to fix the seal if negligence imputable to the corporation has conduced to the misuse of the seal and is the proximate cause of the loss. See *Mayor, etc., Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160 (1887); *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389 (1855); *Bank of England v. Vagliano* (1891), A. C., p. 115, 136, 171. See also §§ 725, 808, *infra*. Where there is no statute or by-law requiring a private corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal that a resolution was passed cannot be questioned by any one claiming under or through the corporation. *Prentiss, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). Where it is proven that the proper agents of a corporation signed a deed, and the seal attached to the deed is

<sup>1</sup> *Wood v. Whelen*, 93 Ill. 153 (1879), where a mortgage executed by corporation officers under its seal without proper authority was held to be adopted by a simple resolution without again affixing the seal. See also § 810, *infra*, and *Royal Bank v. Grand Junction R. R.*, 100 Mass. 444 (1868); *St. James's Parish v. Newburyport, etc. R. R.*, 141 Mass. 500 (1886), in which the facts that two

directors had examined corporate notes under seal and pronounced them genuine, and that the treasurer had paid interest upon them, were held to constitute a ratification. A court of equity may compel a corporation to affix its seal. *Missouri River, etc. R. R. v. Miami County*, 12 Kan. 483 (1874). *Mandamus* sometimes lies. *Rex v. Vice-Chancellor*, 3 Burr. 1647 (1765).



the company was regularly incorporated.<sup>1</sup> The Florida statute requiring two witnesses to a deed does not apply to a deed executed by a corporation.<sup>2</sup>

A defect in the acknowledgment of a corporate instrument is overlooked by the courts if there is sufficient to indicate an intent to acknowledge.<sup>3</sup> The acknowledgment is made by one of the officers who executed it.<sup>4</sup> An acknowledgment by a corporation should show the iden-

presumed to be the corporate seal, such presumption is not overcome by proof that no vote of the directors was had authorizing the execution of the deed. *Ruffner v. Welton, etc. Co.*, 36 W. Va. 244 (1892). Although the proper signatures and seal attached to corporate contracts, deeds, and mortgages raise a presumption of authority on the part of the officers to sign, yet the want of authority may be shown. *Leggett v. New Jersey, etc. Co.*, 1 N. J. Eq. 541 (1832). Where a bank knows that a corporate note is accommodation paper it must prove not only that the note was signed by the president, and treasurer, but also that they were authorized to sign or that the company received the proceeds or that there was a course of business justifying such note. *Nat. Bank, etc. v. Snyder Mfg. Co.*, 107 N. Y. App. Div. 95 (1905); s. c., 117 N. Y. App. Div. 370. A telephone corporation may by special demurrer require the plaintiff to state what officers conducted the transaction complained of. *Cherokee Mills v. Gate City, etc.*, 122 Ga. 268 (1905).

<sup>1</sup> See § 637; also *West Side, etc. Co. v. Conn., etc. Co.*, 186 Ill. 156 (1900).

<sup>2</sup> *Norman v. Beekman*, 58 Fla. 325, (1909).

<sup>3</sup> An acknowledgment is "the act of one who has executed a deed in going before some competent officer or court and declaring it to be his act or deed." Hence, even though the notary's certificate may be insufficient it may be shown that the corporate officer, authorized to execute the deed, did actually acknowledge such execution, the statute not requiring the certificate of acknowledgment to appear upon the document. *Linderman v. Hastings, etc. Co.*, 38 N. Y. App. Div. 488 (1899). A defective acknowledg-

ment does not affect a deed as between the parties. *Marvin v. Anderson*, 111 Wis. 387 (1901). A substantial compliance with the statute relative to acknowledgments by corporations is sufficient. *Copper, etc. Co. v. Costello*, 11 Ariz. 334 (1908). Although a statutory form of acknowledgment by a corporation calls for a statement that the person was the president, yet a statement that the person said he was president is sufficient. *State v. Coughran*, 19 S. Dak. 271 (1905). Neither corporate creditors nor stockholders who had notice of the execution of a mortgage can attack it on the ground that the acknowledgment was not in accordance with the statute. *Larkin v. Hagan*, 126 Pac. Rep. 268 (Ariz. 1912). In Missouri a corporate mortgage has to be acknowledged to be a mortgage. *Barrie v. United Rys.*, 138 Mo. App. 557 (1909).

<sup>4</sup> The officer or agent who, in behalf of the corporation, affixes the common seal to an instrument is, in the absence of any statutory provision, deemed the agent executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by authority of the board of directors. *Bowers v. Hechtman*, 45 Minn. 238 (1891). The deed of a corporation is capable of being acknowledged. Proving the execution is not the only way of preparing it for record. *Hopper v. Lovejoy*, 47 N. J. Eq. 573 (1891). Authority to execute gives authority to acknowledge the instrument. *Wright v. Lee*, 2 S. Dak. 596 (1892); s. c., 4 S. Dak. 237. The deed is good though there is no attestation as to seal.



tity of the corporation and of the officers executing the instrument, and their acknowledgment or deposition that they had executed it, and that they had been duly authorized to execute it. At common law there is no particular form for the acknowledgment of an instrument by a corporation.<sup>1</sup> A statute that a certain form of acknowledgment

*Smith v. Smith*, 62 Ill. 492 (1872). If the president signs the deed he is the proper person to acknowledge it. *Lovett v. Steam, etc. Assoc.*, 6 Paige, 54 (1836). The acknowledgment may be taken out of the state. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). Where a chattel mortgage statute requires an affidavit by the mortgagee or his agent or attorney stating certain facts, and the mortgagee is a corporation, the affidavit may be made by its vice-president without reciting his authority. *American, etc. Co. v. Stolzenbach*, 75 N. J. L. 721 (1908). Where a deed of the corporation is acknowledged by individuals, instead of being proved by the officers, the recording of such deed is of no effect. *Bernhardt v. Brown*, 122 N. C. 587 (1898). 'An acknowledgment similar in form to that of an individual suffices. *Hoopes v. Auburn, etc. Co.*, 37 Hun, 568 (1885); *aff'd*, 109 N. Y. 635. *Cf. Howe, etc. Co. v. Avery*, 16 Hun, 555 (1879). See also *Kelly v. Calhoun*, 95 U. S. 710 (1877); *Frostburg, etc. Assoc. v. Bruce*, 51 Md. 508 (1879); *Muller v. Boone*, 63 Tex. 91 (1885); *Eppright v. Nickerson*, 78 Mo. 482 (1883); *City of Kansas v. Hannibal, etc. R. R.*, 77 Mo. 180 (1882); *Tenney v. Lumber Co.*, 43 N. H. 350 (1861). An acknowledgment of a corporate deed which merely acknowledges the signatures is insufficient, even though the deed is recorded. *Witherell v. Murphy*, 154 N. C. 82 (1910). A notary's certificate to the effect that the persons signing are known to him to be president and secretary is sufficient under the statutes of South Dakota. *Holt v. Met. Trust Co. etc.*, 11 S. Dak. 456 (1899). Under the Texas statute it is sufficient that the officer acknowledge that he executed the deed. *Zimpleman v. Stamps*, 21 Tex. Civ. App. 129 (1899). Even though the

acknowledgment by an Arkansas corporation of a mortgage on land in Arkansas is in the usual common-law form, but not in accordance with the statute of Arkansas, yet any defect may be cured by statute. *Steers v. Kinsey*, 68 Ark. 360 (1900). In West Virginia a certificate of acknowledgment of a deed by a corporation which fails to show that the officer executing it was sworn and deposed to the facts required by statute is insufficient, and a record of the deed is not notice. *Abney v. Ohio, etc. Co.*, 45 W. Va. 446 (1898). A deed may conclude with the words: "In testimony whereof the common seal of said company is hereunto affixed." *Bason v. King's Mountain Min. Co.*, 90 N. C. 417 (1884). As already stated, if the seal is attached this raises the presumption that the party executing it was authorized so to do, and hence to that extent it need not be acknowledged. *Bennett v. Knowles*, 66 Minn. 4 (1896). Proof by a witness whose name does not appear on the paper as a witness is insufficient. *Dodge v. American, etc. Co.*, 109 Ga. 394 (1899).

For form of attestation and proof of deed see Vol. V, *infra*.

<sup>1</sup> *Pruyne v. Adams, etc. Co.*, 92 Hun, 214 (1895); *aff'd*, 155 N. Y. 629, upholding an acknowledgment by the secretary. Under the Nebraska statute a notary's certificate that the president appeared and acknowledged a corporate deed as his voluntary act and deed, is a sufficient acknowledgment. *Powers v. Spiedel*, 84 Neb. 630 (1909). An acknowledgment by a corporation in North Dakota must state that the officer executing the instrument acknowledged that the corporation executed it. *Gessner v. Minneapolis, etc. Ry.*, 15 N. Dak. 560 (1906).



may be used does not prevent the use of some other sufficient form which covers the subject.<sup>1</sup> An affidavit proving the signature of the president and the affixing of the corporate seal is a sufficient acknowledgment.<sup>2</sup> In a deed to a corporation, the acknowledgment cannot be legally taken by a notary who is a stockholder and director in the corporation and a statute validating such acknowledgments cannot have a retroactive effect.<sup>3</sup> A mortgage should not be acknowledged before a notary public who is a stockholder in and officer of the mortgagee.<sup>4</sup> The recording of a mortgage is a sufficient delivery.<sup>5</sup>

§ 723. *Corporate instruments made out in the name of an officer or agent instead of in the name of the corporation may be enforced by or against the corporation.*—This is now the well-established rule.<sup>6</sup> Thus, where a contract is made by the president in his in-

<sup>1</sup> *Strother v. Barrow*, 151 S. W. Rep. 960 (Mo. 1912).

<sup>2</sup> *General, etc. Co. v. Transit, etc. Co.*, 57 N. J. Eq. 460 (1898).

<sup>3</sup> *Fugman v. Jiri, etc. Ass'n*, 209 Ill. 176 (1904). An acknowledgment before a notary who is a stockholder in the grantor is not void. *Greve v. Echo Oil Co.*, 8 Cal. App. 275 (1908). An incorporator is not competent, as a notary public, to take the acknowledgment of another incorporator to the certificate of incorporation. *People v. Bd. R. R. Comrs.*, 105 N. Y. App. Div. 273 (1905).

<sup>4</sup> *Kothe v. Krag, etc. Co.*, 20 Ind. App. 293 (1898). A mortgage to a corporation is legal, even though the witnesses and the notary public who took the acknowledgment are stockholders of such corporation. *Read v. Toledo Loan Co.*, 68 Ohio St. 280 (1903). The president and chief executive officer of an investment company taking a mortgage may act as notary. *Keene, etc. Bank v. Lawrence*, 32 Wash. 572 (1903). A chattel mortgage is good although acknowledged before a notary public who was a director, treasurer, and stockholder, there being nothing in the instrument to indicate that fact. *Ardmore Nat. Bank v. Briggs, etc. Co.*, 20 Okla. 427 (1908). A contract which on its face is with a corporation, but is signed by its agent alone, may nevertheless be enforced by the corporation. *Hanks, etc. Co. v. Woodstock, etc. Co.*, 127 Ga. 108 (1906). The fact that the

acknowledgment is taken before a notary who was also the vice-president of the company does not necessarily invalidate the acknowledgment. *Florida, etc. Exchange v. Rivers*, 36 Fla. 575 (1886). An acknowledgment by a corporation taken before a notary who is a stockholder is of no effect in Texas. *Bexar, etc. Assoc. v. Heady*, 21 Tex. Civ. App. 154 (1899). The assistant cashier, who is also a stockholder and director, cannot take the acknowledgment of a mortgagor to the bank. *Wilson v. Griess*, 64 Neb. 792 (1902). A notary public who is a stockholder in a corporation is not qualified to take its acknowledgment of a corporate judgment. *Betts-Evans, etc. Co. v. Bass*, 2 Ga. App. 718 (1907). A notary public who is a stockholder is disqualified from taking the acknowledgment of the corporation. *Southern, etc. Co. v. Voyles*, 75 S. E. Rep. 248 (Ga. 1912).

<sup>5</sup> *International, etc. Co. v. Vause*, 55 Fla. 641 (1908). Delivery of a mortgage may be informal, and where the same man is president of both mortgagor and mortgagee and makes delivery to himself, this is sufficient. *Re Jackson, etc. Co.*, 189 Fed. Rep. 636 (1911).

<sup>6</sup> Where the president loans corporate funds and takes notes in his own name, the corporation is considered to be the payee. *New England, etc. Co. v. Gay*, 33 Fed. Rep. 636 (1888); *Elwell v. Dodge*, 33 Barb. 336 (1861). A corporation selling lands to a person



dividual name, but for the corporation, and the corporation knows of the contract, and acts upon it, and partly performs it, the cor-

may sue him and his undisclosed associates in the transaction for the purchase price, even though a note was given to the corporation for such price, such note running to its president. *Coaling, etc. Co. v. Howard*, 130 Ga. 807 (1908). A note of a corporation signed "R. J. Beatty, President," may be enforced against the corporation where it is alleged that it adopted that method of executing its notes in the ordinary course of business, and that it so executed that note. *Midland, etc. Co. v. Citizens', etc. Bank*, 34 Ind. App. 107 (1904). *Prima facie* a corporation is not liable on a contract made by an individual, even though he is described as of such corporation. *Railway, etc. Co. v. Chicago Co.*, 126 Fed. Rep. 223 (1903). Where the holder of a mortgage sends it to a bank to collect, and the mortgagor buys and sends a draft payable to the president individually, followed by the letters "Pt.," and he embezzles the funds, the mortgagor is released. *Griffin v. Erskine*, 131 Iowa, 444 (1906). The indorsement of a note by signing the corporate name, without adding by whom the name is signed, is good. *Second Nat. Bank v. Martin*, 82 Iowa, 442 (1891). A lease running to the company is good though only its officers' names were signed. *Clark v. Gordon*, 121 Mass. 330 (1876); *Carroll v. St. Johns, etc.*, 125 Mass. 565 (1878). A sealed instrument to pay money, signed by an individual's name, followed by the words "President of the New York Banking Co.," is enforceable against it. *Boisgerard v. New York Banking Co.*, 2 Sandf. 23 (1844). A corporation may enforce a contract made for its benefit by one of its officers, even though the contract was with the officer individually, where the other party knew of that fact. *Escondido, etc. Co. v. Glaser*, 144 Cal. 494 (1904). A debt to a person as secretary and treasurer of an insurance company shows on its face that it belongs to the company. *Collier v. Alexander*, 142 Ala. 422 (1905). A bond running to the treasurer may

be sued on by the company. *New York, etc. Soc. v. Varick*, 13 Johns. 38 (1816). So also as to a note running to a cashier. *Baldwin v. Bank, etc.*, 1 Wall. 234 (1863); *Commercial Bank v. French*, 38 Mass. 486 (1839). Or to a manager. *Société, etc. v. Mackintosh*, 5 Utah, 568 (1888). But see 7 Utah, 35. The company is liable on an order for goods though the order is signed by an officer as such officer. *Rogers, etc. Co. v. Union, etc. Co.*, 134 Mass. 31 (1883). The case *Farmers', etc. Bank v. Haight*, 3 Hill, 493 (1842), holds a corporation not liable on a note informally made out. See also *Steele v. Oswego, etc. Co.*, 15 Wend. 266 (1836). Suit lies against a bank on its check signed by its cashier in his own name. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326 (1820). See also *Edwards v. Cameron's, etc. Co.*, 11 Eng. L. & Eq. 565 (1852), where directors signed a note; *Olcott v. Tioga R. R.*, 27 N. Y. 546 (1863); *Bank of Brit. N. A. v. Hooper*, 71 Mass. 567 (1856); *Morrill v. Segar Co.*, 32 Hun, 543 (1884), where the secretary signed a contract; *Van Leuven v. First Nat. Bank*, 54 N. Y. 671 (1873), where the president signed; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312 (1859); s. c., 13 N. Y. 309 (1855); *Many v. Beekman, etc. Co.*, 9 Paige, 188 (1841). But see *De Witt v. Walton*, 9 N. Y. 570 (1854). A cashier may transfer a note by signing his own name as cashier. *McIntyre v. Preston*, 10 Ill. 48 (1848). See also § 724, notes, *infra*. A note payable to and indorsed by "E. S. Hubbell, agent for Buffalo Colliery Company," is collectible against the company where it is shown that he was authorized by the company by its mode of doing business. *Lake Shore Nat. Bank v. Butler Colliery Co.*, 51 Hun, 63 (1889). A corporation is liable on a note signed "R., President S. & T. Co. R. R. Co.; R., Personally." *McCormick v. Stockton, etc. R. R.*, 130 Cal. 100 (1900). A note signed "Iowa National Bank, by William Daggett, V. P.," is properly



poration is bound.<sup>1</sup> A deed signed by the president and secretary as such is good, even though the statute requires deeds to be subscribed

signed and is not a personal obligation, even though in correspondence the word "we" is used by such vice-president. *Thilmany v. Iowa, etc. Co.*, 108 Iowa, 357 (1899). In foreclosing a vendor's lien a note given by the corporation may be shown to be a corporate note, although signed "T. R. Wagner, Secy. & Genl. Manager of the Shelby Lime & Cement Works." *Wagner v. Brinkerhoff*, 123 Ala. 516 (1899). It may be shown by parol evidence that a note signed "R. J. B., President," was a corporate note. *Second, etc. Bank v. Midland, etc. Co.*, 155 Ind. 581 (1900). Even though the name of the corporation only is signed to a note without the signature of the officer following the corporate name, yet the note is a valid obligation of the corporation. *Youngs v. Perry*, 42 N. Y. App. Div. 247 (1899). Where a corporation buys land in the name of its agent as trustee it is liable for the price thereof. *Hurst v. Am. Assoc.*, 49 S. W. Rep. 800 (Ky. 1899). A due-bill signed by an individual may be shown to have been intended as a due-bill of the company, he being the president. *Richmond, etc. R. R. v. Snead*, 19 Gratt. (Va.) 354 (1869). An instrument for the payment of money running from a person "as manager and president" is enforceable against the corporation, although signed by the person as an individual. *Jones v. Woolley*, 2 Idaho, 790 (1891). A check signed by an individual with the corporate seal and the name of the secretary attached is not enforceable against the company, it having had no benefit thereof. *Serrell v. Derbyshire, etc. Ry.*, 9 C. B. 811 (1850). Where notes are made by an individual the payee cannot introduce evidence that they were in behalf of the corporation, the suit being on the notes. *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531 (1891). An accommodation note running to "F. Medhurst, commercial director," given to him by a friend, cannot be enforced by the corporation, Medhurst having defaulted and

defrauded the company. *Société, etc. v. Mackintosh*, 7 Utah, 35 (1890). The corporation is not liable on a note as follows: "For value received, we, the subscribers, jointly and severally, promise to pay the plaintiffs or order, for the Boston Glass Manufactory, \$3,500, on demand," and signed by individuals as individuals. *Bradlee v. Boston, etc. Mfy.*, 33 Mass. 347 (1835). A grant to "the governors, president, and fellows of King's College, at Windsor, in the province of Nova Scotia," is *prima facie* a grant to the corporation. *King's College v. McDonald*, 2 Tham. 106 (Can. 1843). A deed to the "trustees of the First Baptist Church" passes title to the corporation. *Keith, etc. Co. v. Bingham*, 97 Mo. 196 (1888). A bill of sale to an individual, "president of" a corporation, "his executors, administrators, and assigns," does not convey title to the corporation. *Florida, etc. Co. v. Usina*, 111 Ga. 697 (1900). A company may be bound by a contract although the contract is signed in the name of an individual. *Jones v. Williams*, 139 Mo. 1 (1897). A contract drawn and signed by "S., general agent," may be shown by parol to be a corporate contract. *Lewis v. Mutual L. Ins. Co.*, 8 Colo. App. 368 (1896). The agreement of J. Gould, as trustee for the Missouri Pacific Railroad, that the latter will do a certain thing upon an extension being made, does not bind the latter. *Hill v. Gould*, 129 Mo. 106 (1895). Where a note is signed by the officers individually, but is really a corporate note, the officers who pay and take up the note may enforce it against the corporation. *Re Pendleton Hardware, etc. Co.*, 24 Oreg. 330 (1893). A note signed "National Forge and Iron Co., Mark Swarts, President," may be shown to be the joint note of the company and president. *Swarts v. Cohen*, 11 Ind. App. 20 (1894), classifying many authorities. See also § 810, *infra*.

<sup>1</sup> *Cotting v. Grant Street Elec. Ry.*, 65 Fed. Rep. 545 (1895).



by the vendor.<sup>1</sup> A mortgage made in the president's name, signed by him, and sealed with his own seal, is not a legal mortgage although authorized by the corporation. It operates, however, as an equitable mortgage as regards subsequent mortgagees with notice.<sup>2</sup> Although a contract under seal is executed by the corporate officers in their individual names, it may be proved by parol that it was a corporation contract, and that the corporation, having adopted and ratified it and attempted to carry it out, is liable on it.<sup>3</sup> In Massachusetts, however,

<sup>1</sup> *Ismon v. Loder*, 135 Mich. 345 (1904). A deed from the president and some of the stockholders of land owned by the corporation does not convey title. *Dickinson v. Harris*, 155 Ala. 613 (1908).

<sup>2</sup> *Miller v. Rutland, etc. R. R.*, 36 Vt. 452 (1863). See *Hatch v. Barr*, 1 Ohio, 390 (1823), and § 721, *supra*, and § 810, *infra*. A corporate chattel mortgage is good if it runs in the corporate name, even though the president signs only his own name. *Sherman v. Fitch*, 98 Mass. 59 (1867); *Hamilton v. McLaughlin*, 145 Mass. 20 (1887). If so drawn it is immaterial as to who signs or seals. *Wiley v. Board of Education*, 11 Minn. 371 (1866), involving a bond. If the statute authorizes the trustees to convey, their personal deed suffices. *De Zeng v. Beekman*, 2 Hill, 489 (1842). Where the president has title in his name he may convey as president. *Vilas v. Reynolds*, 6 Wis. 214 (1858). A deed made before incorporation, to be delivered to the corporation after incorporation, is good. *Spring, etc. Bank v. Hurlings, etc. Co.*, 32 W. Va. 357 (1889). Although the body of the deed reads, "the president, directors, etc., of," followed by the name of the corporation as grantor, the deed should be construed as the deed of the corporation. *Shaffer v. Hahn*, 111 N. C. 1 (1892). The contract is signed sufficiently to satisfy the statute of frauds where the name of the corporation appears in the body of the instrument. *Tingley v. Belingham, etc. Co.*, 5 Wash. St. 644 (1893). Where a mortgage purports to be by a corporation, but is signed by the president, treasurer, and secretary personally, with their official titles following their names, and is acknowl-

edged the same as they would acknowledge a personal mortgage, and the corporate seal is not attached, the mortgage is at most only an equitable mortgage, and in order to be foreclosed must be alleged to be such. *Brown v. Farmers' Supply Co.*, 23 Oreg. 541 (1893). The signature to a corporate mortgage omitting one word of the name is nevertheless good, and although signed "Chas. P. Law, President of the Santa," etc., is sufficient where the corporate seal is affixed. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). A deed of corporate land properly drawn in the body of the deed, sealed with the corporate seal, and properly acknowledged, but signed "M. Brayman, President C. & F. R. R. Co.," etc., is nevertheless good. *Chouteau v. Allen*, 70 Mo. 290 (1879). *Cf. Taylor v. Agricultural, etc. Assoc.*, 68 Ala. 229 (1880). A corporate mortgage signed by the officers with their own names, followed by their titles and scrolls for seals, is good. *Johnston v. Crawley*, 25 Ga. 316 (1858). A mortgage signed by certain individuals as trustees of a church is not on its face a mortgage by the church. *Shackleton v. Allen, etc. Church*, 25 Mont. 421 (1901). Even though a mortgage is signed "Mary L. Byrd, President of the Kingston Lumber & Mfg. Co.," it is a valid mortgage. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); *aff'd*, 106 Tenn. 1.

<sup>3</sup> *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469 (1889). A contract to purchase made by the treasurer and general manager, who is also a director, may bind the corporation if the directors knew about it, even though the agreement read "I" in its body. *Taylor v. Danielsonville, etc. Co.*,



it is held that where a contract *under seal* is made, not by the corporation, but by its agent individually, the corporation cannot be sued thereon by the other party, unless it is estopped by some subsequent act or writing.<sup>1</sup>

Questions relative to the power of certain officers to sign notes and contracts are considered elsewhere.<sup>2</sup>

§ 724. *Liability of officers and agents on corporate securities which are not properly drawn, signed, or sealed in the corporate name.*—It frequently happens that the person with whom a corporate contract has been made, attempts to hold personally liable the officer or agent of the corporation, on the ground that such officer or agent used his own name in the body of the contract, or signed it as principal instead of using the corporate name. But the courts have quite uniformly defeated such attempts to hold the officer or agent liable. If the instrument or contract indicates that the officer or agent is acting only as agent, and if the name of the corporation appears on the instrument, the officer or agent is not liable thereon.<sup>3</sup> Thus an

82 Conn. 220 (1909). The corporation is bound where the president signs his name followed by the word "president," and the secretary signs his name followed by the word "secretary," the corporate seal having been also impressed upon the document in the body thereof. *Union, etc. Co. v. Robinson*, 79 Fed. Rep. 420 (1897). Where the lease in its body is to a corporation, the corporation is bound, even though it is signed "E. J. Crandall [Seal], President." *Consolidated Coal Co. etc. v. Peers*, 150 Ill. 344 (1894). A sealed contract to sell land running to the president cannot be enforced by the corporation. *Buffalo, etc. Inst. v. Bitter*, 87 N. Y. 250 (1881). It is liable on a deed to the manager. *Pickering's Claim*, L. R. 6 Ch. 525 (1871). An assignment of a lease running in its body from "George F. Baker, Treasurer," etc., of the company, and assigned in the same way, is not a corporate assignment. *Norris v. Dains*, 52 Ohio St. 215 (1894). A mortgage is not enforceable against a corporation where it is drawn as a personal obligation and signed by an individual "as president." *Clark v. Hodge*, 116 N. C. 761 (1895). An assignment of a mortgage and a note belonging to a corporation by its president and secretary as follows:

"We, the undersigned, D. R. T., president, and C. S. B., secretary, have transferred . . . and on the part of said company have hereunto attached our names and affixed our seals," signing their names and affixing their private seals, is presumptively a corporate transfer. *Lay v. Austin*, 25 Fla. 933 (1890).

<sup>1</sup> *Congress, etc. Co. v. Worcester*, etc. Co., 182 Mass. 355 (1903).

<sup>2</sup> See §§ 715-720, *supra*.

<sup>3</sup> Quoted and approved in *Morrison v. Baechtold*, 93 Md. 319, 329 (1901), and *Rowley v. Hager*, 127 Pac. Rep. 36, 37 (Oreg. 1912). The agreement of a corporation to take back its own stock which it is selling, is not binding on its officers personally, even though after the corporate name their names follow, and their titles follow their names, and even though the word "we" is used in the body of the agreement. *Jacobs v. Williams*, 85 Conn. 215 (1912). A note stamped with the corporate seal, followed by the words "John Roach, Treasurer," is the company's note alone. *Miller v. Roach*, 150 Mass. 140 (1889). A note, "We promise to pay," and signed "San Pedro Mining and Milling Company, T. Kraus, President," cannot be enforced against Kraus personally. *Liebscher v. Kraus*, 74 Wis. 387 (1889). Even



English court has recently held that a note signed by the company's name and also "J. H. Smethurst, Managing Director," cannot be en-

though following the corporate name to a note is the signature of the treasurer and then another name without any title, yet if he signed only as secretary that fact may be shown by parol. *Germania Nat. Bank v. Mariner*, 129 Wis. 544 (1906). It may be shown by parol evidence that a note signed by the company followed by an individual name as "President" and another individual name as "Secretary" is a note of the corporation only. *Western, etc. Co. v. Lackman*, 75 Kan. 34 (1907). Where a contract is signed by an individual as president of a corporation and as a stockholder it may be shown by parol evidence as to whether he was to be personally liable thereon. *Lynch v. McDonald*, 155 Cal. 704 (1909). Individual signatures followed by the word "Trustees" may be shown by parol to be a corporate obligation only. *Knippenberg v. Greenwood, etc. Co.*, 39 Mont. 11 (1909). Even though following the signature of a corporation to a note there are the signatures of two individuals, one followed by the word "Pres." and the other by the word "Mgr.," yet they may show that it was understood that they were not to be personally liable. *Briel v. Exchange Nat. Bank*, 172 Ala. 475 (1911). The president is not personally liable on a note signed in the name of the company by him as president. *Pease v. Globe, etc. Co.*, 141 Iowa, 482 (1909). A note signed in the company's name followed by the names of the president and secretary is not a personal obligation on their part even though the word "by" is not inserted. *English, etc. Co. v. Globe, etc. Co.*, 70 Neb. 435 (1903). A note reading "We promise," etc., and signed "Warrick Glass Works, J. Price Warrick, President," is conclusively held to be the note of the corporation alone. *Reeve v. First Nat. Bank*, 54 N. J. L. 208 (1892). It is a question of fact whether a note is that of the corporation or of an individual where in the body it is made by the corporation, but the signature is that of a person as

"Gen. Supt." *Frankland v. Johnson*, 147 Ill. 520 (1893). A treasurer is not liable on a note signed as follows: "The Sanitary Milk-Supply Co., T. A. Huston, Trs." *Gleason v. Sanitary, etc. Co.*, 93 Me. 544 (1900). A note reading "We promise to pay," and signed by the corporation and also by the officers as officers, does not render the latter liable personally. *Wilson v. Fite*, 46 S. W. Rep. 1056 (Tenn. 1897). A note signed by the corporate name with the names of the officers underneath with their titles following their names, is presumed to be a corporate note. *Gold, etc. Co. v. Dennis*, 121 Pac. Rep. 677 (Colo. 1912). The following indorsement on negotiable paper, "Estate of Wheeler, Wing, Executor," does not bind such executor individually, even though it does not bind the estate. *Grafton Nat. Bank v. Wing*, 172 Mass. 513 (1899). A note signed by an individual maker, with the word "President" following the signature, is at law a personal note, and the word "President," etc., is disregarded. The defendant, however, may by cross-complaint cause the note to be reformed on the ground of a mistake, and thus relieve himself from liability and render the corporation liable. *Prescott v. Hixon*, 22 Ind. App. 139 (1899). Where the body of a note does not refer to the company, and it is signed by individuals with the words "President," etc., following their names, they are liable personally on the note, but the defendants may file a cross-bill to have the note reformed so as to relieve them from personal liability. *Lawrence County Bank v. Arndt*, 69 Ark. 406 (1901). A guaranty signed by an individual in his own name, followed by the letters "Pt.," may be shown to be the obligation of the corporation only, provided the corporation might execute a guaranty and authorized the president to execute it. *Small v. Elliott*, 12 S. Dak. 570 (1900). A note signed by individuals as officers is *prima facie* their individual note, but it may be shown, as between the orig-



forced against him personally, even though the body of the note read "I."<sup>1</sup> Especially is this the rule as between the original parties to

inal parties, that it was really the note of a corporation. *Bush v. Gilmore*, 45 N. Y. App. Div. 89 (1899). Where the name of an individual is the same as that of a corporation of which he is president, parol evidence may show that the signature to an instrument was the signature of the company and not of the individual. *Hall v. Ochs*, 34 N. Y. App. Div. 103 (1898). A note signed with the company's name per officers does not bind them personally, although the body of the note reads "We promise to pay." *Williams v. Harris*, 198 Ill. 501 (1902). Where the unissued stock of a corporation (upon its reorganization on the expiration of its charter) is issued to the president as trustee to sell from time to time, and to turn over the proceeds of the sales to the company, the fact that he gives the company a note for the same signed by him as "Trustee for Bank" does not render him liable on such note upon the bank becoming insolvent. *Neptune v. Paxton*, 15 Ind. App. 284 (1896). Where the directors sign a corporate note on the back with the words added "board of directors," it may be shown by parol evidence that they signed it as directors, and are not liable personally. *Kline v. Bank of Tescott*, 50 Kan. 91 (1892). A note signed "G. A. Colby, President Pac. Peat Coal Co., D. K. Tripp, Sec. pro tem.," is on its face a corporate note. *Farmers', etc. Bank v. Colby*, 64 Cal. 352 (1883); *Mott v. Hicks*, 1 Cow. 513 (1823); *Bellinger v. Bentley*, 1 Hun, 562 (1874); *Hascall v. Life Assoc.*, 5 Hun, 151 (1875); *aff'd*, 66 N. Y. 616; *Morrill v. Segar Co.*, 32 Hun, 543 (1884), the court saying: "The rule now is that, where the instrument raises on its face a question as to the personal liability of the party signing it, parol evidence is admissible to show the intention of the parties;" *Babcock v. Beman*, 11 N. Y. 200 (1854); *Whitney v. Wyman*, 101

U. S. 392 (1879); *Whitford v. Laidler*, 94 N. Y. 145 (1883), where even a lease made out to an officer as such was held not enforceable against him; *Holt v. Winfield Bank*, 25 Fed. Rep. 812 (1885), where an attempt was made to hold a president liable on an *ultra vires* subscription; *Haight v. Sahler*, 30 Barb. 218 (1859), where also the contract was sealed; *Pitman v. Kintner*, 5 Blackf. (Ind.) 250 (1839); *Stanton v. Camp*, 4 Barb. 274 (1848); *Draper v. Mass. etc. Co.*, 87 Mass. 338 (1862); *Shaper v. Belles*, 61 Pa. St. 69 (1869); *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 126 (1824), where also a seal was used, the body of the instrument being in the company's name. To same effect, *Abbey v. Chase*, 60 Mass. 54 (1850), and *Ellis v. Pulsifer*, 86 Mass. 165 (1862); *McHenry v. Duffield*, 7 Blackf. (Ind.) 41 (1843), where a due-bill was signed by a committee; *Passmore v. Mott*, 2 Binn. (Pa.) 201 (1809), where a secretary signed a ticket; *Hovey v. Magill*, 2 Conn. 680 (1818); *McWhorter v. Lewis*, 4 Ala. 198 (1842); *Means v. Swormstedt*, 32 Ind. 87 (1869); *Mann v. Chandler*, 9 Mass. 335 (1812); *Carpenter v. Farnsworth*, 106 Mass. 561 (1871). An officer is not liable personally on a note payable to him as "Sec. and Treas.," and indorsed by him likewise. *Falk v. Moebs*, 127 U. S. 597 (1888). A promissory note, "We promise to pay," etc., signed "Houston Flour-mills Co., D. P. Shepherd, President," is enforceable against the company only. *Latham v. Houston Flour Mills*, 68 Tex. 127 (1887); *Jefts v. York*, 58 Mass. 371 (1849); s. c., 64 Mass. 392 (1852); *Okell v. Charles*, 34 L. T. Rep. 822 (1876). It may be a question of fact as to whether a treasurer, in buying, bought stock for himself, or the company. *Haynes v. Hunnewell*, 42 Me. 276 (1856). See also *Randall v. Van Vechten*, 19 Johns. 60 (1821), holding a committee not liable on a sealed in-

<sup>1</sup> *Chapman v. Smethurst*, [1909] 1 K. B. 927, rev'g [1909] 1 K. B. 73.



the contract. It also is the rule as to parties taking with notice. The adding of a title does not necessarily constitute such notice, and hence the officers signing may be personally liable.<sup>1</sup> Thus, where a corpora-

strumment; *Stearns v. Allen*, 25 Hun, 558 (1881). Cf. *De Witt v. Walton*, 9 N. Y. 571 (1853). In support of the text see also *Dubois v. Delaware, etc. Co.*, 4 Wend. 285 (1830); *Olcott v. Tioga, etc. R. R.*, 27 N. Y. 546 (1863). See also *Lindley, Companies* (5th ed.), p. 231, etc.; *Green's Brice's Ultra Vires*, p. 754. The denial of the directors' liability on a note signed by them as directors is raised by answer, not by demurrer. *McKenney v. Edwards*, 88 Ky. 272 (1889). A note drawn by the directors as directors of the company, and sealed with the seal of the company, is not enforceable against the directors individually. *Aggs v. Nicholson*, 1 H. & N. 165 (1856). The president is not liable on bonds which he signed as president and which the corporation had power to issue. *McMasters v. Reed*, 1 Grant, Cas. (Pa.) 36 (1854); *Wilson v. Fite*, 46 S. W. Rep. 1056 (Tenn. 1897). 131 Pac. Rep. 1013.

<sup>1</sup> Where a note reads "We promise to pay," etc., and is signed "D. M. Co. J. K., President," the president alone is liable. *Mathews v. Dubuque Matress Co.*, 87 Iowa, 246 (1893). A note signed in the company's name, followed by the words "B. L. Brownell, Pres.," binds him personally. *Heffner v. Brownell*, 70 Iowa, 591 (1887). So also of a note signed "C. F. Clark, Trustee Omega Lodge." *Coburn v. Omega Lodge*, 71 Iowa, 581 (1887). The trustees of an association who signed a note as trustees are personally liable thereon. *McKenney v. Bowie*, 94 Me. 397 (1900). Where the treasurer issues a check signed by him as treasurer, he is personally liable if there are no funds of the corporation to pay the check. *Eastern, etc. Co. v. Cunningham*, 103 Me. 455 (1908). An agreement of an individual, the agreement reading "I, W. H. Plummer, Treasurer," etc. agree to take back certain stock subscribed for and refund the money, is binding on him personally, even though after his

signature at the end of the agreement he adds "Treas." *Gavazza v. Plummer*, 53 Wash. 14 (1909). Members of an unincorporated association who sign a note for it are personally liable, even though the names are followed by the words secretary, treasurer, etc. *Evans v. Lilly & Co.*, 95 Miss. 58 (1909). Where the president of a corporation acting as agent causes his corporation to take a secret profit from the principal, the latter may hold both the president and the corporation liable. *Messer-Moore, etc. Co. v. Trotwood, etc. Co.*, 170 Ala. 473 (1910). A contract of subscription for stock containing a provision that the corporation and other individuals signing as sureties would take back the stock within a certain time and at a certain place is binding on them as individuals, even though they added their corporate titles to their signatures. *Basnight v. Southern, etc. Co.*, 148 N. C. 350 (1908). A note signed by individual names, followed by the words "Board of Business Managers," is enforceable against them personally, although it was intended as a note of a corporation. *Richmond, etc. Works v. Moragne*, 119 Ala. 80 (1898). A note signed by a corporation and several stockholders is binding on all of them, even though the words "as stockholders" follow the individual names. *Savings Bank, etc. v. Central Co.*, 122 Cal. 28 (1898). Where an unincorporated association becomes incorporated, a person who does not know of that fact may hold the trustees personally liable on a note signed by them, although the word "trustees" precedes their signature. *Vliet v. Simanton*, 63 N. J. L. 458 (1899). Where a note is signed by the president and secretary in their individual names, except that they add the words "President" and "Secretary" respectively, there being nothing on the face of the note to show that it is a company note, they are liable personally on the note. They will not be allowed to show that it



tion sells land and incidentally a paper is signed by the president in his own name followed by the word "President," guaranteeing to the

was the intention of all parties to bind the company only, or that the money went to the company only, or that the company authorized the note; nor can they file a cross-bill to relieve themselves from the note. *San Bernardino, etc. Bank v. Anderson*, 32 Pac. Rep. 168 (Cal. 1893). In the case *Hackemack v. Wiebrock*, 172 Ill. 98 (1898), the court held that the signers were individually liable on a note which recited "We promise to pay," and was signed "Henry Hackemack, Pres., Raythe Nagel, Secy.," to a person who took the note supposing that they were personally liable. A note, "We promise to pay," etc., signed "E. H. Close, Treas., John Clark, Pres't," without referring to the corporation, may be enforced against Close and Clark personally, although in the border of the note the company's name appears. *Merchants' Nat. Bank v. Clark*, 64 Hun, 175 (1892); affirmed in 139 N. Y. 314 (1893). A treasurer is liable personally on a note signed personally by him, although the signature is followed by the word "Treasurer." *Medberry v. Short*, 15 N. Y. Week. Dig. 227 (1882); *Tippets v. Walker*, 4 Mass. 595 (1808). A note in the form "I promise to pay," and signed by "E., Pres. & Treas. C. Co.," has been held to be the note of E. and not of the corporation. *Davis v. England*, 141 Mass. 587 (1886); *Stinchfield v. Little*, 1 Me. 231 (1821), where a deed was to the agent; *Bruce v. Lord*, 1 Hilt. 247 (1856), holding the agent *prima facie* liable on a draft; *Mare v. Charles*, 5 El. & B. 978 (1856); *Dayton v. Warne*, 43 N. J. L. 659 (1881), involving a bond; *Sawyer v. Winnegance Mill Co.*, 26 Me. 122 (1846), holding the company not bound by an agreement to arbitrate; *Seaver v. Coburn*, 64 Mass. 324 (1852), involving a lease; *Drake v. Flewellen*, 33 Ala. 106 (1858), holding the secretary *prima facie* liable; *Dutton v. Marsh*, L. R. 6 Q. B. 361 (1871), where the note was, "We, the directors of the Isle of Man Slate & Flag Co., Limited,

do promise to pay J. D. £1,600." The company's seal was affixed; *Tucker, etc. Co. v. Fairbanks*, 98 Mass. 101 (1867); *Barker v. Mechanics', etc. Co.*, 3 Wend. 94 (1829); *Taft v. Brewster*, 9 Johns. 334 (1812), involving a bond; *Brockway v. Allen*, 17 Wend. 40 (1837). Where a draft was drawn on an individual name, followed by the words "President Rosendale M'ng Co., New York," and accepted by him by the same signature, he is liable personally on it. *Moss v. Livingston*, 4 N. Y. 208 (1850); *Hills v. Bannister*, 8 Cow. 31 (1827). Persons signing and sealing a bond in their own names and under their own seals are individually bound, even though they intended to bind the corporation, and in the body of the instruments they are described as trustees. *Cullen v. Nickerson*, 10 Up. Can. C. P. Rep. 549 (1861). *Prima facie* a person is liable personally who signs a note as follows: "J. W. Parrott, President of Long Branch Hotel and Cottage Co." *Terhune v. Parrott*, 59 N. J. L. 16 (1896). A corporate agent who signs the corporate name to a note without authority is liable personally thereon. *Frankland v. Johnson*, 147 Ill. 520 (1893). An officer making a corporation note without authority is personally liable thereon. *Miller v. Reynolds*, 92 Hun, 400 (1895). Where a note reads "We promise to pay," etc., and is signed "William T. Wallis, President, Geo. T. Smith, Treasurer," they are liable personally to a *bona fide* holder. *First Nat. Bank v. Stuetzer*, 80 Hun, 435 (1894); *aff'd*, 150 N. Y. 455. See also *Keokuk Falls Imp. Co. v. Kingsland, etc. Co.*, 5 Okla. 32 (1896). The president executing an ordinary guaranty in the name of the corporation without authority is personally liable thereon. *Nelligan v. Campbell*, 20 N. Y. Supp. 234 (1892). The incorporators may be liable on a note indorsed in the name of the corporation prior to the certificate of incorporation being filed with the secretary of state in Missouri, but the allegations must be



purchaser that such purchaser will be able to resell the land at a higher figure, the president is personally liable on such agreement, that evidently having been the intent. The intent controls and is gathered from the nature and circumstances of the transaction.<sup>1</sup> And where a note is signed by two persons with the words "president" and "treasurer" following their names, they are liable individually, unless the plaintiff had notice that the note was a corporate note. The fact that the plaintiff had brought another suit on another similar note against the corporation after the note in this case had been issued does not prove such notice.<sup>2</sup> A *bona fide* purchaser of a promissory note which does not disclose any corporate obligation, and is signed by the officers with their title attached, may enforce such note against the officers as individuals, if the holder has no notice of the fact that it was a corporate obligation. The fact that the name of the corporation is on the margin does not constitute notice.<sup>3</sup> A person who of his own accord goes to an office of a corporation, having its name on the door, and sells goods, cannot hold the agent liable therefor on the ground that he had not disclosed his principal.<sup>4</sup> If the president and manager makes a contract in his own name and the corporation acts on it, both of them are liable on it.<sup>5</sup> A suit against the president of a company to hold him liable personally on a note is not a bar to a subsequent suit against the company itself where the first suit was dismissed after answer was filed but without prejudice.<sup>6</sup> The liability of officers for signing the company's name to notes and contracts without authority is considered elsewhere.<sup>7</sup>

clear as to the exact dates. *Ryland v. Hollinger*, 117 Fed. Rep. 216 (1902). A note, reciting in its body that the corporation and the undersigned promise to pay, is binding on the latter individually, they actually having signed. *Nunnemacher v. Poss*, 116 Wis. 444 (1902). Where a corporation as lessee assigns the lease to trustees, the corporation is not liable for negligence in connection with the property, but the trustees are the parties to be sued. *Falardeau v. Boston, etc. Assoc.*, 182 Mass. 405 (1903). On this subject of liability see also §§ 245, 503c, *supra*, on the liability of trustees; § 705, *supra*, on the liability of promoters; § 508, *supra*, on the liability of officers of unincorporated associations; and § 888, *infra*, on the liability of committees.

<sup>1</sup> *Rowley v. Hager*, 127 Pac. Rep. 36 (Oreg. 1912).

<sup>2</sup> *First Nat. Bank v. Wallis*, 150 N. Y. 455 (1896). Where a note is signed by an individual followed by the words "Prest. Mt. Carmel Lgt. & Water Co.," and the corporate seal is affixed, the presumption is that he is not personally liable thereon. *Reed v. Fleming*, 209 Ill. 390 (1904).

<sup>3</sup> *Casco Nat. Bank v. Clark*, 139 N. N. 307 (1893); *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314 (1893).

<sup>4</sup> *Donohue v. Watson*, 72 N. Y. Misc. Rep. 56 (1911).

<sup>5</sup> *Bryant Lumber Co. v. Crist*, 87 Ark. 434 (1908). Where a property owner sells a right of way for a railroad to its agent personally, and to others whom he might authorize, the latter is personally liable for the price. *Polk v. Haworth*, 95 N. E. Rep. 332 (Ind. 1911).

<sup>6</sup> *Goldberger Iron Co. v. Cincinnati, etc. Co.*, 154 S. W. Rep. 374 (Ky. 1913).

<sup>7</sup> See §§ 682 and 715-720, *supra*. *De*



§ 725. *Requirements by charter or by-laws that contracts shall be made by certain officers or with certain formalities — Right of party contracting with corporation to rely on proper corporate action having been taken.* — It has been held that, where the charter prescribes that corporate contracts shall be signed by certain officers, a contract that is signed by only a part of them is not enforceable, even in *bona fide* hands.<sup>1</sup> But the harshness and the inconvenience

*facto* officers are not personally liable on a corporate note issued by their authority. *Potwin v. Greenwald*, 123 Ill. App. 34 (1905).

<sup>1</sup> *Safford v. Wyckoff*, 4 Hill, 442 (1842); *Head v. Providence Ins. Co.*, 2 Cranch, 127 (1804); *Badger v. American Ins. Co.*, 103 Mass. 244 (1869); *Dawes v. North River Ins. Co.*, 7 Cow. 462 (1827); *Hill v. Manchester, etc. Co.*, 2 Nev. & M. 573 (1833); s. c., 5 B. & Ad. 866; *Corn Exchange Bank v. Cumberland Coal Co.*, 1 Bosw. 436 (1857). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. *Holcomb v. Bridge Co.*, 9 N. J. Eq. 457 (1853). A corporate deed not countersigned by the secretary as required by statute is void as against a subsequent levy of execution. *Galloway v. Hamilton*, 68 Wis. 651 (1887). Where the articles prohibit a purchase on credit, a vendor who knew it cannot recover. *Hutchin v. Kent*, 8 Mich. 526 (1860). All persons who deal with a corporation are conclusively presumed to know the contents of the certificate of incorporation. *Butler v. Beach*, 82 Conn. 417 (1909). A mortgagee is chargeable with knowledge of the fact that the statute required three directors, and that the company had only two directors when the mortgage was authorized. *Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). Where the statute requires corporate contracts to be executed in a certain way, a contract not so executed cannot be enforced, although probably a *quantum meruit* would lie. *Curtis v. Piedmont, etc. Co.*, 109 N. C. 401 (1891). Where the charter provides that property shall be purchased by five trustees,

a purchase-money mortgage executed by the president and secretary, not sealed with the corporate seal and not authorized by the corporation, is void. *McElroy v. Nucleus Assoc.*, 131 Pa. St. 393 (1890). But where a statute prohibited transfers of securities over \$1,000 in value by the cashier, unless the directors had previously authorized, a director taking such securities without there being a previous authorization takes nothing by the transfer and cannot recover back what he paid therefor, the corporation being in a receiver's hands. *Gillet v. Phillips*, 13 N. Y. 114 (1855). Cf. *Atkinson v. Rochester, etc. Co.*, 114 N. Y. 168 (1889). Where the charter prohibits the directors making a contract for over \$250, unless a stockholders' meeting authorizes the same, a contract for \$2,000 without such authorization is void. *Georgetown, etc. Co. v. Central, etc. Co.*, 34 S. W. Rep. 435 (Ky. 1896). See *Isham v. Bennington*, 19 Vt. 230 (1847), where the deed was signed by the president and failed to recite a resolution authorizing it, and was held void. Where the charter prescribes who may be the corporate agents for particular purposes, the provision is a limitation upon the power of the corporation, and it cannot appoint other agents for such purposes. *Washington Turnpike v. Cullen*, 8 Serg. & R. (Pa.) 517, 521 (1822). And see *U. S. Bank v. Dandridge*, 12 Wheat. 64, 113 (1827); *Royalton v. Royalton Turnp. Co.*, 14 Vt. 311 (1842); *Union Turnpike v. Jenkins*, 1 Caines, 381, 391 (1803); *Beatty v. Marine Ins. Co.*, 2 Johns. 109 (1807); *Commonwealth v. St. Mary's Church*, 6 Serg. & R. (Pa.) 508 (1821); *Conro v. Port Henry Iron Co.*, 12 Barb. 27 (1851); *Re General, etc. Co.*, 38 L. J. (Ch.) 320 (1869). See



of this rule have caused it to be widely departed from and practically abandoned.<sup>1</sup>

also L. R. 14 Eq. 507, where the general manager signed instead of two directors and the secretary. Time notes are void where the charter forbids all except demand notes. *Root v. Godard*, 3 McLean, 102 (1842); s. c., 20 Fed. Cas. 1159; *Root v. Wallace*, 4 McLean, 8 (1845); s. c., 20 Fed. Cas. 1167. The president cannot discount paper where the charter requires the board to pass on it. *Manderson v. Commercial Bank*, 28 Pa. St. 379 (1857). See also *British Assur. Co. v. Brown*, 12 C. B. 723 (1852); but here the contract, being unilateral, was held not to be within the statute; *Edwards v. Cameron's, etc. Co.*, 11 Eng. L. & Eq. 565 (1852) — an acceptance of a bill; *Halford v. Cameron's, etc. Ry.*, 16 Q. B. 442 (1851); *Andrews, etc. Co. v. Youngstown, etc. Co.*, 39 Fed. Rep. 353 (1889). A purchaser of stock in a corporation is bound to take notice of special provisions in its charter relative to liability. *Brown v. Morton*, 71 N. J. L. 26 (1904). Where by statute an association cannot incur a liability for over \$500 except by the signatures of two managers, it is not liable on a purchase of land by one, even though it has made payments and paid taxes on the land. *Geel v. Goulden*, 134 N. W. Rep. 484 (Mich. 1912).

<sup>1</sup> Quoted and approved in *Armstrong v. Stearns*, 156 Mich. 597 (1909). The custom of the corporation may have that effect. *Barnes v. Ontario Bank*, 19 N. Y. 152 (1859); *Bulkley v. Derby Fishing Co.*, 2 Conn. 252 (1817); *Kilgore v. Bulkley*, 14 Conn. 362 (1841); *Kenner v. Lexington, etc. Mfg. Co.*, 91 N. C. 421 (1884), holding also that the provision must be pleaded; *Witte v. Derby Fishing Co.*, 2 Conn. 260 (1817). If the corporation ratifies or receives the benefits of the contract, the contract is valid. *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875); *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *Merchants' Bank v. Central Bank*, 1 Ga. 418 (1846). Even though the charter requires corporate notes to be signed by the presi-

dent and secretary, yet a note signed by the secretary alone is sufficient if that has been the custom of the company. Moreover, a pledge of property to secure the note is good, even though the note is void. *Blanc v. Germania Nat. Bank*, 114 La. 739 (1905). A *bona fide* purchaser of bonds is protected against the defense that they were issued illegally and in violation of statutory provisions, the issue itself having been authorized. *Webb v. Herne Bay*, L. R. 5 Q. B. 642 (1870). A substantial compliance with a statutory provision that bills of exchange must be accepted by the corporation in a certain way is sufficient. *Halford v. Cameron's, etc. Ry.*, 16 Q. B. 442 (1851). In regard to the method in which New York religious corporations contract for the services of the minister, see *Landers v. Frank, etc. Church*, 97 N. Y. 119 (1884). A statute requiring that no contract shall be binding upon a corporation unless made in writing is held to refer wholly to contracts executory. *Foulke v. San Diego, etc. Ry.*, 51 Cal. 365 (1876); *Reuter v. Electric Tel. Co.*, 6 El. & B. 341 (1856). In this case an agreement of the chairman was held to have been ratified by the corporation, though the deed of settlement required the signatures of three directors to contracts of the kind in controversy. *Bargate v. Shortridge*, 5 H. L. Cas. 297 (1855). Although the statute says that deeds of a corporation shall be signed by the president, yet signature by the vice-president is sufficient. *Ballard v. Carmichael*, 83 Tex. 355 (1892). Although the statutes require contracts of corporations involving a liability of over \$100 to be in writing, and under the corporate seal, or signed by a corporate officer, yet a person performing work for the company may sue on a *quantum meruit*. *Roberts v. Deming, etc. Co.*, 111 N. C. 432 (1892). A charter provision as to certain officers signing documents may be disregarded. *Re Norwich, etc. Co.*, 22 Beav. 143 (1856), where three direc-



“Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.”<sup>1</sup> A mortgagee is not bound to inquire into the observ-

tors did not sign as required. The provision in Pennsylvania that certain corporations shall not make certain contracts except in writing signed by two directors does not apply to contracts made out of the state, and is waived if the corporation sues on the contract; and it does not apply to a contract executed on one side. *Park, etc. Co. v. Kelly Axe Mfg. Co.*, 49 Fed. Rep. 618 (1892). A corporate lease not *mala prohibita* nor *mala in se*, but informal in that all the statutory formalities were not complied with, supports an action for past-due rent. *Mayor, etc. v. Wylie*, 43 Hun, 547 (1887); *aff'd*, 122 N. Y. 663. A statute providing that the president and two other members of a corporation shall sign deeds does not exclude the common-law method. *Bason v. King's Mountain Min. Co.*, 90 N. C. 417 (1884). A statute requiring corporate contracts for over \$100 to be in writing does not apply to executed contracts. *Clowe v. Imperial, etc. Co.*, 114 N. C. 304 (1894). A provision in the charter that contracts beyond a certain amount must be executed in a certain way, or else ratified by the board of directors, is satisfied if all of the directors assent to the contract. *New York, etc. Co. v. Metropolitan Inv. Co.*, 10 N. Y. App. Div. 342 (1896). Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him. *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889). A statute providing that contracts signed by the president shall bind the company does not prevent the company being bound by an oral contract. *St. Joseph, etc. Co. v. Globe, etc. Co.*, 156 Ind. 665 (1901). Where the president has authority to make contracts, a secret agreement between him and the stockholders that he would not make certain contracts is not binding on a stranger dealing with the corporation.

*Heinze v. South, etc. Co.*, 109 Wis. 99 (1901). A deed of corporate land made by the president under his own name and seal is good when the statute said “the deed of the president.” *Warner v. Mower*, 11 Vt. 385 (1839). A statute authorizing a corporation to convey real estate by an agent appointed for the purpose does not exclude other means of conveyance, as by its officers. *Morris v. Keil*, 20 Minn. 531 (1874), where the deed was by a foreign corporation. And in general the ordinary contracts of the company may be made without observing this statutory provision as to what officers shall contract. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326 (1820); *Prince of Wales Ass. Co. v. Harding, El. & E.* 183 (1857); *Rockwell v. Elkhorn Bank*, 13 Wis. 653 (1861); *Merriek v. Burlington Plank-Road*, 11 Iowa, 74 (1860); *Dana v. Bank of St. Paul*, 4 Minn. 385 (1860); *De Groff v. American Linen T. Co.*, 21 N. Y. 124 (1860); *Creswell v. Lanahan*, 101 U. S. 347 (1879); *Kelley v. Mayor of Brooklyn*, 4 Hill, 263 (1843); *Moreland v. State Bank*, 1 Ill. 263 (1828); *South Carolina Bank v. Hammond*, 1 Rich. L. (S. C.) 281 (1845); *Boisgerard v. N. Y., etc. Co.*, 2 Sandf. Ch. 23 (1844). See also *Merritt v. Lambert, Hoffm. Ch.* 166 (1840), where title to land was taken in the president's name instead of the company's. *Cf. Farmers' Loan, etc. Co. v. Carroll*, 5 Barb. 613 (1849). See also *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868), where no previous authorization by the stockholders was obtained; *Agar v. Athenæum, etc. Soc.*, 3 C. B. (N. S.) 725 (1858), where a seal was required but was omitted; *Lindley, Companies*, p. 160.

<sup>1</sup> *Demings v. Supreme Lodge*, 131 N. Y. 522 (1892). The authority of officers in signing a note is presumed. *Gold, etc. Co. v. Dennis*, 121 Pac. Rep. 677 (Colo. 1912). See also *Campbell v. Argenta, etc. Co.*, 51 Fed. Rep. 1 (1892). A *bona fide* purchaser of a



ance of the rules and regulations of the company relative to the call of meetings.<sup>1</sup> Where the seal of the company has been affixed to a

negotiable corporation bond is protected in assuming that the acts of the corporation and relating to its management in the issue of the bonds have been complied with. *Hacken-sack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883); *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251, where the defense was set up that the stockholders had not voted on the matter, as required by statute. The court held that the regular execution of the corporate powers was conclusively presumed in favor of *bona fide* holders. A corporate lease which on its face was regularly executed and has been lived up to by the lessee, cannot be attacked by third persons on the ground that the board of directors did not authorize it or that they were irregularly elected or that their meeting was not duly called. *Chandler v. Hart*, 161 Cal. 405 (1911). Where the three directors owned all the stock and one as president assigned a patent application, and another director witnessed it, and the third had knowledge of it, and the assignee knew of no irregularity, the assignment was good, although no meeting was held. *United States, etc. Co. v. J. B. M. Electric Co.*, 194 Fed. Rep. 866 (1912). Purchasers are not affected by informalities in the notice of and the conducting of meetings. *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868). Under the negotiable instruments act a corporate note and mortgage, regular on its face, apparently issued in accordance with a resolution of the directors, cannot be defeated on the ground that the directors had not authorized it. *Wolf v. Zachary, etc. R. R.*, 128 La. 1092 (1911). A statutory provision that a liability over \$500 must be signed by at least two managers is satisfied by the minute-book showing authorization by all of the managers. *Howard v. Factory Land Co.*, 167 Mich. 251 (1911). It has been held that a purchaser of corporate securities may safely assume that all charter require-

ments in regard to votes relative to the securities have been complied with. *Royal British Bank v. Turquand*, 6 El. & B. 327 (1856); *Colonial Bank v. Willan*, L. R. 5 P. C. 417 (1874); *London, etc. Ry. v. M'Michael*, 5 Exch. 855 (1850), where the company sued for subscriptions; *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859), where the stockholders acquiesced. See also *Bank of U. S. v. Dandridge*, 12 Wheat. 64 (1827). But compare the cases under the New York statute requiring the written consent of stockholders before a mortgage can be made by certain corporations. § 779, *infra*. See also § 808, *infra*. Where directors have power to bind the company, "but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed." *Re Land Credit, etc. Co.*, L. R. 4 Ch. 460 (1869), where bills of exchange had been issued and the directors knew it and acquiesced. Where the statute requires the consent of the court to a mortgage, the mortgage cannot be foreclosed if such consent was not obtained. *Dudley v. Congregation of St. Francis*, N. Y. L. J., Sept. 2, 1891; s.c., 138 N. Y. 451 (1893).

<sup>1</sup> *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896). Where a mortgage is approved by all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement as required by statute. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). Even though the statutory notice of a stockholders' meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. *Atlantic, etc. Co. v. The Vigilancia*, 73 Fed. Rep. 452 (1896). Although the statute requires three directors, who shall be



mortgage by the secretary, the mortgagee need not inquire whether a quorum of the directors was present at the meeting and authorized the mortgage, nor whether the secretary was duly authorized to affix the seal, the court upholding the mortgage, although a quorum was not present when it was authorized.<sup>1</sup> Again, where a person sells land to a company relying on a resolution certified to by the officers to the effect that the purchase had been duly authorized, the company cannot afterwards repudiate the purchase on the ground that the directors' meeting was irregular and no quorum present.<sup>2</sup>

The supreme court of the United States lays down the rule as follows: "One who takes from a railroad or business corporation in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."<sup>3</sup>

These rules, however, do not apply to usurpations of authority by

stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), rev'g *Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894).

<sup>1</sup> *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced. *Savage v. Miller*, 56 N. J. Eq. 432 (1897). A corporation cannot defend against a mortgage and bonds where it received the consideration and its seal was attached and the mortgage and bonds were apparently signed by its president and secretary with the authority of the board of directors, the mortgagee having no notice of any defects. *Clearwater, etc. Bank v. Bagley, etc. Tel. Co.*, 116 Minn. 4 (1911). A mortgagee need not inquire whether a resolution of the directors authorizing a mortgage, and recited therein, has been actually passed by them. *Manhattan Hardware Co. v. Roland*, 128 Pa. St. 119 (1889). Where a mort-

gage on its face has been regularly executed it is not necessary in a foreclosure suit to prove a resolution of the board of directors authorizing it, proof of delivery and the payment of consideration to the corporation having been given. *Reed v. Helois, etc. Co.*, 64 N. J. Eq. 231 (1903). See also §§ 768, 808, *infra*, and § 712, *supra*.

<sup>2</sup> *Montreal, etc. Co. v. Robert*, [1906] A. C. 196.

<sup>3</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

A *bona fide* purchaser of corporate bonds is entitled "to presume that all necessary preliminaries not required to be a matter of public record have been properly performed," and hence it is no defense that the directors met out of the state when they authorized the mortgage securing the issue. *Schultze v. Van Doren*, 64 N. J. Eq. 465 (1902). Where the board of directors have power to borrow money and issue debentures, and a debenture is issued in due form on its face, a



corporate officers.<sup>1</sup> As already explained, the authority of the president, secretary, and treasurer, and other officers to make contracts for the corporation is exceedingly limited.<sup>2</sup> They must have special authority from the board of directors. Hence the mere fact that they have signed the corporate name to a contract and affixed the corporate seal does not make the instrument binding on the corporation. It raises a presumption,<sup>3</sup> but this presumption may be overthrown. Consequently it is difficult to lay down definite rules as to when a corporation is and when it is not bound by a contract which apparently has been regularly executed by the corporation through its proper officers. The tendency is to hold the corporation liable, inasmuch as it selects its own officers and should be, to a certain extent, responsible for their acts in signing the corporate name and attaching the corporate seal to contracts. Where the charter provides that certain contracts may be made only after an act has been performed by the company, a third person may rely on the company's representation that the act has been done.<sup>4</sup> A by-law requiring that contracts be made only by certain officers, or that certain formalities shall be observed, is of little avail as against outside parties. Persons contracting with the corporation are not bound to know of the by-law, and the courts are reluctant to invalidate a contract by reason of it.<sup>5</sup>

*bona fide* holder thereof is protected, although the company had not been fully organized and no directors had been appointed and no resolutions passed by them. *Duck v. Tower, etc. Co.*, [1901] 2 K. B. 314. Where a person loans money to a corporation and pays it over to the secretary and takes the note of the company executed by the president and secretary, the note is good, even though they took the money and used it to pay for stock in another corporation. *Allen v. West Point, etc. Co.*, 132 Ala. 292 (1902). Where the secretary and treasurer and a director have been allowed to transact the business of the company and they borrow money for the company and give the company's bond and mortgage therefor, and produce a certified copy of a resolution apparently passed by the board of directors, the lender may rely on such certified copy, even though it afterwards turns out to have been unauthorized. *Hutchison v. Rock Hill, etc. Co.*, 65 S. C. 45 (1902). A holder of corporate bonds issued without author-

ity may nevertheless be protected in equity. *Roberts v. Hughes Co.*, 83 Atl. Rep. 807 (Vt. 1912).

<sup>1</sup> Quoted and approved in *St. Vincent College v. Hallett*, 201 Fed. Rep. 471, 476 (1912).

<sup>2</sup> See §§ 712-720, *supra*.

<sup>3</sup> See § 722, *supra*.

<sup>4</sup> *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883), where bonds were to be issued only after a certain amount of the capital stock had been paid in; *Royal British Bank v. Turquand*, 5 El. & B. 248 (1855), *aff'd* 6 El. & B. 327, where a resolution was to precede all contracts. See also *Ex parte American, etc. Co.*, 3 De G., J. & S. 147 (1865), and *Prince of Wales Ass. Co. v. Harding, El. & E.* 183 (1857). See also *Akin v. Blanchard*, 32 Barb. 527 (1860); *Kingsley v. New England, etc. Ins. Co.*, 62 Mass. 393 (1851); *Union, etc. Ins. Co. v. White*, 106 Ill. 67 (1883); *Irvine v. Union Bank of Australia*, L. R. 2 App. Cas. 366 (1877).

<sup>5</sup> *Fay v. Noble*, 66 Mass. 1 (1853); *Ten Broeck v. Winn, etc. Co.*, 20 Mo.



A limitation by by-law that no corporate liability shall be incurred unless expressly authorized by the directors does not invalidate corporate

App. 19 (1885); *Walker v. Wilmington, etc. R. R.*, 26 S. C. 80 (1887); *Bank v. Cresson*, 12 Serg. & R. (Pa.) 306 (1825); *Manville v. Belden, etc. Co.*, 17 Fed. Rep. 425 (1883); *Morrill v. Segar, etc. Co.*, 32 Hun, 543 (1884); *Samuel v. Holladay*, 1 Woolw. 400 (1869); s. c., 21 Fed. Cas. 306; *Mechanics' Bank v. Smith*, 19 Johns. 115 (1821). A *bona fide* pledgee of a certificate of stock is not bound to know that the corporation has a by-law giving it a lien on the stock for the debts of the stockholder of record. *Just v. State Sav. Bank*, 132 Mich. 600 (1903). A pledgee or transferee of a certificate of stock is not bound to take notice of a by-law giving the corporation a lien on the stock unless the by-law appears on the face of the certificate. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575 (1904). The superintendent of a water-works company has inherent authority to give special rates as to water and the company is bound, even though there was a by-law limiting his authority, which by-law, however, is not known to the other party to the contract. *Milledgeville, etc. Co. v. Edwards*, 121 Ga. 555 (1904). A lien created by articles of association of a bank, being the same as by-laws, is not good as against a *bona fide* pledgee of the certificate of stock where the certificate does not refer to such articles of association nor to the lien. *Lyman v. State Bank, etc.*, 81 N. Y. App. Div. 367 (1903); *aff'd*, 179 N. Y. 577. A person taking a lease from the corporation, represented by its president, who had been allowed to make leases without action of the board of directors, is not bound to know that the by-laws limited the powers of the president. *Pine, etc. Corporation v. Columbia, etc. Co.*, 106 Va. 810 (1907). By-laws limiting power are not notice. *Rosenbaum v. Gilliam*, 101 Mo. App. 126 (1903). Even though a by-law requires notes to be signed by the president and countersigned by the secretary and treasurer, yet if they are signed by

the latter two and indorsed by the president individually, that is sufficient. *Johnson v. Waxelbaum Co.*, 1 Ga. App. 511 (1907). A purchaser of goods from the manager of sales of a manufacturing company is not bound to know of the restrictions on his authority by the by-laws. *Barber v. Stromberg, etc. Co.*, 81 Neb. 517 (1908). A person contracting with a corporation is not bound to know that a by-law requires that corporate contracts of a certain kind shall be approved by the board of directors. *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354 (1898). A person contracting with a corporation is not bound to take notice of a by-law requiring the approval of the president. *Allison v. Tennessee, etc. Co.*, 46 S. W. Rep. 348 (Tenn. 1897). A corporation which indorses a note and obtains the money thereon cannot defend against the indorsement on the ground that it was not made strictly in accordance with its by-laws. *First Nat. Bank, etc. v. Eureka, etc. Co.*, 123 N. C. 24 (1898). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to an assignment for the benefit of creditors. *Goetz v. Knie*, 103 Wis. 366 (1899). Even though the by-laws require the president and treasurer to sign notes, yet if the president and secretary have been accustomed to sign such notes, the notes so signed are valid and may be enforced. *Produce, etc. Co. v. Bieberbach*, 176 Mass. 577 (1900). A person contracting with a corporation is not bound to know that a by-law requires that corporate contracts of a certain kind shall be approved by the board of directors. *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354 (1898). A person who receives in good faith a note of the corporation is not bound to know that a by-law required the approval of two members of the executive committee to such note. *Lyndon Sav. Bank v. International Co.*, 75 Vt. 224 (1903). A by-law limiting the



contracts made by agents acting "within the apparent scope of the agency."<sup>1</sup> A by-law limiting the power of the general manager is not

authority of an officer is not notice to a purchaser from such officer. *Domestic, etc. Assoc. v. Guadiano*, 195 Ill. 222 (1902). A company is bound by the customary contracts of its general freight agent, though he does not obtain the approval of the president as required by the by-laws. *Medbury v. New York, etc. R. R.*, 26 Barb. 564 (1858). *Contra*; *Susquehanna Ins. Co. v. Perrin*, 7 Watts & S. (Pa.) 348 (1884). A by-law that contracts for over a year can be made by the directors only does not bind a person who, without knowledge thereof, makes a longer contract with the general manager. *Moyer v. East Shore Term. Co.*, 41 S. C. 300 (1894). The treasurer cannot make a corporate note good by his sole signature where the by-laws require the signature of the president also. *Re Milward-Cliff Cracker Co.*, 161 Pa. St. 157 (1894). A by-law requiring contracts to be signed by a certain officer does not invalidate a contract signed by another officer if the party contracting had no knowledge of the by-law. *Smith v. Martin, etc. Co.*, 19 N. Y. Supp. 285 (1892). If the company receives the money on a note with knowledge, it cannot set up that the note was not signed by the treasurer as required by the by-laws. *Grant v. Treadwell Co.*, 1 N. Y. App. Div. 367 (1896). The failure of the treasurer to sign a note as required by the by-laws does not avoid the note in *bona fide* hands. *National Spraker Bank v. Treadwell Co.*, 80 Hun, 363 (1894). The general manager may sell a part of the product, even though a by-law requires the consent of the president. *Cone v. Empire Plaid Mills*, 12 N. Y. App. Div. 314 (1896). Although the by-laws require the secretary to sign notes, yet, if the treasurer is ac-

customed to sign them, notes signed by him are good. *Milbank v. De Riesthal*, 82 Hun, 537 (1894). So also as to notes signed by the president only, when the by-laws require the treasurer to sign also. *Grant v. Treadwell Co.*, 82 Hun, 591 (1894). A person contracting with a corporation is not bound to know that a by-law prohibits the officers from borrowing money except by order of the board of directors. *Arapahoe, etc. Co. v. Stevens*, 13 Colo. 534 (1889). A by-law that all notes shall be made to the order of the company may be disregarded. *Stewart v. St. Louis, etc. R. R.*, 41 Fed. Rep. 736 (1887). Secret instructions limiting the apparent power of a general manager to contract do not affect strangers. *Benesch v. John Hancock, etc. Co.*, 11 N. Y. Supp. 348 (1890). Officers intrusted with the management of the corporate business are general agents, and private restrictions imposed by the corporation are immaterial against third persons acting on the faith of the agency. *Grafius v. Land Co.*, 3 Phila. 447 (1859). Where the by-laws provided that no contract of the corporation involving a liability of over \$500 shall be voted unless signed by the president and treasurer and sealed with the corporate seal, a lease to the corporation on a rental of over \$500, and signed by the president alone, was held to be void. In this case it seems that no proof of even an apparent authority of the president was given: *Bohm v. Loewer's, etc. Co.*, 9 N. Y. Supp. 514 (1890); *Johnston v. Milwaukee, etc. Co.*, 46 Neb. 480 (1895). A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do

<sup>1</sup> *Rathbun v. Snow*, 123 N. Y. 343 (1890). A by-law prohibiting any officer from creating any liability, except by direct authority of the board of directors, is not binding on a per-

son who deals with the officers without notice of such by-law. *Lake Street, etc. R. R. v. Carmichael*, 184 Ill. 348 (1900). *American Natl. Bk. v. Wheeler, etc. Co.*, 141 N. W. Rep. 396 (S. Dak. 1913).



binding on a party who deals with the corporation through him without notice of such by-law.<sup>1</sup> And a by-law requiring a vote by the board of directors in financial transactions does not prevent a contract being made by inference.<sup>2</sup>

A by-law requiring the signature of the secretary to notes issued by the corporation does not bind a person taking a note without actual knowledge of the by-law, especially where it has been long in disuse.<sup>3</sup> A party contracting with a corporation is not bound to know of restrictions in the by-laws as to the method of authorizing and executing contracts, nor is he bound to take notice that a quorum of the directors was not present when the act was authorized.<sup>4</sup> An insurance company cannot avoid a policy on the ground that its regulations required the insured to be a member of the company, but that fact was not known to the insurer.<sup>5</sup>

A constitutional and statutory provision that debts shall be incurred only upon a vote of the stockholders does not apply to ordinary business debts.<sup>6</sup> This subject of statutory or by-law requirements that the

not know of it. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). The question of the regularity of the action of corporate agents and officers in making contracts, and more especially of waiving provisions in contracts in violation of the rules, has frequently arisen in insurance policies where provisions have been waived orally or without the consent of specified officers. *Carrugi v. Atlantic, etc. Co.*, 40 Ga. 135 (1869). An insurance policy is good although not sealed and without a clause exempting the stockholder from liability as required by the by-laws. *Re Athenæum, etc. Soc.*, 4 K. & J. 549 (1858). The same question has also arisen in regard to the contracts of municipal corporations.

<sup>1</sup> *Hagerstown Brewing Co. v. Gates*, 117 Md. 348 (1912). 86 Atl. Rep. 1093.

<sup>2</sup> *North Anson Lumber Co. v. Smith*, 209 Mass. 333 (1911).

<sup>3</sup> *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890). Even though by resolution of the board of directors the signature of the general manager is necessary to a note and the treasurer forges such signature, yet if the secretary attaches the seal and attests to the same, the note is good in *bona fide* hands. *Merchants', etc. Co. v. Lufkin, etc. Bank*, 34 Tex. Civ. App. 551 (1904). A third party cannot

object that a corporate lease was signed by the secretary instead of by the president, as required by the by-laws. *Chandler v. Hart*, 161 Cal. 405 (1911).

<sup>4</sup> *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. The directors may authorize a five-year lease even though the by-laws require all conveyances to be approved by the stockholders. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911). See also § 808, *infra*.

<sup>5</sup> *Timberlake v. Supreme Commandery, etc.*, 208 Mass. 411 (1911).

<sup>6</sup> *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889). Under a charter power to receive, in payment for stock, property "for the advancement of the purposes for which" the corporation was organized, a trust company may receive stock in a savings association; and even though by statute the payment of stock by property must first be authorized by the stockholders, yet if the corporation receives the stock and pledges it and receives a dividend thereon and retains it two years until it depreciates in value, it cannot then repudiate the transaction. *Southern Trust Co. v. Yeatman*, 130 Fed. Rep. 798 (1904); *aff'd*, 134 Fed. Rep. 810. Where a company takes over the property of



stockholders shall assent to the issue of obligations is considered elsewhere.<sup>1</sup> A written statement on a contract that the corporation will not be liable for misrepresentations of agents is binding, unless it is shown that the corporation received the money with knowledge of such misrepresentations.<sup>2</sup>

C. ADMISSIONS OF AND NOTICE TO THE VARIOUS OFFICERS AND AGENTS OF A CORPORATION.

§ 726. *Admissions and declarations of a director, president, cashier, general manager, treasurer, agent, or stockholder as regards the corporation.* — This subject is closely identified with the questions discussed in preceding sections. If a particular officer or agent has power to represent or contract for a corporation, he may in most cases bind the company by his admissions or declarations in regard thereto. But his power to do so must be shown.

The law is clear that the admissions of a stockholder do not bind the corporation.<sup>3</sup> The board of directors acting as a board may bind the

another company and the president delivers goods in payment of debts of the latter with the knowledge and consent of the officers and directors of the purchasing company, such payments are legal, and the statutes of Pennsylvania where such corporations existed, requiring stockholders' consent to the incurring of debts, do not apply. *Curtis v. Natalie, etc. Co.*, 89 N. Y. App. Div. 61 (1903); *aff'd*, 181 N. Y. 543. A provision that corporate debts shall not be increased except on a vote of the stockholders, etc., does not apply to ordinary debts in the usual course of business; neither does it prevent the giving of a mortgage in the ordinary course of business. *West & Co. v. Dyson*, 79 Atl. Rep. 782 (Penn. 1911).

<sup>1</sup> See § 808, *infra*. Even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, but a purchaser with notice cannot enforce such guaranty. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899), the court saying: "The dis-

inction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

<sup>2</sup> *Butler v. Standard, etc. Co.*, 122 Ga. 371 (1905).

<sup>3</sup> *Polleys v. Ocean Ins. Co.*, 14 Me. 141 (1837); *Mitchell v. Rome R. R.*, 17 Ga. 574, 586 (1855); *Fairfield, etc. Co. v. Thorp*, 13 Conn. 173 (1839); *Re Kip*, 1 Paige, 601 (1829); *Soper v. Buffalo, etc. R. R.*, 19 Barb. 310 (1855); *Hartford Bank v. Hart*, 3 Day (Conn.), 491, 495 (1807); *Morrell v. Dixfield*, 30 Me. 157 (1849); *City Bank v. Bateman*, 7 Har. & J. (Md.) 104 (1826); *Magill v. Kauffman*, 4 Serg. & R. (Pa.) 317, 321 (1818); *Stewart v. Huntington Bank*, 11 Serg. & R. (Pa.) 267, 269 (1824); *Hosack v. College of Physicians*, 5 Wend. 547 (1830); N. Y. Code Civ. Pro., § 839; *Angell & A. Corp.*, §§ 309, 657-660; 1 Phill. Ev. 487, note 134, saying, "The admissions of corporators or quasi-corporators in the United States are received or rejected upon much the same principle as governs in respect to admissions of agents." The frequently cited case of *Hartford Bank v. Hart*, 3 Day (Conn.), 491, 495 (1807), where it



company by admissions and declarations, but a single director cannot do so except as a special agent of the company.<sup>1</sup> Neither do the admissions or declarations of the president bind the company unless he has extra powers given to him;<sup>2</sup> nor ordinarily those of the secretary and

was offered to prove that the president and directors of a bank knew when they discounted a note that the indorsement was forged, and to prove this by the confessions of said president and directors, held, that the evidence was inadmissible. The admissions of a stockholder may be admissible as against him, but not as against others. *Starr, etc. Ass'n v. North, etc. Ass'n*, 77 Conn. 83 (1904). Where one person owns the entire capital stock his admissions are binding on the corporation. *Rutz v. Obeare*, 15 Cal. App. 435 (1911).

<sup>1</sup> Quoted and approved in *Cannel Coal Co. v. Luna*, 144 S. W. Rep. 721 (Tex. 1912). *Magill v. Kauffman*, 4 Serg. & R. (Pa.) 317 (1818), holding that while acts and declarations of trustees and agents of the congregation in their official capacities are evidence against those whom they represent, yet their statements made not in the transaction of the business of their principal are not evidence. "A fact once admitted by a corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of any one who, in reliance upon it, has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as to an individual." *O'Leary v. Board of Education*, 93 N. Y. 1 (1883). A written acknowledgment by three of five directors, who were also officers, that work has been done for the corporation is binding on it. *Bingel v. Brown*, 43 Colo. 281 (1908). Admissions of a director who is also a member of the discount board of a bank do not bind the corporation unless he was a duly authorized agent. *East River Bank v. Hoyt*, 41 Barb. 441 (1864); *aff'd*, 32 N. Y. 119. A declaration of a director that a certain person is a corporate agent does not bind the com-

pany. *Florida, etc. R. R. v. Varnedoe*, 81 Ga. 175 (1888); *Stewart v. Huntington Bank*, 11 Serg. & R. (Pa.) 267 (1824), where certain declarations of bank officers as to the disposition to be made of certain collaterals were held not evidence against the bank. Reports to stockholders and directors do not bind the company by reason of that fact. *Hall v. Mobile, etc. R. R.*, 58 Ala. 10 (1877). The company is not bound by a director's declaration that an attorney would be paid. *Hillyer v. Overman, etc. Co.*, 6 Nev. 51 (1870). Nor as to the purpose of a fund. *Grayville, etc. R. R. v. Burnes*, 92 Ill. 302 (1879). See also, in general, *Peek v. Detroit, etc. Works*, 29 Mich. 313 (1874); and § 712, *supra*. A director and vice president of a bank is not presumed to have authority to bind the bank by his admissions. *Westminster Nat. Bank v. New England, etc.*, 73 N. H. 465 (1906). A declaration of a director is binding on the company when the company by its acts ratifies such declaration. *Guillaume v. Fruit Land Co.*, 48 Ore. 400 (1906).

<sup>2</sup> An admission by the president at a club a few days after an accident has occurred is not binding on the company. *Cobb v. United States Engineering, etc. Co.*, 191 N. Y. 475 (1908). The admissions of the president of the construction company which is operating the road are not admissible against the railroad company which is sued for an accident. *Chattanooga, etc. R. R. v. Liddell*, 85 Ga. 482 (1890). His admissions cannot create a liability. *Spyker v. Spence*, 8 Ala. 333 (1845); *Henry, etc. Co. v. Northern Bank*, 63 Ala. 527 (1879). A coal company is not bound by the act of its president in turning over to the company a personal contract between himself and a third person, and a statement by him that the company has ratified it is inadmissible. *Re Roanoke Furnace Co.*, 166 Fed. Rep.



treasurer;<sup>1</sup> nor those of a cashier — except as to matters in the ordinary course of his duties.<sup>2</sup>

944 (1909). The president's representation that \$70,000 had been paid for the plant, when in fact only \$50,000 had been paid, is material and sufficient to cancel the subscription. *Weissinger, etc. Co. v. Van Buren*, 135 Ky. 759 (1909). The admissions of the president are binding if he has charge of the business of the company. *Wales-Riggs Plantations v. Caston*, 152 S. W. Rep. 282 (Ark. 1912). The statement of the president that the board of directors had passed certain resolutions is not admissible. *Childs v. Ponder*, 117 Ga. 553 (1903). An admission by an officer in the performance of his duty is binding on the corporation. *Lynneburgh, etc. Co. v. Booker*, 103 Va. 594 (1905). Representations and declarations of the president who represented the company in the particular transaction are binding on it. *Marshall v. Columbia, etc. Co.*, 73 S. C. 241 (1906). In an action against a corporation for damages for conspiracy to injure plaintiff's business, the conduct and statements of the president may be shown. *American, etc. Co. v. Brown*, 101 S. W. Rep. 856 (Tex. 1907). The correspondence between a person and the corporate president, secretary, and treasurer on corporate business may be admissible in evidence. *Eagle, etc. Co. v. Hamilton*, 14 N. M. 271 (1907). Admissions of the president of a bank that it did not own a note which was assigned to it are not admissible. *Tuthill, etc. Co. v. Shaver, etc. Co.*, 35 Fed. Rep. 644 (1888). See also *City Bank v. Bateman*, 7 Har. & J. (Md.) 104 (1826), where a declara-

tion by the president of a bank to an inferior officer, that certain money which had been brought into the bank by one of the directors was the money of the plaintiff, was held not admissible. But his admissions may prove its actual indebtedness. *Hoag v. Lamont*, 60 N. Y. 96 (1875). And as an active agent his admissions may bind the company. *Northrup v. Mississippi Val. Ins. Co.*, 47 Mo. 435 (1871); *Spalding v. Susquehanna County Bank*, 9 Pa. St. 28 (1848). So, also, where the company itself first uses his admissions as evidence. *Western Union Tel. Co. v. Baltimore, etc. Tel. Co.*, 26 Fed. Rep. 55 (1885), the court saying: "A corporation can only speak through its officers and agents; and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation." The president's admissions of what is due a laborer are not good in enforcing a stockholder's statutory liability, unless he was acting as agent of the company. *Truesdell v. Chumar*, 75 Hun, 416 (1894). The statement of the president as to an accident, he not being present, is not admissible. *Lombard, etc. Ry. v. Christian*, 124 Pa. St. 114 (1889); *Ricketts v. Birmingham St. Ry.*, 85 Ala. 600 (1889). Under the Alabama statute, evidence of a person interested in the suit as to a conversation between him and the deceased president of a corporation is inadmissible. *Tabler v. Sheffield, etc. Co.*, 87 Ala. 305 (1889). See also § 716, *supra*.

<sup>1</sup> *Alexander v. Cauldwell*, 83 N. Y.

<sup>2</sup> Quoted and approved in *Cannel Co. v. Luna*, 144 S. W. Rep. 721, 722 (Tex. 1912). He cannot admit that the signature of the person to whom a certificate of deposit is issued is genuine, *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 96 (1845); nor that a new company is liable for the debts of an old one, *Wyman v. Hallowell, etc. Bank*, 14 Mass. 58 (1817); nor make representations as to an indorser's

responsibility, *Mapes v. Second Nat. Bank*, 80 Pa. St. 163 (1875). But he may admit to a surety that a note has been paid. *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116 (1871). The admissions of a cashier in a case to which the bank is not a party are not generally binding on the bank. *Harrison County v. State Sav. Bank*, 127 Iowa, 242 (1905).



The power of a superintendent to bind the company by his admissions and declarations depends on whether they pertain to his work and duties.<sup>1</sup> The president and managing agent of a corporation has authority to make admissions in regard to the fulfillment of contracts.<sup>2</sup> The above rules apply also to other agents of the corporation.<sup>3</sup> "The

480 (1881); *Tripp v. New, etc. Co.*, 137 Mass. 499 (1884), where the treasurer said that a condition had been performed; *Kalamazoo, etc. Co. v. McAlister*, 36 Mich. 327 (1877), where he stated a matter relative to a salary. A written statement by the secretary showing a balance due for wages is an admission good against the corporation as a matter of bookkeeping. *Smith v. Sinbad, etc. Co.*, 11 Cal. App. 253 (1909). The secretary's admissions or declarations do not bind the company unless accompanied by some authorized act. *Re Coventry, etc. Co.*, 166 Fed. Rep. 516 (1909). The secretary of a business corporation does not bind it by letters or documents signed by him unless he was authorized to bind the corporation in that way. *City of Chicago v. Stein*, 252 Ill. 409 (1911). Admissions or declarations of a secretary as to the amount due the corporation on a mortgage are not admissible unless it is shown that he was specially authorized to make them. *Johnston v. Elizabeth, etc. Assoc.*, 104 Pa. St. 394 (1883). A statement by the treasurer in reference to a bond which he had nothing to do with, such statement not being made in connection with the business of the company, is not admissible as an admission. *Hardwick, etc. Co. v. Drenan*, 72 Vt. 438 (1900). A declaration by the treasurer not made in connection with his duties is not admissible. *Stanton v. Baird, etc. Co.*, 132 Ala. 635 (1902). The secretary and assistant treasurer of a corporation has no authority to bind the corporation by an account rendered by him to a creditor of the corporation. *Harvey v. West Side, etc. Co.*, 13 Hun, 392 (1878). The assignee of a contractor's claim against a company cannot enforce it on the ground that at the time of assignment the secretary of the company represented that it

would be paid. *Barnett v. South London, etc. Ry.*, L. R. 18 Q. B. D. 815 (1887). In a suit of ejectment against a corporation, evidence that a corporate officer had tried to buy the land of plaintiff is not admissible as an admission by the corporation. *Mobile, etc. R. R. v. Cogsbill*, 85 Ala. 456 (1888). See also § 717, *supra*.

<sup>1</sup> The admissions of a superintendent that a reward offered by his company is to go to a certain person is not binding, *Blain v. Pacific Exp. Co.*, 69 Tex. 74 (1887); nor his representations as to the cost of mining, *Hanover, etc. Co. v. Ashland, etc. Co.*, 84 Pa. St. 279 (1877). But he may admit the amount of damages caused by a nuisance. *McGinness v. Adriatic Mills*, 116 Mass. 177 (1874). He may make admissions as to an assault made by an employee. *Malecek v. Tower, etc. Ry.*, 57 Mo. 17 (1874).

<sup>2</sup> *Bullock v. Consumers' Lumber Co.*, 31 Pac. Rep. 367 (Cal. 1892). In ascertaining the terms of an oral contract a memorandum dictated by the general manager may be admissible as an admission binding the company. *Pacific, etc. Co. v. North, etc. Co.*, 46 Oreg. 194 (1905). The general manager may testify as to whether a corporation is solvent or not. *Campbell v. Park*, 128 Iowa, 181 (1904).

<sup>3</sup> Their admissions in regard to who paid for water in a ditch are evidence as to ownership thereof. *Imboden v. Etowah, etc. Co.*, 70 Ga. 86 (1883). So, also, of a conductor as to a trunk, *Morse v. Connecticut, etc. R. R.*, 72 Mass. 450 (1856); of a freight agent relative to the delivery of freight, *Lane v. Boston, etc. R. R.*, 112 Mass. 455 (1873); and of a bridge-tender as to the proper way to pass through, *Toll, etc. Co. v. Betsworth*, 30 Conn. 380 (1862); but not of a road-master as to trees that were cut down, *Coyle v. Ball, etc. R. R.*, 11 W. Va. 94 (1877); nor as to an accident after it



declarations of an agent or officer of a corporation are not admissible, except when made as a part of the *res gestæ*, or in the performance of his duties as agent or officer."<sup>1</sup> It is of course elementary law that an agent's admissions made subsequently to the transaction are not admissible.<sup>2</sup>

The admissions and representations made by an agent of a corporation, acting within the scope of his authority and concerning matters intrusted to him, are binding upon the corporation.<sup>3</sup> There are a large

had happened, *McDermott v. Hannibal*, etc. R. R., 73 Mo. 516 (1881); nor of trainmen, *Adams v. Hannibal*, etc. R. R., 74 Mo. 553 (1881); nor of an engineer that a brakeman would be paid, *Stiles v. Western R. R.*, 49 Mass. 44 (1844); nor of a telegraph operator, *Sweatland v. Illinois*, etc. Tel. Co., 27 Iowa, 433 (1869); nor of an engineer as to an accident, *Robinson v. Fitchburg*, etc. R. R., 73 Mass. 92 (1856). The admissions of a contractor may bind the company. *Morris*, etc. R. R. v. *Green*, 15 N. J. Eq. 469 (1852). Declarations of agents made and known by the officers bind the corporation. *Toll-bridge Co. v. Betsworth*, 30 Conn. 380 (1862).

<sup>1</sup> *Cosgray v. New England P. Co.*, 22 N. Y. App. Div. 455 (1897). Admissions by an agent of a corporation are binding only when relative to matters under his charge and in respect to which he is authorized in the usual course of business to give information, and also when he is acting within his authority and during his agency, and pertaining to transactions pending when the admissions are made. *Case*, etc. *Works v. Pulsifer*, 79 Kan. 176 (1908).

<sup>2</sup> *Thalhimer v. Brinckerhoff*, 4 Wend. 394 (1830); *Packet Co. v. Clough*, 20 Wall. 528 (1874); *Waldele v. New York C. etc. R. R.*, 95 N. Y. 274 (1884). *Cobb v. United States Engineering*, etc. Co., 191 N. Y. 475 (1908). Declarations and admissions by the president as to past events are incompetent. *Zentner v. Oshkosh*, etc. Co., 126 Wis. 196 (1905). The admission of the president that the corporation owes a debt is not binding, where the admission is not made in connection with the debt. *Robins*, etc. Co. v. *Murdoch*, 69 Kan. 596 (1904). Ad-

missions by a general manager made after a personal injury of an employee are not binding on the company. *Donnelly v. Younglove Lumber Co.*, 140 N. Y. App. Div. 846 (1910). Admissions of the president after an accident are not binding on the company. *Kaplan v. Friedman*, etc. Co., 148 N. Y. App. Div. 14 (1911). The statement of the president of a manufacturing corporation after an accident has occurred that the employee had a good case against the company is not admissible in the latter's suit for damages. *Lytton v. Marion Mfg. Co.*, 157 N. C. 331 (1911). Declarations by a corporate agent after the transaction are not admissible. *Henderson*, etc. Co. v. *Chapman & Co.*, 3 Ala. App. 296 (1911).

<sup>3</sup> Quoted and approved in *Taylor v. Sutherland*, etc. Co., 107 Va. 787 (1908), and *White Hall Co. v. Hall*, 102 W. Va. 284 (1903). *Fairfield*, etc. Co. v. *Thorpe*, 13 Conn. 173 (1839); *Stewart v. Huntington Bank*, 11 Serg. & R. (Pa.) 267 (1824); *Hayward v. Pilgrim Soc.*, 38 Mass. 270 (1838); *Sterling v. Marietta Co.*, 11 Serg. & R. (Pa.) 179 (1824); *Westmoreland Bank v. Klingensmith*, 7 Watts (Pa.), 523 (1838); *Harrisburg Bank v. Tyler*, 3 Watts & S. (Pa.) 377 (1842); *Farmers' Bank v. McKee*, 2 Pa. St. 321 (1845); *Hackney v. Allegheny Ins. Co.*, 4 Pa. St. 185 (1846); *Spalding v. Susquehanna County Bank*, 9 Pa. St. 28 (1848); *Crump v. U. S. Min. Co.*, 7 Gratt. (Va.) 352 (1851); *Baptist Church v. Brooklyn Ins. Co.*, 18 Barb. 69 (1854); *Devendorf v. Beardsley*, 23 Barb. 656 (1857); *Troy Ins. Co. v. Carpenter*, 4 Wis. 20 (1855); *Metropolis Bank v. Jones*, 8 Pet. 12 (1834); *Merchants' Bank v. Marine Bank*, 3 Gill (Md.), 96 (1845); *Hartford Bank v. Hart*, 3 Day (Conn.), 491 (1807); *Osgood v. Man-*



number of cases on this subject, and the question of how far the corporation is bound by the declarations of subordinate agents frequently arises in the courts. The general rule is very much the same as prevails in regard to admissions made by agents of a large business copartnership. If the admission pertained to matters within the scope of that particular agent's powers, or apparent powers, the principal is bound, otherwise it is not. Thus an inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock, must be made of officers having authority to speak for the corporation.<sup>1</sup> The statements and admissions of soliciting agents of a packing house corporation are admissible in a suit brought by the state to oust it from doing business in the state on the ground that it has violated the anti-trust act of the state.<sup>2</sup> Reports from officers and employees of a corporation to its executive officer in regard to an accident may be privileged communications.<sup>3</sup> But in a case involving fraud, the letters of officers of a corporation to one another may be put in evidence.<sup>4</sup> Even though the minute-

hattan Co., 3 Cow. 612 (1824); *Polleys v. Ocean Ins. Co.*, 14 Me. 141 (1837); *Ruby v. Abyssinian Soc.*, 15 Me. 306 (1838); *Oldtown Bank v. Houlton*, 21 Me. 507 (1842); *Holman v. Norfolk Bank*, 12 Ala. 369 (1847); *Soper v. Buffalo, etc. R. R.*, 19 Barb. 310 (1855); *Mitchell v. Rome R. R.*, 17 Ga. 574 (1855); *Toll-bridge Co. v. Betsworth*, 30 Conn. 380 (1862); *Morse v. Connecticut River R. R.*, 72 Mass. 450 (1856); *McGinness v. Adriatic Mills*, 116 Mass. 177 (1874). See also *Green's Brice's Ultra Vires*, pp. 500-504; *Wood, Railw. Law*, pp. 457-465. A railroad company building a bridge is not bound by statements of its agents as to the space between the arches where the agents have no connection with the erection of the bridge and made the statements to parties who were building rafts to float down the river. *Seaboard, etc. Ry. v. Sikes*, 4 Ga. App. 7 (1908). The declaration of an engineer of a locomotive is not admissible against the railroad company in an action by a passenger for damages for an injury, the question being as to the speed at which the engine was going. *Vicksburg, etc. R. R. v. O'Brien*, 119 U. S. 99 (1886). The statement of the general agent of an insurance company, sent by it to examine into the circumstances connected

with a death, to the effect that it would be better for the company to pay the policy, is not admissible in a suit on the policy. *Insurance Co. v. Malone*, 21 Wall. 152 (1874). Statements by an engineer in charge of a locomotive, made prior to an accident, as to the condition of the engine, are not admissible. *Louisville, etc. R. R. v. Stewart*, 56 Fed. Rep. 808 (1893). In the case *Anderson v. Rome, etc. R. R. Co.*, 54 N. Y. 334 (1873), the court held that it was error to admit the declarations or admissions of a track superintendent of the defendant relative to his knowledge of a defective rail which had caused an accident. An agent of a railroad corporation has no power to alter or make admissions in variation of a contract. *Sullivan v. Louisville, etc. R. R.*, 128 Ala. 77 (1901). A party claiming a contract with a corporation cannot testify that he made it with the agent of the corporation if the agent is dead at the time of the trial. *Florida, etc. Co. v. Usina*, 111 Ga. 697 (1900).

<sup>1</sup> *Browning v. Hinkle*, 48 Minn. 544 (1892).

<sup>2</sup> *State v. Armour Packing Co.*, 173 Mo. 356 (1903).

<sup>3</sup> *Ex parte Schoepf*, 74 Ohio St. 1 (1906). But see § 519, *supra*.

<sup>4</sup> *Weiss v. Haight, etc. Co.*, 148 Fed. Rep. 399 (1906).



book is in another state, yet this does not excuse failure to produce the minutes or a certified copy thereof, and hence the statements of officers of the company as to the contents of such minute-book are incompetent.<sup>1</sup> One who contracts with the authorized agent of a corporation is not a competent witness as to the contract or of the admissions and declarations of the agent, after the latter's death.<sup>2</sup> Statements by a receiver are not necessarily binding on stockholders and creditors contesting the validity of a transfer of property prior to the receivership.<sup>3</sup>

§ 727. *Notice to an incorporator, stockholder, agent, superintendent, treasurer, secretary, cashier, president, or director — When does their knowledge of facts constitute a notice of those facts to the corporation — Corporate books as evidence against directors and stockholders — Notice of fraud perpetrated on the corporation.* — It is well settled that a corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators<sup>4</sup>

<sup>1</sup> Central, etc. Co. v. Sprague, etc. Co., 120 Fed. Rep. 925 (1902). See also §§ 11, 714, *supra*. A person sued by a corporation cannot testify in his own behalf as to communications with a deceased agent of the corporation, even though third persons were present. Dolvin v. American Harrow Co., 131 Ga. 300 (1908).

<sup>2</sup> Central Bank, etc. v. Thayer, 184 Mo. 61 (1904). See also § 11, *supra*.

<sup>3</sup> North Georgia, etc. Co. v. Clark, 76 S. E. Rep. 95 (Ga. 1912).

<sup>4</sup> A corporation is not bound to take notice of facts known to only part of the incorporators. Seeger, etc. Co. v. American Car Co., 171 Fed. Rep. 416 (1909). Where an owner of a patent makes a contract to assign it, but afterwards, instead of doing so, forms a corporation and transfers the patent to it, the corporation is protected in its title, although the patentee was one of the incorporators and also a director of the corporation. Davis, etc. Co. v. Davis, etc. Co., 20 Fed. Rep. 699 (1884). The knowledge of an incorporator, who afterwards becomes a director, of an equitable claim to real estate, is not notice to the corporation unless received by him while acting for the corporation or under circumstances which made it his duty to inform the corporation. Reed v. Munn, 148 Fed. Rep. 737

(1906). Upon the reorganization of a corporation after bankruptcy the new company is not bound by the knowledge of its corporators as to the existence of incumbrances on property purchased from the old company. Burt v. Batavia Paper Mfg. Co., 86 Ill. 66 (1877). "If false and fraudulent representations are made to persons who afterwards become officers or agents of a corporation, and the corporation acts on the faith of such representations and is thereby defrauded, an action will lie in favor of the corporation for the damages thus sustained." Iowa, etc. Co. v. American, etc. Co., 32 Fed. Rep. 735 (1887). Notice before incorporation to one who afterwards becomes an officer of the corporation is not notice to the latter. Brennan v. Emery, etc. Co., 99 Fed. Rep. 971 (1900). Where the officers of a corporation in their individual capacity took part in a transaction before the corporation was formed, whereby a business was taken over by the corporation on an agreement that the title should not pass until payment was made, the corporation takes with notice of the facts. Adams v. Roscoe, etc. Co., 159 N. Y. 176 (1899). Knowledge of the corporators is not notice to the corporation. Grand Rapids, etc. Co. v. Grand Hotel, etc. Co., 11 Wyo. 128 (1902).



or stockholders<sup>1</sup> or clerk,<sup>2</sup> or promoters.<sup>3</sup> But the corporation has notice of facts which came to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control.<sup>4</sup> Thus, a corporation has been charged with notice of facts which were known at the time to its agent,<sup>5</sup>

<sup>1</sup> A company formed to purchase a patent-right is protected in its title, although some of its promoters and stockholders knew of an infirmity in the title. *Racine, etc. Co. v. Joliet, etc. Co.*, 27 Fed. Rep. 367, 375 (1886); *Housatonic Bank v. Martin*, 42 Mass. 294, 308 (1840), where it was unsuccessfully sought by a mortgagor to defeat his deed by a subsequent assignment, on the ground that members of the corporation mortgagee had knowledge of the assignment; *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393 (1842), where, in a contest over title to land, evidence was held properly excluded which depended on the fact that a party was a stockholder in a company, and constructive notice of adverse claims was thereby sought to be established against the company. See *Fairfield Sav. Bank v. Chase*, 72 Me. 226 (1881). Knowledge of stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue unless inequitable or rights of third persons have intervened. *Pacific R. R. v. Missouri Pac. R. R.*, 111 U. S. 505 (1884). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. *East St. Louis, etc. Ry. v. Jarvis*, 92 Fed. Rep. 735 (1899). A record of a stockholders' meeting showing acceptance of an auditor's report is an admission of his employment. *Clarke v. Warwick, etc. Co.*, 174 Mass. 434 (1899).

<sup>2</sup> Knowledge of a bank clerk of the place of residence of a party chargeable as indorser is not notice to the bank. *Goodloe v. Godley*, 21 Miss. 233 (1849).

<sup>3</sup> The knowledge of the promoters is not notice to the corporation. *Ropes v. Nilan*, 44 Mont. 238 (1911).

<sup>4</sup> Quoted and approved in *Zeigler v. Valley Coal Co.*, 150 Mich. 82 (1907). The knowledge of an officer acquired in transactions affecting the corporate business is notice to the corporation. *Atlantic Trust, etc. Co. v. Union Trust, etc. Corporation*, 111 Va. 574 (1911). The knowledge of a corporate agent that a rule of the corporation is not being complied with may be notice to the corporation itself, sufficient to show acquiescence in the non-compliance. *Central, etc. Ry. v. Mobley*, 6 Ga. App. 33 (1909). Notice to a partner of a corporate officer is not notice to the corporation. *Baskins v. Valdosta, etc. Co.*, 5 Ga. App. 600 (1909). Notice to a corporate officer is not notice to the corporation unless on a matter within the sphere of his duty and acquired while attending to the company's business. *McDermott v. Hayes*, 197 Fed. Rep. 129 (1912). The question of whether a company may be chargeable with notice may be a question of fact. *State v. People's Ice, etc. Co.*, 151 S. W. Rep. 101 (Mo. 1912).

<sup>5</sup> "Notice to one agent of a corporation, with respect to a matter covered by his agency, must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing." *Saint v. Wheeler, etc. Co.*, 95 Ala. 362 (1892). Notice to an agent, but not in the course of his business, is not notice to the corporation. *Willard v. Denise*, 50 N. J. Eq. 482 (1892). Where the duty of an employee of an electric light company is to see that the electric current is



who had charge of the transaction, or to a local agent,<sup>1</sup> or

turned off from houses that are being painted, notice to him that a house will be painted is notice to the company. *Baries v. Louisville, etc. Co.*, 118 Ky. 830 (1905). Notice to the attorney and president of the corporation is not notice to the corporation. *Wardlow v. Troy Oil Mill*, 74 S. C. 368 (1906). Where two corporations deal with each other through a common agent, the question of notice depends upon the circumstances of each case. *Lyndon, etc. Co. v. Lyndon, etc. Inst.*, 63 Vt. 581 (1891). The corporation is given notice of a breach of trust by an attorney in fact for the transfer of stock, the attorney being one of its directors. *Taft v. Presidio, etc. Co.*, 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). "In case of a corporation created for, and engaged in, trade or business, service of a notice on any officer or agent of the company whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is tantamount to personal service in case of a natural person." *State v. Felton*, 52 N. J. L. 161 (1889). The knowledge of an agent, whose powers are no greater than those of the master of a ship, is not notice to a corporation. *Craig v. Continental Ins. Co.*, 141 U. S. 638 (1891). In *Consolidated, etc. Co. v. Kansas, etc. Co.*, 45 Fed. Rep. 7 (1891), the court said: "Facts coming to the knowledge of an agent or an attorney while engaged about the business of his agency are, in law, presumed to be known to the principal or client." As to when a client is chargeable with knowledge of facts known to the attorney, see *Slattery v. Schwannecke*, 44 Hun. 75 (1887); aff'd, 118 N. Y. 543. A corporation taking an assignment of a patent without notice that another party was entitled to it is protected. *Averill v. Barber*, 6 N. Y. Supp. 255 (1889). Notice to a traveling salesman of a change in the firm is not notice to a corporation. *Neal v. M. E. Smith, etc. Co.*, 116 Fed. Rep. 20 (1902).

<sup>1</sup> Knowledge of a local insurance agent that the insured is insuring for his firm is notice to the company. *Keith v. Globe Ins. Co.*, 52 Ill. 518 (1869). Knowledge of a local agent that the insured had gone beyond the limits, and receipt of premiums thereafter, bind the company. *Wing v. Harvey*, 5 De G., M. & G. 265 (1854). Notice to an insurance company of a subsequent insurance was involved in *Schenck v. Mercer, etc. Ins. Co.*, 24 N. J. L. 447 (1854). See also, in general, as to insurance: *Troy, etc. Ins. Co. v. Carpenter*, 4 Wis. 20 (1855); *Bennett v. Maryland, etc. Co.*, 14 Blatchf. 422 (1878); s. c., 3 Fed. Cas. 229; *McEwen v. Montgomery, etc. Co.*, 5 Hill, 101 (1843). And see textbooks on insurance law. "Notice to an agent of a bank or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by such agent, acting for the corporation, within the scope of its authority, whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion." *Cragie v. Hadley*, 99 N. Y. 131 (1885); *Wood, Railw. Law*, pp. 457-465; *Smith v. Board, etc. Co.*, 38 Conn. 208 (1871). To this rule there are certain limitations more or less depending on the time of notice and the occasion of such notice; for example, while acting in the ordinary course of his employment as agent, notice to such agent of a corporation is notice to the corporation itself. But if such notice is given at an inopportune time, or upon an inappropriate occasion, constructive notice to the corporation may *ipso facto* be easily rebutted. *Seneca County Bank v. Neass*, 5 Denio, 329 (1848); *Holden v. New York, etc. Bank*, 72 N. Y. 294 (1878). It is well settled that presumptive notice to a principal by reason of knowledge of an agent or trustee interested in concealing the fact from his principal cannot be imputed to the principal. *Curtis v. Leavitt*, 15 N. Y. 194, 195



superintendent.<sup>1</sup> So also as regards the higher officers of the company. Thus, the company has been charged with notice of facts known to the treasurer,<sup>2</sup> secretary,<sup>3</sup> cashier,<sup>4</sup> and man-

(1857); *Commissioners v. Thayer*, 94 U. S. 631 (1876). This is equally true in the case of corporate agents. *Seneca County Bank v. Neass*, 5 Denio, 329 (1848). When the agent himself is the person charged with the fraud, notice to the principal through such an agent cannot be presumed, for it is the interest of the agent to conceal the facts from his principal. *Cave v. Cave*, L. R. 15 Ch. D. 639 (1880). Knowledge obtained by the corporate attorney and agent in another transaction does not bind the corporation. *Constant v. Rochester University*, 111 N. Y. 604 (1888); *Fairfield Sav. Bk. v. Chase*, 72 Me. 226 (1881). Notice to a bank clerk of matters not under his charge is not notice to the bank. *Goodloe v. Godley*, 21 Miss. 233 (1849).

<sup>1</sup> Knowledge of the general officers that an employee is incompetent is notice to the corporation, and it is liable for his negligence in running a train. *Pittsburgh, etc. Ry. v. Ruby*, 38 Ind. 294, 313 (1871). Knowledge of the company's supervising engineer that the contractors in the construction of the bridge are innocently omitting certain things is notice to the company. *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151 (1850). Knowledge of a superintendent of an unrecorded lien is not notice to his company to which he conveys the property so subject. *Wickersham v. Chicago, etc. Co.*, 18 Kan. 481 (1877). Knowledge by the superintendent of a coal mine of a dangerous roof is notice to the company. *Quincy, etc. Co. v. Hood*, 77 Ill. 68 (1875).

<sup>2</sup> *Hotchkiss, etc. Co. v. Union Nat. Bank*, 68 Fed. Rep. 76 (1895). A bank is not bound to take notice of the fact that its treasurer is misusing guardian funds of which he is guardian, although the account was with the bank. *Brookhouse v. Union, etc. Co.*, 73 N. H. 368 (1905). Where the treasurer of two corporations takes the funds of one and places them with the other to make good a defalcation

from the latter, the latter corporation is liable, since it is chargeable with the knowledge of its treasurer. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268 (1888). Payment to the treasurer, who enters the same on the books, is notice to the company, since the directors, if they did their duty, would know of such entry. *New England, etc. Co. v. Union, etc. Co.*, 4 Blatchf. 1 (1857); s. c., 18 Fed. Cas. 59.

<sup>3</sup> A corporation is not chargeable with notice that its secretary is indebted to it, and hence a bond given to it for his good behavior is not unenforceable by reason of a statement that he was not indebted to it. *American Bonding Co. v. Spokane, etc. Soc.*, 130 Fed. Rep. 737 (1904). Knowledge of the secretary that a vessel is being run, not by the owners, but by a third person, is notice to the corporation, and it cannot sue the owners for work done. *Ponchartrain R. R. v. Heirne*, 2 La. Ann. 129 (1847). Knowledge of the secretary that his wife, the owner of the stock, had pledged that stock, is not notice to the corporation. *Platt v. Birmingham, etc. Co.*, 41 Conn. 255 (1874). Notice to one acting for the secretary in his absence, and at his place of business, is as effectual as though given to the secretary himself. *McKenney v. Diamond, etc. Assoc.*, 8 Houst. (Del.) 557 (1889). Notice to the secretary, who is also a director, that a note given by the corporation had been assigned by the payee to another is sufficient notice. *Love v. Anchor, etc. Co.*, 45 Pac. Rep. 1044 (Cal. 1896). Where two companies have the same secretary notice to one of them is not necessarily notice to the other. *Re Fenwick, etc. Co.*, [1902] 1 Ch. 507.

<sup>4</sup> Where the treasurer of a company is cashier of a bank in which the company keeps an account and to cover up his defalcations in the bank he checks the company's funds to the bank, the bank is liable. *Emerado*,



ager.<sup>1</sup> Notice to the president of a bank may be notice to the

etc. *Co. v. Farmers' Bank*, 20 N. Dak. 270 (1910). A bank as a creditor of an insolvent corporation may enforce the subscription liability of stockholders, even though the stock was issued as fully paid with the knowledge of the cashier of the bank who was president of the company. *First Nat. Bank v. Northup*, 82 Kan. 638 (1910). Knowledge of the cashier and manager of a bank, acquired in the bank busi-

ness, that an unrecorded deed has been made, defeats the bank's deed. *Johnston v. Shortridge*, 93 Mo. 227 (1887). Even though the president of a company fraudulently executes notes to a bank in which he is cashier, the bank is not chargeable with notice thereof. *Produce, etc. Co. v. Bieberbach*, 176 Mass. 577 (1900). Knowledge by the cashier, who is also a director and manager of the bank, that it is insol-

<sup>1</sup> A company is not bound by the knowledge of its vice-president and general manager that its money has been fraudulently transferred by him to another company of which he is president and owns practically all the stock, and hence need not restore money which he has caused the other company to repay just before bankruptcy. *High v. Opalite Title Co.*, 184 Fed. Rep. 450 (1911). Knowledge that a person has, as secretary of one company, is not necessarily notice to another corporation in which he is manager. *Cherry v. First Texas etc. Co.*, 144 S. W. Rep. 306 (Tex. 1912). A corporation buying property from its general manager is not affected by his knowledge that he had not full title himself. *Georgia, etc. Ass'n. v. Crane*, 137 Ga. 50 (1911). Notice to the manager, president, and treasurer that snow and ice on a building owned by the corporation is doing damage, is notice to the corporation. *Bishop v. Readsboro, etc. Co.*, 81 Atl. Rep. 454 (Vt. 1911). Notice to a general managing agent was held to be notice to the corporation in *Robertson Lumber Co. v. Anderson*, 96 Minn. 527 (1905). Notice to a resident director and manager who was also the principal promoter and incorporator, is notice to the corporation. *California, etc. Co. v. Manley*, 10 Idaho, 786 (1905). Facts known to a sole manager and almost sole stockholder in a transaction for the joint benefit of the corporation and another, constitutes notice to the corporation itself. *Lea v. Iron, etc. Co.*, 147 Ala. 421 (1906). Where the general manager and secretary does the corporate business entirely as he sees

fit, his knowledge of facts is notice to the corporation. *Anderson v. Kinley*, 90 Iowa, 554 (1894). A pledgee is entitled to collect the dividends, and in some instances may do so, even though the stock is not transferred to him on the books, it being shown that the officers knew of the pledge. *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511 (1895). It may be a question of fact whether a sale of property to the corporation for stock was made, even though a certificate of stock was issued. The delivery of all the papers may have been in escrow. The knowledge of a promoter who then becomes general manager may be notice to the corporation. *Huron, etc. Co. v. Kittleson*, 4 S. Dak. 520 (1894). Notice prior to incorporation to a person who becomes an officer upon incorporation is not notice to the corporation, even though he transacts the business. *Taylor v. Calloway*, 7 Tex. Civ. App. 461 (1894). Although a managing director of one company is secretary of another company, yet knowledge that he has as to the latter company is not notice to the former company. *Re Hampshire Land Co.*, [1896] 2 Ch. 743. Notice to a managing director while acting as such, and affecting business under his charge, is notice to the company. *Dr. Jaeger's etc. Ltd. v. Walker & Sons*, 77 L. T. Rep. 180 (1897). Knowledge which a managing director had in regard to real estate three years prior to the organization of the corporation is not in itself notice to the corporation. *Red River, etc. Co. v. Smith*, 7 N. Dak. 235 (1898).



company unless he is interested on the other side of the transaction.<sup>1</sup> There are many conflicting decisions, however, on this subject of

vent, is notice to the bank, and hence a person who deposits money after the bank is hopelessly insolvent may recover it back on the ground that it was fraudulently received and no title passed. *Orme v. Baker*, 74 Ohio St. 337 (1906). Even though the stockholder has transferred his certificate, yet if the corporation has no knowledge of the fact it may acquire a lien thereafter, and prior to the time of its having knowledge, the transfer not having been made within sixty days as required by statute, and even though such stockholder is its cashier, it is not chargeable with notice on account of that fact. *Pueblo, etc. Bank v. Richardson*, 39 Colo. 319 (1907). Where the cashier is dealing with the bank himself, his knowledge is not notice to the bank, neither is the knowledge of a director whose father is interested in the transaction. *Central Bank, etc. v. Thayer*, 184 Mo. 61 (1904). It may be a question for the jury as to whether a bank has notice of facts known to its president and cashier, which facts they learned as officers of another corporation, which sold a note to the bank. *Iowa, etc. Bank v. Sherman, etc.*, 19 S. Dak. 238 (1905). The fact that a stockholder and the secretary in a corporation are the president and the cashier of a bank is not notice to the bank of facts known to the corporation. *Iowa Nat. Bank v. Sherman, etc.*, 17 S. Dak. 396 (1903). A trust company may enforce a mortgage given to it by an executor, even though the money was used by the latter in connection with the president and cashier of the trust company for their own individual purposes illegally. *Camden, etc. Co. v. Lord*, 67 N. J. Eq. 489 (1904). A bank cannot repudiate its satisfaction of a mortgage where its president and cashier took part in another capacity in the making of a new mortgage based on such satisfaction. *Harris v. American, etc. Assoc.*, 122 Ala. 545 (1899). Where a cashier and director in a bank borrow money from the bank on their note the bank is not chargeable

with notice of the relations between them. *First Nat. Bank, etc. v. Briggs' Assignees*, 70 Vt. 594 (1898). A bank may be a *bona fide* purchaser of a draft from its cashier who has notice of defenses. *Hummell v. Bank of Monroe*, 75 Iowa, 689 (1888). Knowledge of the cashier of a bank that stock received in pledge is trust stock is notice to the bank. *Loring v. Brodie*, 134 Mass. 453 (1883). See also *Second Nat. Bank v. Howe*, 40 Minn. 390 (1889). The cashier's knowledge of fraud in a note is notice to the company. *Fall, etc. Bank v. Sturtevant*, 66 Mass. 372 (1853). Notice to the cashier of acceptance of the bank to receive payment in bonds is good notice. *Branch Bank v. Steele*, 10 Ala. 915 (1846). Notice to a cashier that bank funds have been loaned is notice to the bank. *New Hope, etc. Co. v. Phenix Bank*, 3 N. Y. 156 (1849). Where the directors acquiesce in the cashier's assumption of exclusive management of the bank's business, they will be held chargeable with knowledge of such things as by proper diligence they might and should have known as to the condition of the business. *Martin v. Webb*, 110 U. S. 7 (1884). Knowledge of the cashier that a person turning in property to the bank is insolvent is notice to the bank. *Witters v. Sowles*, 32 Fed. Rep. 762 (1887). Notice to the cashier is notice to the bank. *Bank of St. Mary's v. Mumford*, 6 Ga. 44 (1849); *Trenton, etc. Co. v. Woodruff*, 2 N. J. Eq. 117 (1838). But knowledge obtained by the cashier outside of his duties is not notice to the bank (*dictum*). *Seneca Co. Bank v. Neass*, 5 Denio, 329, 337 (1848).

<sup>1</sup> *Louisville T. Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896). See s. c., 174 U. S. 552. Where the president is interested on the other side of the transaction his knowledge of facts is not notice to the corporation. *Seaverns v. Presbyterian, etc.*, 173 Ill. 414 (1898). The knowledge acquired by the president of a bank while acting for himself in the interest of



whether notice to the president is notice to the corporation, and in general the question may be said to turn largely on the particular facts in each case.<sup>1</sup> A corporation leasing its property is not

himself alone is not chargeable to the bank. First, etc. Bank *v. Skinner*, 10 Kan. App. 517 (1900). Notice to the president is notice to the bank in a bank transaction. *Fouche v. Merchants'*, etc. Bank, 110 Ga. 827 (1900). Knowledge of the president of a bank acquired by him as vice-president of a manufacturing company may not be binding on the bank. *Robertson v. Commercial, etc. Co.*, 153 S. W. Rep. 450 (Ky. 1913). A bank may enforce a note given by a person to the bank, even though it turns out that such note was an accommodation note, the real borrower being the president of the bank. *Richardson v. Watson*, 51 La. Ann. 1390 (1899). Where a bank knows that a stockholder has pledged his certificate of stock, the bank cannot claim a lien upon such stock for a debt incurred to the bank subsequently by the pledgor of the stock, even though the stock is not transferred on the books, and even though the statute requires that transfers should be made only on the books of the bank. But the fact that the pledgor was the cashier of the bank is not notice to the bank, nor is the fact that the president knew of the pledge notice to the bank where he took no active part in the management of the bank and was not acting for the bank when he learned of the pledge. *Curtime v. Crawford, etc. Bank*, 110 Fed. Rep. 830 (1901). A corporation is not bound by notice to an officer while acting for himself and not for the corporation. *Aycock, etc. Co. v. First Nat. Bank of Dothan*, 54 Fla. 604 (1907).

<sup>1</sup> The case *Kissam v. Anderson*, 145 U. S. 435 (1892), reversed the decision below on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payments by the broker to the president. A corporation to which the principal stockholder, incorporator, and president conveys land is a purchaser with notice unless it proves

the contrary. *Billings v. Aspen, etc. Co.*, 51 Fed. Rep. 338, 349 (1892). A lien of a bank on stock for a debt from a stockholder to the bank is subject to a pledge of the stock where such pledge was made before the debt was incurred, and the bank incurred the debt with knowledge of the pledge. Knowledge of the facts by the president is notice to the bank. *Curtime v. Crawford, etc. Bank*, 118 Fed. Rep. 390 (1902). The knowledge of the president of a bank that a check to himself had been made by a depositor is not notice to the bank. *Organized Charities v. Mansfield*, 82 Conn. 504 (1909). Even though the same person is president of a corporation and also of a financial institution, and signs a note of the former to the latter, his knowledge is not notice to the latter. *Chestnut, etc. Co. v. Record Pub. Co.*, 227 Pa. St. 235 (1910). A bank may collect the note of a corporation from an indorser thereof even though the president of the bank was president of the other corporation and agreed that the note should be indorsed by others, which was not done, it appearing that as president of the bank he did not represent it in this transaction, and was interested adversely to the bank. *American, etc. v. Ritz*, 70 W. Va. 409 (1912). The knowledge of the president of fraud in the issue of a note to the corporation is chargeable to the corporation which participated in the fraud. *First Nat. Bank v. Harvey*, 137 N. W. Rep. 365 (S. Dak. 1912). Where the president sells his own property to the company the company is not chargeable with notice of facts known to him. *Lee v. Elliott & Co.*, 75 S. E. Rep. 146 (Va. 1912). Knowledge of the president in a personal transaction between himself and his company is not notice to the corporation. *Roberts v. Hughes Co.*, 83 Atl. Rep. 807 (Vt. 1912). Knowledge of the president acting for himself and not for the corporation in



chargeable with knowledge that the lessee is forming an illegal monopoly, even though the president of the former executed the lease

regard to title to land is not notice to the corporation. *Teagarden v. Godley Lumber Co.*, 154 S. W. Rep. 973 (Tex. 1913). A creditor who knows that stock has been paid for by property taken at an overvaluation cannot afterwards complain, and if the same person is president of both the creditor and the debtor his knowledge is notice to the creditor. *Berry v. Rood*, 168 Mo. 316 (1902). Knowledge of the president of a trust company acquired in taking a mortgage for other parties is not notice to the trust company. *Tate v. Security T. Co.*, 63 N. J. Eq. 559 (1902). Where the president of a corporation is a director in another corporation which owes money to the former, the former is chargeable with knowledge of facts known to its president. *Easton Nat. Bank v. American, etc. Co.*, 69 N. J. Eq. 326 (1905). Even though the president of a bank sells to it a note which has not a sufficient consideration, yet if the note was accepted at a meeting of the directors at which the president was not present, the bank may enforce the note. *McDonald v. Randall*, 139 Cal. 246 (1903). Knowledge of the corporate officers that they may rescind a sale of goods for fraud binds the corporation if it levied an attachment instead and thereby waived its right of rescission. *Baker v. Brown Shoe Co.*, 78 Ark. 501 (1906). A representation of the president of a national bank that the signature to a note is the genuine signature of the individual does not bind the bank. *Commercial, etc. Bank v. First, etc. Bank*, 97 Tex. 536 (1904). The president of a slate company has no power to make a time contract with a railroad to ship the product of the company over such road, and knowledge of such contract by the president is not notice to the corporation. *Bangor, etc. Ry. v. American, etc. Co.*, 203 Pa. St. 6 (1902). A bank is not given notice as to defenses to notes of a cattle company presented to the bank by its president, but in behalf of the cattle company. *Corcoran v. Snow Cattle Co.*, 151 Mass. 74 (1890).

Drafts which are indorsed to the corporation by its president, who held them individually, are collectible by the corporation as a *bona fide* holder, notwithstanding its president had notice of defenses. *Levy, etc. Co. v. Kauffman*, 114 Fed. Rep. 170 (1902). A corporation purchasing a note from another corporation is not notified of defenses thereto by the fact that the president of the selling corporation was superintendent of the buying corporation, it appearing that he did not manage the financial affairs of the latter. *Newman v. Aultman, etc. Co.*, 51 S. W. Rep. 198 (Tenn. 1899). Knowledge which a trustee of a railroad mortgage receives as trustee binds another company in which he is president and superintendent. *New York, etc. R. R. v. New York, etc. R. R.*, 52 Conn. 274, 280 (1884). Notice to the president that stock is held in trust is notice to the company. *Porter v. Bank of Rutland*, 19 Vt. 410 (1847). Notice to the president of a bank that the village is being sued for damages due to the bank's sidewalk is notice to the bank. *Port Jervis v. First Nat. Bank*, 96 N. Y. 550 (1884). See also *Gold Min. Co. v. National Bank*, 96 U. S. 640 (1877). Knowledge of the president that a person who is turning property in to the bank is insolvent is notice to the bank. *Getman v. Second Nat. Bank*, 23 Hun. 498 (1881). See also *Central, etc. Bank v. Levin*, 6 Mo. App. 543 (1879); *First Nat. Bank v. Fricke*, 75 Mo. 178 (1881). Cf. *First Nat. Bank v. Sherburne*, 14 Bradw. (Ill.) 566 (1884). Notice to the president and certain stockholders who are sent to investigate for the corporation is notice to the corporation. *U. S. v. San Pedro, etc. Co.*, 4 N. M. 225 (1888). Knowledge of a president in regard to property which he sells to the company is not notice to the company. *Barnes v. Trenton, etc. Co.*, 27 N. J. Eq. 33 (1876). Where it was attempted to impute to a corporation the knowledge of its president of a prior unrecorded conveyance, it was held this could not be



and knew that fact by reason of his interest in the lessee.<sup>1</sup> Where a corporation takes title to land through its incorporators, and all of them as well as the president had constructive or actual knowledge of a flaw

done where the knowledge was general and not specific or official. *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381 (1851); s. c. on appeal, *sub nom.* General Ins. Co. v. U. S. Ins. Co., 10 Md. 517 (1857). Knowledge by the president of outstanding equities to land mortgaged by him to the corporation is not notice thereof to the company. *Winchester v. Baltimore, etc. R. R.*, 4 Md. 231, 239 (1853). Notice to a stockholder who is also president of another company is not notice to the latter. *First Nat. Bank v. Anderson*, 28 S. C. 143 (1888). The company is bound to take notice of the extent of a power of attorney given by a third person to its president. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228 (1866). The knowledge of the vendor of personalty to a corporation that a chattel mortgage exists is not necessarily notice to the corporation, although he becomes its president and general manager. It is for the jury to decide whether there are not *bona fide* stockholders who would be injured by such a result. *International, etc. Co. v. McMorran*, 73 Mich. 467 (1889). Knowledge of one who is president of a railroad and also of a bank, where the bank discounts paper for the railroad, is notice to the bank if he took part in its action. *Waynesville Nat. Bank v. Irons*, 8 Fed. Rep. 1 (1881); and see the note. Notice to a member of a copartnership is not notice to a corporation of which that member is president. *Miller v. Illinois, etc. R. R.*, 24 Barb. 312 (1857). The president and treasurer who stand by and allow another to purchase property without saying that the company has a claim thereon bind the company thereby. *Mihills Mfg. Co. v. Camp*, 49 Wis. 130 (1880). Knowledge of a president and director of a transfer of stock is notice to the company. *Factors', etc. Co. v. Marine, etc. Co.*, 31 La. Ann. 149 (1879). Knowledge of a vice-president is not notice to the company. *Fisher v. Murdock*, 13 Hun, 485 (1878).

Although the president and cashier are the discount committee and discount a note which is indorsed by the president, the bank is not charged with notice that the note was given for an illegal purpose. *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225 (1896). The fact that the maker of a note tells the president of a bank, at the office of another company in which they are both directors, that a certain note was fraudulent, is not notice to the bank although it afterwards discounts the note. *Washington Nat. Bank v. Pierce*, 6 Wash. 491 (1893). Where the president of a bank purchases for the bank a note from a corporation in which he is a director, the bank is chargeable with notice of defenses to the note known to the vendor of the note. *Traders' Nat. Bank v. Smith*, 22 S. W. Rep. 1056 (Tex. 1893). Knowledge acquired by an attorney, as attorney, of the execution of a mortgage, is chargeable to a corporation which takes a subsequent mortgage, where the attorney is the president of the corporation. *Willard v. Denise*, 50 N. J. Eq. 482 (1893). A bank is not chargeable with knowledge of the fact that its president, in depositing money to his individual credit, was depositing trust funds. *Re Plankinton Bank*, 87 Wis. 378 (1894). Where the president of a corporation sells property to it, the corporation is not chargeable with notice of defects in the title known to him. *Higgins v. Lansingh*, 154 Ill. 301 (1895). Where the treasurer of a corporation is also vice-president of a bank, and draws out the funds of the former, taking in payment a draft running to himself individually, the bank is not chargeable with notice of a diversion of the corporate funds to his own use. *Gunster v. Scranton Illuminating, etc. Co.*, 181 Pa. St. 327 (1897). See 229 U. S. 517.

<sup>1</sup> *Brooklyn, etc. Co. v. Standard, etc. Co.*, 193 N. Y. 551 (1908).



in the title, the corporation thereby had similar notice.<sup>1</sup> Where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.<sup>2</sup> A corporation is chargeable with notice that a party selling a patent to it obtained the patent by fraud, where the corporate agent making the purchase was informed of the same.<sup>3</sup> Where an attorney in fact for the sale of a patent causes his friends to organize a corporation, and then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement.<sup>4</sup> In general the test turns on whether the corporate agent received the knowledge in the regular course of business. Knowledge by an officer, derived as an individual and not while acting officially for the corporation, cannot operate to its prejudice, and will not be imputed to it.<sup>5</sup> Where there is a common agent, and he alone represents both parties, both are bound by his undisclosed knowledge, but if one of the parties is a corporation, and is represented by other officers, the corporation is not bound by the agent's knowledge.<sup>6</sup>

The corporation is sometimes chargeable with knowledge of facts which are known to one of its directors;<sup>7</sup> but there are so many ex-

<sup>1</sup> *Simmons, etc. Co. v. Doran*, 142 U. S. 417, 436 (1892).

<sup>2</sup> *National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co.*, 73 Fed. Rep. 491 (1896). See also § 663, *supra*.

<sup>3</sup> *Vulcan, etc. Co. v. American, etc. Co.*, 70 N. J. Eq. 588 (1906).

<sup>4</sup> *Young Reversible, etc. Co. v. Young Lock-Nut Co.*, 72 Fed. Rep. 62 (1896).

<sup>5</sup> *Casco Nat. Bank v. Clark*, 139 N. Y. 307 (1893); *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314 (1893). Concerning notice to an officer who is acting as a third party, and not for a company, see also *First Nat. Bank v. Tompkins*, 57 Fed. Rep. 20 (1893). Where the same persons are officers of a corporation and trustees for the benefit of its creditors, notice to them as such officers is not notice to them as trustees. *New York Security, etc. Co. v. Lombard Inv. Co.*, 65 Fed. Rep. 271 (1895). Notice to an officer who is personally interested is not notice to the corporation. *Vietor, etc. Co. v. National Bank*, 15 Utah, 391 (1897).

A corporation is not chargeable with notice of the fact that the parties conveying property to it for stock are doing so in breach of trust, even though such parties are directors in the corporation. This rule will be applied, especially where the beneficiary has been guilty of laches. *Whittle v. Vanderbilt, etc. Co.*, 83 Fed. Rep. 48 (1897).

<sup>6</sup> *Taylor v. Felder*, 3 Ga. App. 287 (1907).

<sup>7</sup> A corporation is chargeable with notice of facts known to its directors whereby the corporation acquired title to a large property from the bondholders of a foreclosed company. *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197 (1892). Notice to a director is not notice to the company except "in the business to which the knowledge is material through the agency of such director acting either alone or as one of the board." *Buttrick v. Nashua, etc. R. R.*, 62 N. H. 413 (1882). The knowledge of a patentee that a label claims more than is cor-



ceptions to this rule that the only safety lies in a study of the cases themselves.<sup>1</sup> Even though a director purchases a mortgage for a cor-

rect is not notice to a corporation which purchased, owns, and operates the patent, although he is a director. *Lawrence v. Holmes*, etc., 45 Fed. Rep. 357 (1891). Knowledge casually acquired by a director while not officially engaged is not notice to the corporation. *Thomson v. Central*, etc. Ry., 85 Atl. Rep. 201 (N. J. 1912). Notice to a person who becomes a stockholder and director of a corporation organized after the notice may be notice to the corporation. *Hall*, etc. Co. v. *Haley*, etc. Co., 56 S. Rep. 726 (Ala. 1911). A bank may be chargeable with notice of a fraud perpetrated by some of its directors in issuing the stock of another corporation and taking notes therefor and indorsing the notes and discounting them with the bank. *State Bank of Indiana v. Mentzer*, 125 Iowa, 101 (1904). Where every director knew of the president's agreement with a person to continue work on a mine owned by the corporation, the corporation is bound. *Davis v. Brown*, etc. Co., 21 S. Dak. 173 (1906). The fact that a director in a bank negotiates the sale of commercial paper to it does not charge the bank with notice of defenses to the paper. *Koehler v. Dodge*, 31 Neb. 328 (1891). If a director act in behalf of a bank in a transaction of which the bank takes the benefit, the bank is chargeable with a knowledge of all the director's acts in such transaction. *Smith v. South Royalton Bank*, 32 Vt. 341 (1859). Notice to a director who is acting as a special agent is notice to a bank. *Fulton Bank v. Benedict*, 1 Hall (N. Y.), 480, 557 (1829); *Farmers' Bank v. McKee*, 2 Pa. St. 318 (1845). Notice to three trustees and superintendent of repairs for a corporation that the water from the bank building was not properly conducted away is notice to the corporation. The "jury may presume that the trustee did his duty by communicating to the corporation the knowledge he had obtained, and which it was material that the corporation should know." *Winne v. Ulster*, etc.

*Inst.*, 37 Hun, 349 (1885). Knowledge of a firm dissolution imparted to the board by a director at a regular meeting is notice to the bank. *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.), 397 (1840). In *Re Carew's Estate Act*, 31 Beav. 39 (1862), where a director and local manager of a bank obtained possession of certain acceptances without consideration, had them discounted by the bank, and carried to his account, which was largely overdrawn, the bank was held to have notice sufficient to prevent its being a *bona fide* owner. Notice once given to a board of directors is notice to its successor, although the individuals constituting it are all different. *Mechanics' Bank v. Seton*, 1 Pet. 299, 309 (1828). A director who, as attorney for the company, takes an acknowledgment of a mortgage to it, binds the company with notice when he had previously taken an acknowledgment of an unrecorded deed. *Fairfield Sav. Bank v. Chase*, 72 Me. 226 (1881). *Contra*, *Houseman v. Girard*, etc. Assoc., 81 Pa. St. 256 (1876). The mere fact that individual directors knew of the general manager engaging a broker to sell its property does not constitute ratification where the company derived no benefit. *Elk*, etc. Co. v. *Thompson*, 150 S. W. Rep. 817 (Ky. 1912).

<sup>1</sup> Although three of a 'body of city commissioners who have defrauded the city by a conspiracy in expending money are directors in a bank which advanced the money to the city, yet the bank may collect, it being proved that these three did not attend directors' meetings in reference to the matter, and did not act for the bank in any way in regard to it. *Mayor*, etc. v. *Tenth Nat. Bank*, 111 N. Y. 446 (1888). See also *National Park Bank v. German*, etc. Co., 53 N. Y. Super. Ct. 367 (1886). Knowledge by a director of a bank is not necessarily notice to the bank. *Home*, etc. Bank v. *Peoria*, etc. Soc., 206 Ill. 9 (1903). Where two companies have a director in common and he brings about the



poration it is not chargeable with his knowledge of equities against the

loan of money by one to the other, the lending company is not chargeable with notice of the fact known to such director that the borrowing company intended to use the money *ultra vires*. *Re David Payne & Co., Ltd.*, [1904] 2 Ch. 608. Where a notice of a mechanic's lien is served on persons who are directors of the company erecting the building, and also of a bank having a mortgage upon it, it may be a good notice to both corporations. *First Nat. Bank v. Chowning Elec. Co.*, 142 Ky. 624 (1911). A transferrer of stock in a national bank is not liable on it after the transfer, even if the bank was insolvent at that time, he not knowing that fact, and even though the transferrer was a director of the bank. *Fowler v. Crouse*, 175 Fed. Rep. 646 (1910). Knowledge of directors of defects in the title to property which they are selling to the corporation is not notice to the corporation. *Schneider v. Sellers*, 98 Tex. 380 (1905). Notice to a director is not notice to the company. *Luling, etc. Co. v. Lane, etc. Co.*, 49 Tex. Civ. App. 534 (1908). Knowledge of a majority of the directors that an unauthorized note has been given is not notice to the company. *Edwards v. Carson Water Co.*, 21 Nev. 469 (1893). Notice to a director of a bank, acquired by him, not in the bank's business, but privately, is not notice to the bank. *Black v. First Nat. Bank*, 96 Md. 399 (1903). Knowledge of a director who sells a note to his bank that there is a defense to the note is not notice to the bank. *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123 (1894). Where two of fifteen directors sell land to the corporation, their knowledge of a prior vendor's lien is not notice to the corporation. *Bang v. Brett*, 62 Minn. 4 (1895). Knowledge of a director that a note is tainted with gambling is not notice to the bank, although he recommended it for discount. *Shaw v. Clark*, 49 Mich. 384 (1882). The fact that a cashier who discounts a note for a corporation payee is also a director in the latter is not notice to the bank of facts known to the

corporation payee. *First Nat. Bank v. Loyhed*, 28 Minn. 396 (1881). Knowledge of a director that a member of a firm in which the director is also a member has withdrawn therefrom is not notice to the corporation. But it was proved that the director had no management of the corporate affairs. *Powles v. Page*, 3 C. B. 16, 24, 81 (1846). Where a director causes his bank to discount a note which he holds as an indorsee, the bank is not chargeable with knowledge of facts which he knows and which would defeat payment. *Loomis v. Eagle Bank*, 1 Disney (Ohio), 285 (1859); *Louisiana State Bank v. Senecal*, 13 La. 525 (1839). Where a board of bank directors discounted a note for one of their number, who had knowledge of fraud in its inception, the maker was held liable on the ground that the knowledge of the director which was not communicated to any other director could not be considered notice to the bank. *Terrell v. Branch Bank at Mobile*, 12 Ala. 502 (1847). And see *Lucas v. Bank of Darien*, 3 Ala. (O. S.) 280, 321 (1830); *Washington Bank v. Lewis*, 39 Mass. 24 (1839); *Commercial Bank v. Cunningham*, 41 Mass. 270, 276 (1841); *First Nat. Bank v. Christopher*, 40 N. J. L. 435 (1878). Where a director had knowledge that certain bills which were discounted at the bank had been given originally as accommodation paper, but was not present when the board discounted them, and did not communicate his knowledge to any one, the bank was not regarded as having notice. *Farmers', etc. Bank v. Payne*, 25 Conn. 444 (1857); *Westfield Bank v. Cornen*, 37 N. Y. 320 (1867). But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the latter is affected with his knowledge. *National Security Bank v. Cushman*, 121 Mass. 490 (1877); *Bank of U. S. v. Davis*, 2 Hill, 451, 464 (1842). *Cf. North River Bank v. Aymar*, 3 Hill, 262, 274 (1842).

Notice to an individual director,



mortgage, where such knowledge was not acquired by him while acting for the corporation.<sup>1</sup>

who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. And even knowledge of the president that certain deposits were only to be withdrawn in a certain manner was held not to be knowledge of the bank so as to render it liable when such money had, unknown to the president, been wrongfully withdrawn. *Fulton Bank v. New York, etc. Canal*, 4 Paige, 127, 136 (1833). Knowledge of directors in a matter of their own in which they are not acting for the corporation is not notice to the latter. So held in a patent case where this defect of actual or constructive notice enabled the legal title to prevail over the equitable. *Davis, etc. Wheel Co. v. Davis, etc. Wagon Co.*, 20 Fed. Rep. 699 (1884). An insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises will not be charged with constructive notice of such deed by the fact that the grantor and mortgagor was, at the date of the deed and execution of the mortgages, a director in the insurance company. *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54, 61 (1856). Knowledge of a director, acquired by reading a notice thereof in a newspaper, that a firm has dissolved and that certain partners are no longer liable, is not notice to the corporation; he did not acquire the knowledge, nor was it given to him, for the corporation. *National Bank v. Norton*, 1 Hill, 572 (1841). On a question as to the ratification by a company of the unauthorized act of its president, where it is necessary to show knowledge on the part of the company, it is not enough to show an individual knowledge on the part of the minority of the board of trustees, even if a knowledge by all of them in their individual capacity, and not acting as a board, would be sufficient. *Yellow Jacket, etc. Co. v. Stevenson*, 5 Nev. 224 (1869). A corporation is not chargeable with any knowledge of a deed which a director discovers on examining the record

unofficially. *Farrell Foundry v. Dart*, 26 Conn. 376 (1857). Notice to a director, not constituted an agent of communication between the parties, that a promissory note was made to be discounted for a special purpose, is not notice to the bank, although the director was present when the note was discounted. *Custer v. Tompkins County Bank*, 9 Pa. St. 27 (1848). Knowledge by a director of a deed drawn by him professionally is not notice to the corporation whose subsequent deed of the same property is first recorded. *Armstrong v. Abbott*, 11 Colo. 220 (1888). Notice of an unrecorded lien does not come to the corporation by the fact that a stockholder had notice and that he afterwards became an officer. *The Admiral*, 1 Fed. Cas. 178 (1856). Knowledge of a director that a bill purchased by the company is accommodation on the part of the drawee is not knowledge of the company if the director took no part in the purchase. *Re Peruvian Ry.*, L. R. 2 Ch. App. 617 (1867). Knowledge acquired by a director while acting as a member of the firm which sells a note to the company is not notice to the company. *Atlantic, etc. Bank v. Savery*, 82 N. Y. 291 (1880). Corporations having common directors or officers are not chargeable with knowledge of each other's transactions and condition. *Re Marseilles Extension Ry.*, L. R. 7 Ch. App. 161 (1871). See also, in general, *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243 (1882); *West Boston Sav. Bank v. Thompson*, 124 Mass. 506 (1878). Where the president of a corporation is vice-president and manager of a bank, and obtains money from the latter in the name of the former, but for his own use, the bank cannot recover from the corporation, the officers of the bank being cognizant of the transaction. *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485 (1897).

<sup>1</sup> *Gilkeson v. Thompson*, 210 Pa. St. 355 (1904).



A corporation has notice of facts which are known to all its officers and stockholders, and especially to a contracting firm that owns the corporation and uses it to carry on the firm's business.<sup>1</sup>

Where a copartnership engaged in manufacturing lumber incorporates and takes stock in payment for the property, and the partners become the officers of the corporation, the corporation is bound by their knowledge that a part of the land which they conveyed to the corporation was obtained by fraudulent patents from the United States.<sup>2</sup> And where railroad property purchased at foreclosure sale is transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals holds that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors."<sup>3</sup>

<sup>1</sup> *Holly Mfg. Co. v. New Chester*, etc. Co., 48 Fed. Rep. 879 (1891). Where suit is brought by a riparian owner to enjoin a riparian owner higher up the stream from diverting the water, and the latter pending the suit conveys his rights to a corporation organized for that purpose, and owns all its stock, such corporation is bound, although not a party to the suit. *Miller & Lux v. Rickey*, 146 Fed. Rep. 574 (1906); *aff'd*, 152 Fed. Rep. 11 and 22, and 218 U. S. 258. See also § 663, *supra*.

<sup>2</sup> *McCaskill Co. v. United States*, 216 U. S. 504 (1910). The court cited the above section of this work and said: "Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it when their interest is adverse their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it and to the officers who are identified with that

purpose." Where an owner of land knows of a flaw in the title and he turns it over to a corporation for stock, the corporation is not a *bona fide* purchaser, even though subsequently *bona fide* stockholders subscribe to or purchase their stock in good faith and in ignorance of the defect. *Wilson Coal Co. v. United States*, 188 Fed. Rep. 545 (1911). The vendor's lien on land for the unpaid purchase price is good as against a corporation which the vendee forms to take over the land, the directors and stockholders being dummies, and all the stockholders having knowledge of the lien. *Finnell v. Finnell*, 156 Cal. 589 (1909). A conditional sale, even though not recorded as required by statute, is good as against a corporation to whom the purchaser transfers the property for stock and as against a mortgage taken from such corporation by such purchaser. *York Mfg. Co. v. Brewster*, 174 Fed. Rep. 566 (1909). Where a partition suit has been instituted and the defendant then forms a corporation to buy the property and issue stock to him in payment therefor, the corporation is not a *bona fide* purchaser. *Mound City Co. v. Castleman*, 177 Fed. Rep. 510 (1910); *aff'd*, 187 Fed. Rep. 921.

<sup>3</sup> *Vilas v. Page*, 106 N. Y. 439, 465 (1887). See also § 673, *supra*. Where the officers of a bank use its funds to buy property which they then turn in to a corporation in payment for stock, the property is impressed



A director cannot claim to be a *bona fide* purchaser of bonds upon their issue by the corporation. He is bound to know what transpires in the meetings of the board of directors.<sup>1</sup> Where a company sells land to its president and secretary, they are charged with knowledge of facts known to the company, the latter having been present at the meetings.<sup>2</sup> The question sometimes arises whether a director or officer of a corporation is chargeable with notice of all facts contained in the corporate books. The general rule is that he is not chargeable with actual knowledge of such entries,<sup>3</sup> but such entries may be admissible in evidence

with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property, at their option. *Farmers', etc. Bank v. Kimball Milling Co.*, 1 S. Dak. 388 (1890). A consolidated company takes with notice of facts known to one of the companies consolidated. *Joy v. St. Louis*, 138 U. S. 1 (1891). A tripartite agreement relative to a right of way through a park binds the successors of one of the companies. *Joy v. St. Louis*, 138 U. S. 1 (1891).

<sup>1</sup> *Greenville Gas Co. v. Reis*, 54 Ohio St. 549 (1896). The directors' minute-book is evidence against a director. *Allison v. Coal Creek, etc. Co.*, 87 Tenn. 60 (1888); *First Nat. Bank v. Tisdale*, 84 N. Y. 655 (1881); *Leonard v. Faber*, 52 N. Y. App. Div. 495 (1900). See also § 714, *supra*. A notice to one director is not notice to another director individually. *Washburn v. Intermountain, etc. Co.*, 56 Oreg. 578 (1910).

<sup>2</sup> *Rapley v. Klugh*, 40 S. C. 134 (1893).

<sup>3</sup> "There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder." Hence, in an action by the corporation for an accounting, the books of the company are not competent evidence to establish the account and hold him liable. *Rudd v. Robinson*, 126 N. Y. 113 (1891). A director is not chargeable with notice of facts which appear on the corporate books when he has no actual knowledge of the same. *Re Coasters Ltd.*, [1911] 1 Ch. 86. Even a director and

vice-president of a bank may hold the cashier liable for false representations inducing the former to purchase stock from the cashier where such director and vice-president had no actual knowledge of the condition of things, and could not ascertain it except by an extended examination of the books. *Snider v. McAtee*, 165 Mo. App. 260 (1912). The presumption is that entries in the corporate books are known to and binding on a director. *Smith v. Moore*, 199 Fed. Rep. 689 (1912). A director who sells his stock to another director who is treasurer, may collect a check given in payment, even though the check is signed by the latter as treasurer of the company. *Fillebrown v. Haywood*, 190 Mass. 472 (1906). In a suit by the corporation to hold its president liable for unauthorized acts, the principle that the directors are chargeable with notice with what is in the books is not applicable. *Pacific, etc. Works v. Smith*, 152 Cal. 507 (1907). General entries upon the ledger of the corporation do not charge a director with notice thereof, unless it is proved that he had access to the ledger or control over it. *Leonard v. Faber*, 52 N. Y. App. Div. 495 (1900), the court stating that corporate books, such as the stock-book and minute-books containing records in which third parties are not interested, are evidence of the facts set forth in them both in favor and against the corporation, but that account books showing transactions between the corporation and third persons are similar to account books of other parties and are admissible only as admissions by the corporation.



against him in suits brought by strangers.<sup>1</sup> They are not admissible

In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant. *Hayden v. Williams*, 96 Fed. Rep. 279 (1899). As against the officers of the company it may be proved by the books of the company that they had converted to their own use the funds of the company illegally. *Saranae, etc. R. R. v. Arnold*, 167 N. Y. 368 (1901). One who is a stockholder, director, and vice-president is chargeable with knowledge of entries on the corporate books. *First Nat. Bank v. Tisdale*, 18 Hun, 151 (1879); *aff'd*, 84 N. Y. 655. See also ch. XXX, *supra*. One who is a stockholder and also director is as fully bound by entries in the corporate books as a partner is by entries in the partnership books. *Montgomery v. Exchange Bank*, 6 Atl. Rep. 133 (Pa. 1886). The books of the company are not, *per se*, evidence against a director. *Powell v. Conover*, 75 Hun, 11 (1894). See § 55, *supra*. A director sued by a stockholder for negligence in not attending to his duties is not presumed to have knowledge of all that is shown by the books of the company. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). A director is bound to take notice of calls, and cannot set up that he had no actual notice. *Spellicer, etc. Co. v. Geiger*, 147 Pa. St. 399 (1892). Directors of an insolvent bank obtaining a preference are bound to know that the bank is insolvent. *James Clark Co. v. Colton*, 91 Md. 195 (1900). Even though a corporation is insolvent, yet, if the directors believe it is solvent, although in financial distress, they may loan money to the corporation and take securities as collateral thereto, and they are not bound to know that the corporation is insolvent. *Converse v. Sharpe*, 161 N. Y. 571 (1900). A discussion of what constitutes insolvency of a corporation, and stating that the directors are bound to know the con-

dition of business, is given in *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7 (1891). Where the president discounts a note for the company and pays in the money therefor, he is a *bona fide* holder of it. *Hitchings v. St. Louis, etc. Co.*, 68 Hun, 33 (1893). Knowledge imparted to the corporation is not notice to its president, who buys a note from it. *Peckham v. Hendren*, 76 Ind. 47 (1881). The rule that a bank is estopped by the statement of its cashier to a surety that his principal had paid the note is not applicable where the surety is a director of the bank, for he will be conclusively presumed to know whether payment was made. His knowledge will also be imputed to a firm which was the surety and of which he was a member. *Merchants' Bank v. Rudolf*, 5 Neb. 528 (1877). See also § 714, *supra*. A director cannot hold the president liable on a loan by the former to the corporation made on representations of the condition of the corporation. *Hubbard v. Weare*, 79 Iowa, 678 (1890).

<sup>1</sup> The books of a company are "competent as evidence so far as related to any entries legitimately contained in them, and so far as they were relevant to the issues on trial" in an action by creditors to hold a director liable, under the New York statute, for making a false report. *Huntington v. Attrill*, 118 N. Y. 365 (1890). In a suit against a director to enforce a statutory liability, a creditor cannot prove his debt by the books of the company unless he proves that the director had access to or was familiar with such books. *Minor v. Crosby*, 76 N. Y. App. Div. 561 (1902). Corporate books are admissible in evidence to show money received as against a corporate officer on trial for embezzlement, even though the entries were not made by him. *Humphrey v. People*, 18 Hun, 393 (1879). The president, treasurer, and general manager, who is also a director, is bound to know the financial condition of a company, and a preference to him



as evidence, however, as against strangers.<sup>1</sup> In a criminal proceeding

within four months prior to its bankruptcy may be set aside. *Atherton v. Emerson*, 199 Mass., 199 (1908). Knowledge a director should have officially is notice to him as a private individual. *McCarty v. Kepreta*, 139 N. W. Rep. 992 (N. Dak. 1913). So far as the rights of third persons are concerned directors are bound to know the condition of the business of the company as shown by its record books. *Mamerow v. National, etc. Co.*, 206 Ill. 626 (1903). In an action against the president for damages for false representations it need not be proved that he had actual knowledge of the falsity of the statements in regard to corporate affairs, inasmuch as he was bound to know thereof. *Norvell v. Pye*, 95 S. W. Rep. 666 (Tex. 1906). The president is not guilty of larceny merely because a clerk embezzled funds paid in by a customer. *State v. Carmean*, 126 Iowa, 291 (1905). The minutes of a directors' meeting are evidence of who were present and what was done, so far as a suit between the corporation and one of those who were present is concerned. *Olney v. Chadsey*, 7 R. I. 224 (1862). A director and vice-president is chargeable with knowledge of what is on the corporate records. *First Nat. Bank v. Tisdale*, 84 N. Y. 655 (1881). *Quære*, as to entries in miscellaneous corporate books. *Billings v. Trask*, 30 Hun, 314 (1883). The entries in the books of a business corporation during the period of his directorship are admissible in evidence against one who has been a director in the corporation, and as such took part in its affairs. *Bedford v. Sherman*, 68 Hun, 317 (1893). In a suit by a vendee of bank stock against the vendor for false representations, the vendor, even though he is vice-president and managing director of the bank, is not chargeable with knowledge of all that the bank books contain, except so far as he had such knowledge. *Baker v. Mathew*, 137 Iowa, 410 (1908). All of the directors are chargeable with notice of acts of the board of directors,

even though some of them were not present at the meeting. *Gay v. Young Men's, etc. Inst.*, 37 Utah, 280 (1910). Where directors pay dividends from the capital stock, a trustee in bankruptcy of the corporation may hold them liable for the same, even though they did not know the financial condition of the company when they voted the dividends. A corporate ledger is admissible to prove such financial condition, although such ledger may not be competent in a suit against stockholders or strangers. *Wesp v. Muckle*, 136 N. Y. App. Div. 241 (1910); *aff'd*, 201 N. Y. 527. The allegations and proof in an action by a stockholder against directors for deceit in persuading him not to sell his stock were considered in *Thayer v. Schley*, 137 N. Y. App. Div. 166 (1910), and it was held that the directors are not in such an action chargeable with knowledge of all the entries in the corporate books or proceedings at a directors' meeting at which they were not present and of which they have no knowledge, and that they are not liable by reason of dividends from capital when the complaint alleges only false representations and there is no proof of conspiracy. In an action against the directors, officers, and stockholders for fraudulent representations inducing a person to purchase stock, the corporate books made by the secretary from other books and not made at the time of the transactions, are admissible against the defendants. *Lederer v. Morrow*, 132 Mo. App. 438 (1908).

<sup>1</sup> Corporate records are not binding on a party with whom the corporation deals, although they may be *prima facie* evidence, there being no proof that he had notice of such records. *Northland, etc. Co. v. Stephens*, 116 Minn. 23 (1911). Books and records of the corporation are not evidence in its behalf, except as memoranda used in connection with oral testimony. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641 (1905). The secretary and treasurer may identify the cash book,



against a corporate officer the corporate books are not evidence unless he has been connected with them or the entries therein.<sup>1</sup>

The minutes of a meeting of a corporation are admissible to show what took place as against members who attended the meeting.<sup>2</sup>

A stockholder is chargeable with notice of entries on the corporate books if made in his presence and he personally assented thereto.<sup>3</sup> The books of the corporation are evidence in a suit against a stockholder on a call, even though the entries are not proved to be correct by the person actually making them.<sup>4</sup>

But "a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers."<sup>5</sup> In general, however,

journal, and ledger of a corporation, even though he did not make the entries therein. Entries in such books may be shown as admissions on the part of the corporation in a suit between it and a third party. *Matter of Randall*, 90 N. Y. App. Div. 192 (1904). A corporation cannot prove the sale of its treasury stock by entries in its own books. *Jacobs v. Morgenthaler*, 149 Mich. 1 (1907). The title of the corporation to a horse may be shown by its records and the testimony of its officers. *Jaquith Co. v. Shumway's Estate*, 69 Atl. Rep. 157 (Vt. 1908). A person contracting with a corporation is not bound to know what is contained in the corporate records. *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 684 (1885); *aff'd*, 133 U. S. 534. Entries in the corporation books of matters relating to any property or right claimed by it can never be evidence for it unless made so by act of the legislature. They are not admissible in favor of the corporation as against strangers. *Graville v. New York, etc. R. R.*, 34 Hun. 224 (1884). See also 15 Wend. 256, note; *Wait, Insolv. Corp.*, § 528. *Cf. Leonard v. Faber*, 52 N. Y. App. Div. 495 (1900). As between claimants to the property of a corporation, the corporate records are not admissible as evidence to show the title of the corporation. *Dolan v. Wilkerson*, 57 Kan. 758 (1897).

<sup>1</sup> *People v. Burnham*, 120 N. Y. App. Div. 388 (1907). The president of

an incorporated bank is not criminally liable for the act of the receiving teller in receiving a deposit when such teller knew that the bank was insolvent. The statute rendering a bank officer liable for knowingly receiving such a deposit applies only to the officer actually receiving the deposit. *Ex parte Rickey*, 31 Nev. 82 (1909). 204 Fed. Rep. 1.

<sup>2</sup> *Booth v. Dexter, etc. Co.*, 118 Ala. 369 (1898).

<sup>3</sup> See *Abbott's Tr. Ev.*, p. 53.

<sup>4</sup> *Sigua, etc. Co. v. Brown*, 171 N. Y. 488 (1902). See also § 55, *supra*.

<sup>5</sup> So held where a stockholder in a telegraph company sued it for negligence in sending a message. *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256 (1890), *aff'd* 44 Hun. 532. In a suit by a corporation against one of its stockholders for debt, the books of the corporation are not admissible as evidence against him. *Trainor v. German-American, etc. Ass'n*, 204 Ill. 616 (1903). A stockholder owning but one share is not chargeable with notice of a fraud perpetrated on the corporation by its president. *Clark v. Latourette*, 129 Pac. Rep. 1043 (Oreg. 1913). Where a director knows that the corporation has made a contract he is bound to take notice of its contents, but the same rule does not apply to a stockholder. *Watts v. Bucknall*, [1903] 1 Ch. 766. A stockholder is not chargeable with knowledge of corporate contracts of which as a fact he knows nothing. *Tarbox v. Gorman*, 31 Minn. 62 (1883). Min-



a stockholder is bound to take notice of the by-laws,<sup>1</sup> but the purchaser of stock is not, unless they appear on the face of the certificate of stock.<sup>2</sup> In a suit by stockholders to dissolve and wind up the corporation, the books of the company are not admissible as against them, being mere declarations in its favor.<sup>3</sup> Where a party owns all the stock of another corporation, it has been held that he is chargeable with notice of entries upon its books.<sup>4</sup> A stockholder in a corporation that is carrying on a patent litigation is not bound by its admissions as affecting subsequent litigations.<sup>5</sup> Even though a person purchases bonds with knowledge

utes of the directors have been held to be evidence against a subscriber to disprove certain defenses set up by him to his subscription. *Bedford R. R. v. Bowser*, 48 Pa. St. 29 (1864). The cases *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393, 398 (1842), and *Graff v. Pittsburgh, etc. R.-R.*, 31 Pa. St. 489, 495 (1858), hold that a stockholder present and assenting to an entry on the corporate books is bound by it. But *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833), per Parke, B., holds that corporate minutes are not admissible on behalf of the company in a suit against it by one of its stockholders. Corporate books are not only evidence of corporate acts when they are to be proved, but are to the same extent evidence against stockholders who are chargeable with knowledge of their contents. *Blake v. Griswold*, 103 N. Y. 429 (1886); *Billings v. Trask*, 30 Hun, 314 (1883). As between stockholders, the books of a corporation and sworn copies thereof are competent evidence to show the acts of a corporation. *Hubbell v. Meigs*, 50 N. Y. 480 (1872). See also *Lindley, Companies*, p. 312; *Black v. Shreve*, 13 N. J. Eq. 455 (1860); *Haynes v. Brown*, 36 N. H. 545 (1858); *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365 (1868). Where a person is merely in possession of bank stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound to have knowledge of the facts in possession of the corporation or its officers. *Baker v. Woolston*, 27 Kan. 185, 189

(1882). A pledgee of stock who takes no part in the stockholders' meetings is not chargeable with notice of a lien which the corporation has on property which he purchases. *Baker v. Woolston*, 27 Kan. 185 (1882). The books of a fraternal lodge are admissible in evidence against the members in an action by the lodge. *Union Pacific Lodge, etc. v. Bankers' Surety Co.*, 79 Neb. 801 (1907). A stockholder in one company which is consolidated with another cannot hold a stockholder in the latter liable for misrepresentations that the latter was in a prosperous condition where there was no concealment and the stockholder could have examined into the condition of the latter and perhaps did so. *Pigott v. Graham*, 48 Wash. 348 (1908).

<sup>1</sup> See § 4a, *supra*. A stockholder is chargeable with notice of the by-laws. *Richardson v. Devine*, 193 Mass. 336 (1907).

<sup>2</sup> See § 11, *supra*.

<sup>3</sup> *Matter of Dittman*, 65 N. Y. App. Div. 343 (1901).

<sup>4</sup> *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa, 364 (1893).

<sup>5</sup> *American, etc. Co. v. Phoenix, etc. Co.*, 113 Fed. Rep. 629 (1902). A stockholder, even though he owns a majority of the stock, is not bound individually as a party or privy by a decree in a suit against the corporation where he has not intervened or controlled the defense to the suit nor made a separate defense. *Victor, etc. Co. v. American, etc. Co.*, 189 Fed. Rep. 359 (1911); s. c., 190 Fed. Rep. 1023. A deed by a corporation of a right of way for a flume over the land of one of its stockholders does not prevent the latter denying such



that the vendor had already made a contract for the sale of the bonds to another person, the former cannot be compelled to account to the latter.<sup>1</sup> All persons who deal with a corporation are conclusively presumed to know the contents of the certificate of incorporation.<sup>2</sup>

The question of serving notice or papers upon corporations in judicial proceedings is discussed elsewhere.<sup>3</sup> The publication of a notice in a newspaper is not notice, unless the party so notified is proved to have read the notice.<sup>4</sup>

The important principle of law that a person taking from a corporate officer corporate obligations in payment of a personal debt of such officer is not a *bona fide* holder of the same is considered elsewhere.<sup>5</sup>

right of way, he having taken no part in the deed. *Falls City, etc. Co. v. Watkins*, 53 Oreg. 212 (1909).

<sup>1</sup> *Sweeney v. Smith*, 171 Fed. Rep. 645 (1909). But see § 350, *supra*.

<sup>2</sup> *Butler v. Beach*, 82 Conn. 417 (1909).

<sup>3</sup> See § 752, *infra*.

<sup>4</sup> See § 119, *supra*. Though the company takes a newspaper, the announcement therein of a dissolution of partnership is not notice to it. *Vernon v. Manhattan Co.*, 22 Wend. 183 (1839), *aff'd* 17 Wend. 524. *Cf.* 1 Hill,

578, n. *Contra*, *Bank of South Carolina v. Humphreys*, 1 McCord (S. C.), 388 (1821); *Martin v. Walton*, 1 McCord (S. C.), 16 (1821). Notice in a newspaper taken by an individual is not notice. *Rawley v. Horne*, 3 Bing. 2 (1825). But if contained in a newspaper taken by a marine insurance company, and is marine news, and the president knew the fact involved, the company has notice. *Green v. Merchants' Ins. Co.*, 27 Mass. 402 (1830).

<sup>5</sup> See § 293, *supra*.



## CHAPTER XLIV.

### RATIFICATION, ACQUIESCENCE, OR LACHES AS A BAR TO A STOCKHOLDER'S ACTION HEREIN.

§ 728. Introductory.

729. Laches, acquiescence, or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy — Right of the corporation itself to complain.

730. Express ratification herein — Ratification by the majority is binding when on the minority? — Transferee of stock

that has been voted in favor of the act cannot complain.  
§ 731. Stockholder chargeable with laches only after he has a full knowledge of the facts.

732. Silent acquiescence while changes are taking place is laches and is a bar to a suit — What length of time constitutes laches herein — Statute of limitations.

733. Miscellaneous applications of the doctrine of laches herein.

§ 728. *Introductory.* — When a stockholder brings an action to remedy the frauds, *ultra vires* acts, or negligence of a director or third person, the most common and dangerous defense that he has to encounter is the defense that he has been guilty of laches in bringing his action. Like the defense of contributory negligence — a modern principle of law that defeats many actions for negligence — so the defense of laches, acquiescence, or ratification has sprung up to defeat stockholders' actions herein. The principles which govern, define, and explain this defense have become well settled. They form the subject of this chapter.

§ 729. *Laches, acquiescence, or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy — Right of the corporation itself to complain.* — It has already been shown that a stockholder may bring an action to remedy frauds, negligence, or *ultra vires* acts. As regards the frauds and negligence of corporate officers, it is well settled that laches is a good defense to a stockholder's action herein. In reference to *ultra vires* acts, however, which are *mala prohibita* or *mala in se*, there is more difficulty. It is very clear that no assent or acquiescence of the stockholders can validate such acts.<sup>1</sup>

<sup>1</sup> See *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 186 (1879), where the court said: "A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can

validate them." A contract in which the directors are interested, where it is void by statute, cannot be enforced on the ground of waiver by the corporation. *Barton v. Port Jackson, etc. Co.*, 17 Barb. 397 (1854). "Void" cannot be construed as "voidable" in



But it is a different question to determine whether, after long acquiescence, the stockholder may take advantage of the invalidity of such acts. As regards acts *mala prohibita*—that is, acts expressly prohibited by statute—the stockholder may be barred by laches from complaining thereof, since the state, through its attorney-general, may protect the interests of the public.<sup>1</sup> The stockholder, however, may sue on the ground that unless the evil is corrected the state may forfeit the corporate franchises.<sup>2</sup>

As regards acts *mala in se*, probably the rule will depend on the circumstances of the case. If the stockholder has participated in the act or knowingly accepted the benefit thereof, the court will not aid him, since he who comes into equity must do so with clean hands.<sup>3</sup> Thus, where a lease of a railroad is *ultra vires*, a bill in equity filed by one of the parties to the contract will not lie to set it aside. The court will aid neither party, they being *in pari delicto*.<sup>4</sup> When, however, a stockholder has not participated or knowingly accepted the benefit of corporate contracts which are *mala in se*, there would seem to be

a statute which is enacted from public policy, and not for the benefit of parties only. *Rex v. Hipswell*, 8 B. & C. 466 (1828), concerning a statute against binding out children. For a collection of the cases on *ultra vires* acts as *mala prohibita* and *mala in se*, see an article in *The Counsellor*, vol. 4, p. 151.

<sup>1</sup> See *Stewart v. Erie*, etc. Transp. Co., 17 Minn. 372 (1871); and *Gray v. Chaplin*, 2 Russ. Ch. 127 (1826), where the court held that the stockholder cannot claim that the public is wronged. If a public right is to be enforced, it must be at the suit of those to whom the protection of public rights belongs. *Cf. Ashbury*, etc. Co. v. *Richie*, L. R. 7 H. L. 653 (1875); s. c., L. R. 9 Exch. 224, 262. That which is forbidden by statute cannot be ratified. *Nellis Co. v. Nellis*, 62 Hun, 63 (1891); *Taylor v. Chichester*, etc. Ry., L. R. 2 Exch. 356 (1867). The state may at any time object. *Alexander v. Searcy*, 81 Ga. 536 (1889). A New York corporation cannot maintain a suit in Maryland to collect a subscription where by the terms of the subscription \$100,000 preferred stock and \$175,000 common stock was issued for an agency agreement which

was worthless and \$75,000 of the preferred stock was returned to the company as treasury stock, and then subscriptions were taken on the basis of one share of preferred and a half share of common stock for each \$100 paid, although the New York statute prohibited such a transaction. *Trent*, etc. Co. v. *Wheelwright*, 84 Atl. Rep. 543 (Md. 1912).

<sup>2</sup> *Manderson v. Commercial Bank*, 28 Pa. St. 379 (1857), where discounts were being improperly made.

<sup>3</sup> See § 39, *supra*. A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder by being a stockholder is estopped from complaining, and is presumed to have had knowledge of the facts from the time when he became a stockholder. *Coquard v. National L. S. Co.*, 171 Ill. 480 (1898).

<sup>4</sup> *St. Louis*, etc. R. R. v. *Terre Haute*, etc. R. R., 145 U. S. 393 (1892).



no reason why mere delay on his part in bringing suit to set aside such acts should be fatal to his bill.<sup>1</sup>

As to the corporation itself, the fact of its participating in an act which is merely beyond the powers of a corporation, but is not prohibited by statute or pernicious in itself, may not be a bar to recovery upon the contract.<sup>2</sup> A suit in equity lies at the instance of a railroad corporation that has guaranteed negotiable bonds of another railroad corporation to have such guaranty canceled and suits upon the guaranty restrained, because of facts not appearing upon the face thereof and because otherwise the bonds may pass into *bona fide* hands.<sup>3</sup> Where a director is one of the committee appointed by the board of directors to settle claims against the corporation, and he buys some of the claims, he must turn them in at the price he paid; and even though the stockholders and directors intended to allow him the profit, yet this does not estop the corporation from objecting.<sup>4</sup> But the corporation itself cannot maintain a suit to set aside a conveyance of some of its property to a person without consideration and to defraud corporate stockholders and creditors.<sup>5</sup> A corporation cannot refuse to transfer stock on the ground that it was issued to promoters for their services in bringing

<sup>1</sup> A stockholder may object to the voting of overissued stock in the hands of the party to whom it was originally issued, even though he voted to issue such stock, and he may maintain an action to have the stock canceled. *Haskell v. Read*, 68 Neb. 107 (1903).

<sup>2</sup> *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24 (1896).

<sup>3</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899). The pledgee of a majority of the stock of a corporation may take control of its board of directors and cause it to bring suit against the directors to hold them personally responsible for aiding the insolvent pledgor to fraudulently borrow the money of the corporation. *Cream City, etc. Co. v. Donahue*, 142 Wis. 651 (1910). Even though a corporation borrows money to pay the obligations of an insolvent debtor of such corporation without consideration, yet if thereafter all of the former's stock is sold on the basis of such loan being legal, the corporation cannot thereafter repudiate it. *Remington, etc. Co. v. Caswell*, 126 N. Y. App. Div. 142 (1908). A corporation may set aside a sale of corporate land to the

directors themselves, and not even a subsequent board of directors can ratify such a sale, and it is immaterial that the stock is held by persons who purchased with knowledge of the transaction. *Nueces, etc. Co. v. Davis*, 116 S. W. Rep. 633 (Tex. 1909).

<sup>4</sup> *Kroegher v. Calivada, etc. Co.*, 119 Fed. Rep. 641 (1902). A corporation may purchase its own stock, and if it purchases such stock from a director the sale may be valid, but the price is not binding and the director will be allowed only what the stock is reasonably worth. Even though the stockholders for two years, with full knowledge of the facts, do not object, the corporation may defend against the agreed price, but may be obliged to pay what the stock was worth. *Oliver v. Rahway, etc. Co.*, 64 N. J. Eq. 596 (1903). See also § 38, *supra*, and §§ 766a, 848g, *infra*.

<sup>5</sup> *Pigg v. Casper Co.*, 196 Fed. Rep. 177 (1912). Although the president makes a contract with the corporation by which he gets certain of the assets, yet if the stockholders ratify the contract on condition that all the other stockholders be offered a similar amount of assets, the corporation can-



about the organization, it appearing that all the stockholders approved of the issue and no corporate creditors objected.<sup>1</sup>

In Massachusetts the supreme court has recently held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors, and officers approved the transaction when it was carried out, it appearing that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.<sup>2</sup>

not subsequently repudiate the transaction. *Goss & Co. v. Goss*, 147 N. Y. App. Div. 698 (1911).

<sup>1</sup> *Fitzpatrick v. O'Neill*, 118 Pac. Rep. 273 (Mont. 1911).

<sup>2</sup> Where a person buys all the stock of a corporation for about \$613,000, and some real estate for about \$175,000, and sells the former to a corporation formed by him for that purpose, for \$2,500,000 par value of stock, having also an actual value of \$2,500,000, and sells the real estate for \$750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter: it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said: "That is an obligation resting upon every fiduciary who makes

a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315 (1905), the court refusing to follow *Old Dominion, etc. Co. v. Lewisohn*, 136 Fed. Rep. 915, involving the other issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued. In the final decision of this case in Massachusetts a judgment of upwards of \$2,000,000 by the company against the defendant was sustained. The court held that al-



The supreme court of the United States, however, subsequently passed on the same transaction and held very properly that the corporation could not complain at all, and that it would not be allowed to repudiate its consent to an issue of stock for property, and to charge a single stockholder therefor, when thirteen fifteenths of its stock was held by parties receiving the benefit of the transaction, especially where any such repudiation would be for the benefit of the guilty and innocent alike.<sup>1</sup> Where promoters buy property with a view to organizing a

though the contracts were made in New Jersey, the company being incorporated in that state, yet where they were intended to be and were carried out in Massachusetts, the law of Massachusetts governed on this subject. The court gave a wide meaning to the word "promoter" in defining its fiduciary relation towards the company, and held that in selling property to the company there must be (1) an independent board of directors and a full disclosure to them, or (2) a full disclosure to all existing and future subscribers to shares, or (3) ratification by the stockholders after complete organization, or (4) all the stock issued to himself. The court again held that where the property costing \$1,000,000, with a market value of not over \$2,000,000 was turned in by the promoters for \$3,250,000 of stock, and then \$500,000 remaining unissued stock was sold to the public at par, without disclosing such purchase and profit, the company might recover such secret profit, even though at the time of the sale the vendor owned the entire capital stock then outstanding. The measure of damages is the difference between the market value of the stock issued and the market value of the property received. *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909); s. c., 225 U. S. 111 (1912).

<sup>1</sup> *Old Dominion, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908). A promoter, who is being sued in Massachusetts by a New Jersey corporation for alleged illegal profits, cannot by a suit in equity in New Jersey enjoin the corporation from prosecuting such suit in Massachusetts, even though he has been held liable by the Massachusetts court, and he alleges that the decision is erroneous, and even though the

New Jersey courts might not have held him liable originally, and even though the United States court in the same transaction held that the parties were not liable, especially where he has delayed five years before he has commenced suit in New Jersey. Where a promoter has been held liable for illegal profits the court will not compel another promoter equally guilty to pay a part of the judgment, even though the judgment is for more than the profit received by the defendant promoter. The liability of a promoter is to be determined by the law of the state where the transaction occurred or where the action is tried, rather than of the state where the corporation was organized. *Bigelow v. Old Dominion, etc. Co.*, 74 N. J. Eq. 457 (1908). The line between liability as promoters, and freedom from liability as vendors of property, to a corporation for stock, is somewhat vague and indefinite, and in fact courts differ even where exactly the same state of facts exists. For instance, in this case a New York man Lewisohn, and a Boston man Bigelow, acting together, transferred mining properties to a New Jersey corporation in payment for stock, the supreme court of the United States held that Lewisohn was not liable, while the supreme court of Massachusetts held that Bigelow was liable to the corporation for his profit as a promoter. Judge Hough has well said in regard to that particular case that it has "a history writ very large in the reports, and not calculated to encourage any one who hopes to look upon the law as a science." *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911). An interesting history of the Lewisohn and Bigelow litigation in New York



corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock were sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six years' statute of limitations.<sup>1</sup> Even though promoters turn in property at a very high value, yet if all the parties were aware of all the facts a receiver of the corporation cannot hold the promoters liable.<sup>2</sup> A fraudulent decree of foreclosure may subsequently be attacked by the corporation itself after it has passed into other hands, even though the officers, directors, and stockholders who were such at the time of the foreclosure acquiesced therein.<sup>3</sup> But a contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby.<sup>4</sup>

§ 730. *Express ratification herein — Ratification by the majority is binding when on the minority — Transferee of stock that has been voted in favor of the act cannot complain.* — There are in general two ways in which a stockholder may be said to have ratified an act of the directors which he is attempting to enjoin or set aside. The ratification may be by vote or by an express agreement or state-

and Massachusetts with an analysis of the various decisions is found in *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911), where the United States court in New York refused to hold the Lewisohn estate liable. If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the allegations in the first suit. *Old Dominion, etc. Co. v. Lewisohn*, 202 Fed. Rep. 178 (1913).

<sup>1</sup> *Pietsch v. Milbrath*, 123 Wis. 647 (1904). A corporation may rescind a contract which promoters have made prior to its organization, and turned over to the corporation at a profit, which the promoters concealed from the stockholders, who were induced to subscribe by a prospectus which did not state such profit, it appearing also that the other party to the contract paid the commission to the promoters knowing that it had been concealed. *Commonwealth S. S. Co. v. American, etc. Co.*, 197 Fed. Rep. 797 (1912).

<sup>2</sup> *Tompkins v. Sperry, etc. Co.*, 96 Md. 560 (1903). Even though the stockholders of a bank assent to notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor, *Coddington v. Canaday*, 157 Ind. 243 (1901). See also § 701, *supra*. These subjects, however, are fully discussed elsewhere. See §§ 46, 47, *supra*.

<sup>3</sup> *Pacific R. R. of Mo. v. Missouri, etc. Ry.*, 111 U. S. 505 (1884).

<sup>4</sup> *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); s. c., 198 U. S. 561. Where all the stockholders acquiesce, the corporation itself cannot complain. *Home, etc. Co. v. Barber*, 67 Neb. 644 (1903). A corporation claiming the benefit of transactions of its president on its money and credit, but the profit of which he has kept, cannot maintain suit therefor if it has ratified the same. *North Chicago Railroad v. Chicago, etc. Co.*, 150 Fed. Rep. 612 (1907); *aff'd*, 162 Fed. Rep. 1007.



ment to that effect, or it may be by such laches or acquiescence as will amount to an implied ratification.<sup>1</sup> Cases involving the defense of an express ratification rarely arise, since the courts are not open to a stockholder who expressly agrees to an alleged illegal act being done by the corporation and then comes into court to have it set aside.<sup>2</sup>

<sup>1</sup> Thus, in *Evans v. Smallcombe*, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court said: "Consent might be either express or might be inferred from the acquiescence of the shareholders after full knowledge of the transaction which was in excess of the powers of the directors." See also *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 187 (1879). "Acquiescence as a defense has, speaking generally, a dual nature. It may, upon the one hand, rest upon the principle of ratification, and may be denominated implied ratification, or it may, upon the other hand, rest upon the principle of estoppel, and may be denominated equitable estoppel. The former principle underlies it when the conduct of a plaintiff, relating to the transaction or matter complained of by him, subsequent to the rise of it, justifies and supports the normal and reasonable conclusion that he, by his assent thereto or acquiescence therein, has accepted and adopted it. His ratification is implied through his acquiescence instead of expressed by positive and distinct action or language. The latter principle underlies it when a plaintiff against whom it is invoked remained silent or inactive when there was the opportunity and the duty to speak or act." *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1912). Where the directors own all of the capital stock there is no objection to their selling property to the company, and the price may be collected even though the company subsequently becomes insolvent. *Attorney General, etc. v. Standard, etc. Co. of New York*, [1911] A. C. 498.

<sup>2</sup> As an instance of express ratification, see *Allen v. Wilson*, 28 Fed. Rep. 677 (1886); *Butterfield v. Cowing*, 112 N. Y. 486 (1889); *Burden v. Burden*, 159 N. Y. 287, 304 (1899). A stockholder who has given a release to another stockholder or officer cannot

thereafter maintain a suit in behalf of the corporation to hold the latter liable; neither can a person to whom he transfers his stock, nor his personal representatives. *Babcock v. Farwell*, 245 Ill. 14 (1910). A director who is present at a directors' meeting which forfeits stock for non-payment of calls and supports the resolution, cannot afterwards attack the forfeiture on the ground that the directors were illegally appointed and hence that the forfeiture was void or that notice of forfeiture was not legally served. *Jones v. North Vancouver, etc. Co.*, [1910] A. C. 317. A sale of land by a corporation to the wife of the president is valid if unanimously ratified by the stockholders. *Davis v. Nueces, etc. Co.*, 103 Tex. 243 (1910). In a proceeding by a stockholder to test an election under the New York statute, another stockholder cannot intervene unless she shows that she was a stockholder at the date of the election or that the former owner of her stock did not vote for the directors who were declared elected. *Matter of Scheel*, 134 N. Y. App. Div. 442 (1909). By unanimous consent stockholders of an Arizona corporation may transfer all its assets to a Nevada corporation, the latter assuming the liabilities and issuing its stock share for share for the old stock, and any stockholder who votes for it cannot thereafter object, but a stockholder who has merely given a proxy is not bound, where the stockholder did not know of the proposed action, even though the proxy votes for the change and the written proxy gave to him all the authority that the stockholder "would possess if personally present at such meeting," those words having reference to ordinary business only. Such a stockholder is not bound, even though the Arizona corporation is dissolved, inasmuch as such a reorganization is giving away corporate assets to a new



So also if the complaining stockholder participated in the act complained of, he cannot afterwards complain.<sup>1</sup> Thus a stockholder cannot

corporation or compelling him to be a party to a continuation of the business by a new corporation. He may cause the reorganization to be set aside, even though the Nevada corporation is not a party. *Farish v. Cieneguita, etc. Co.*, 12 Ariz. 235 (1909). Cf. §§ 652, 662, 681, *supra*. 86 Atl. Rep. 843.

<sup>1</sup> See §§ 39, 40, *supra*, and § 735, *infra*.

Where by consent of all the stockholders in a corporation doing a losing business its president is authorized to sell its property and pay the debts, and he does sell it to one of the stockholders at its full value, the other stockholders having notice of the sale and an opportunity to purchase, one of them cannot afterwards object on the ground that the directors had not authorized the sale. *Ebelhar v. Nave*, 119 S. W. Rep. 1176 (Ky. 1909). A stockholder who takes part in selling the corporate property to another company cannot thereafter attack the sale as being *ultra vires* or irregularly authorized. *Bridges v. Southern Bell, etc. Co.*, 136 Ga. 251 (1911). A stockholder who votes for a lease cannot afterwards attack it on the ground that it violates stockholders' rights. *State v. Boston, etc. R. R.*, 80 Atl. Rep. 858 (N. H. 1911). A stockholder who ratifies a transaction cannot two years thereafter withdraw his ratification, it having been acted upon. *Baker v. Seattle, etc. Co.*, 61 Wash. 578 (1911). A stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto where she afterwards disposes of part of the new stock so issued. *Hoene v. Pollak*, 118 Ala. 617 (1898). Where a reorganization has been completed, and a voting trust established and a release to the reorganization committee executed by the certificate holders, one of the certificate holders cannot hold them liable in damages on the ground that as trustees of the voting trust they controlled the board of directors and had mismanaged the new corporation, it appearing that they did not consti-

tute a majority of the board of directors and that in managing the corporation they acted as stockholders and directors, and not as a reorganization committee. *Lawrence v. Curtis*, 191 Mass. 240 (1906). Although on a consolidation the president of one of the companies takes a large amount of the new common stock for services, yet, if the stockholders knew all about it and agreed that he should have the stock, they cannot afterwards hold him liable therefor. *Rusling v. Moses*, 47 Atl. Rep. 1054 (N. J. 1901). Acquiescence and ratification of the guaranty by one railroad of stock and bonds of another railroad, the stock and bonds being owned by directors of the former company, is a bar to an action to set the same aside. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). "The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied." *Wormser v. Metropolitan Street Ry.*, 184 N. Y. 83 (1906). A stockholder who by proxy takes part in a meeting extending the corporate existence cannot deny the validity of such extension. *Callahan v. Chilcott, etc. Co.*, 37 Colo. 331 (1906). Even though the corporation makes loans *ultra vires*, yet an officer who takes part therein cannot complain. *Bixler v. Summerfield*, 210 Ill. 66 (1904). A stockholder may object to the voting of overissued stock in the hands of the party to whom it was originally issued, even though he voted to issue such stock, and he may maintain an action to have the stock canceled. *Haskell v. Read*, 68 Neb. 107 (1903). Stockholders who have participated in a contract between the corporation and its officers cannot complain thereof. *Clark v. Pittsburgh, etc. Co.*, 184 Pa. St. 188 (1898). "Property delivered under an illegal contract cannot be recovered back by any party in *pari delicto*." *Harriman v. North-*



object to a lease as being *ultra vires*, where he has accepted pecuniary benefits thereunder, such as selling the privilege to subscribe for stock, the

ern Securities Co., 197 U. S. 244 (1905). In Story, Equity Jurisprudence, 13th ed., sec. 298, it is said, "in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not, in equity, material. The reason is that the public interest requires that the relief should be given, and it is given to the public through the party." A stockholder cannot hold a director liable for the company's exchanging accommodation paper with another company, where such stockholder was himself a director when the practice commenced and acquiesced therein. Davenport v. Crowell, 79 Vt. 419 (1907). Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital stock into preferred stock and thereafter divide the profits among themselves without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, corporate creditors not being injured. Breslin v. Fries-Breslin Co., 70 N. J. L. 274 (1904). The court said: "In the present case we apply this doctrine to the non-observance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante*,

were the assent of his fellow stockholders and of the company to be now withdrawn." A director who objects to an increase in the salaries of the officers, but participates in their re-election from year to year, cannot maintain a suit to hold them liable. Klein v. Independent, etc. Assoc., 231 Ill. 594 (1907). A stockholder who votes for an act cannot afterward complain of it. McGeorge v. Big Stone Gap Imp. Co., 57 Fed. Rep. 262 (1893). Stockholders who participate in an alleged fraudulent reorganization cannot complain. Symmes v. Union Trust Co., 60 Fed. Rep. 830 (1894). A stockholder who votes for the purchase of property from a director cannot afterwards complain. Barr v. Pittsburgh Plate Glass Co., 51 Fed. Rep. 33 (1892). See also ch. XXXIX, *supra*. A director who has voted for a sale cannot as a stockholder object. Holton v. Wallace, 66 Fed. Rep. 409 (1895). A stockholder who, as secretary, signed certificates of stock, cannot claim that they were watered stock, and hence that they cannot be voted at a meeting called to ratify a sale of property to a director. Wisner v. Delhi, etc. Co., 46 La. Ann. 1223 (1894). Although a stockholder voted in favor of an *ultra vires* lease, yet if the corporation has repudiated the lease, the estoppel is destroyed and the stockholder's suit may continue. Memphis, etc. R. R. v. Grayson, 88 Ala. 572 (1890). See also ch. XL, *supra*. A stockholder in a corporation which is acting practically for the profit of another corporation cannot, after he expressly assents to such an arrangement, object thereto. Hart v. Mt. Pleasant, etc. Co., 97 Iowa, 353 (1896). A stockholder who has participated in a consolidation cannot object thereto as being irregular. Bradford v. Frankfort, etc. R. R., 142 Ind. 383 (1895). Parties taking part in an extension of the road cannot object that the charter amendment authorizing it was unconstitutional. Jones v. Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234. See



lease not being prohibited by statute nor evil in itself. The New York court of appeals said: "Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it, or be denominated merely an acquiescence or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here."<sup>1</sup> A shareholder who knows of the payment of a dividend out of the capital stock *ultra vires* and receives and retains such dividend is estopped from maintaining an action to compel the directors to replace it. While the corporation itself is not estopped by the participation, knowledge, or acquiescence of the shareholders, yet the latter may be.<sup>2</sup> However, a provision in a contract of subscription to the stock of the company whereby the subscriber waives notice of all contracts between the promoters and the company is not binding

also, in general, *Steger v. Davis*, 8 Tex. Civ. App. 23 (1894). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder and who signs the mortgage, cannot do so. *Perry v. Pearson*, 135 Ill. 218 (1890). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1889). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. *Farmers' L. & T. Co. v. San Diego, etc. Co.*, 45 Fed. Rep. 518 (1891). See also, in general, *Branch v. Jesup*, 106 U. S. 468, 476 (1882); *U. S. v. Union Pac. R. R.*, 98 U. S. 569, 612 (1878). If all of the directors and stockholders know of a sale of property by a director to the corporation and do not object, and use the property, the transaction cannot be set aside. *Battelle v. Northwestern, etc. Co.*, 37 Minn. 89 (1887). A bondholder who is a party to the reorganization plan, under which and as part of which the foreclosure sale is held, cannot object to the legality of the sale. *Crawshay v. Soutter*, 6 Wall. 739 (1867). Knowledge of

stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue, unless inequitable, or rights of third persons have intervened. *Pacific R. R. v. Missouri Pac. R. R.*, 111 U. S. 505 (1884). A stockholder in an old and new company who aids in the latter's improvement of property purchased by it from the former, and is instrumental in bringing about the sale and purchase, is estopped from objecting to the validity of the sale. *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 116 Ill. 170 (1886). A person who sells property to a director to be paid for partly in the stock of a corporation cannot afterwards object that the director was disqualified from reselling the property to the corporation. *Mackey v. Burns*, 16 Col. App. 6 (1901), the court holding also that even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction, where he had himself moved that the stock be so issued.

<sup>1</sup> *Wormser v. Metropolitan Street Ry.*, 184 N. Y. 83 (1906).

<sup>2</sup> *Towers v. African, etc. Co., Ltd.*, [1904] 1 Ch. 558. Cf. 202 Fed. Rep. 599 and § 808, *supra*.



on the stockholder if such waiver is tricky and fraudulent.<sup>1</sup> A general resolution at a stockholders' meeting approving all acts of the directors and officers, such acts not being specified nor the minutes thereof read to the meeting, is not a ratification of the same.<sup>2</sup> A vote of the stockholders ratifying all the acts of the directors does not ratify acts which are not fully explained to the stockholders.<sup>3</sup>

A difficult question arises when a majority of the stockholders vote an approval or ratification of questionable acts of the directors. A board of directors and a majority of the stockholders cannot condone an actual fraud in the way of a sale of corporate property to directors, where it is to the advantage of the corporation to have the sale set aside.<sup>4</sup> Thus in a stockholder's suit to hold directors to account for stock

<sup>1</sup> *Greenwood v. Leather, etc. Co. Ltd.*, [1900] 1 Ch. 421. Where the promoters paid to a person who is to act as chairman of the directors, and his firm who underwrote ten thousand shares, a commission of twelve thousand shares, the court held that ten thousand of the twelve thousand was for the use of his name and only two thousand shares for the commission; and hence he was liable at the instance of an investor in the stock to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there 'may' be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. *Cackett v. Keswick*, [1902] 2 Ch. 456. See also § 160, *supra*.

<sup>2</sup> *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). Where a corporation has illegally transferred property to a director a resolution to recover back part of it is not a ratification as to the remaining part. *Mobile, etc. Co. v. Gass*, 142 Ala. 520 (1905).

<sup>3</sup> *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). See also § 731, *infra*.

<sup>4</sup> *Kessler & Co. v. Ensley Co.*, 129 Fed. Rep. 397 (1904). See § 740, *infra*. A majority of the stockholders in interest cannot ratify the officers unlaw-

fully taking for their own use its moneys in excess of their salaries or the value of their services. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock. *Booth v. Land, etc. Co.*, 68 N. J. Eq. 536 (1905). *Cf.* §§ 649, 662, *supra*. Unreasonable salaries voted by a majority of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased. *Jacobson v. Brooklyn, etc. Co.*, 184 N. Y. 152 (1906). Where in order to increase its apparent reserve directors of an insurance company borrow money and purchase worthless stock of another corporation, they are personally liable therefor to a receiver of the former, even though the stockholders ratified the transaction, it appearing that the directors controlled the stockholders' meeting. *Bowers v. Male*, 111 N. Y. App. Div. 209 (1906); *aff'd*, 186 N. Y. 28. A dissenting stockholder in a going corporation may enjoin it from selling its stock to another corporation in exchange for the stock of the latter, which stock is then to be offered to the subscribers of the former



practically given away, it is no defense that a majority of the stockholders had ratified the fraudulent transaction.<sup>1</sup> "The direct or indirect misappropriation of assets of the corporation to his own use or benefit by an officer is incapable of being authorized or ratified by a vote or any act or omission of the majority of the stockholders."<sup>2</sup> On the other hand, even though a lessor railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment.<sup>3</sup>

for subscription. This is practically increasing the stock and forcing the stockholders to subscribe or lose their present interest in the corporation; in other words, putting upon them a forced assessment under penalty of total loss. Such a transaction is not legal, even though ratified by a majority of the stockholders, inasmuch as they cannot ratify an illegal act. *Schwab v. Potter Co.*, 129 N. Y. App. Div. 36 (1908); *aff'd*, 194 N. Y. 409. See also § 884, *infra*. The board of directors of a railroad company have no power to accept amendments to the charter involving the building of many miles of branch railroad and a radical change of the location of the road and the abandonment of the existing line and depots, especially where the old charter provided that no branch over two miles long should be constructed until the stockholders had voted in favor of it, and ratification of their acts by a stockholders' meeting does not cure the defect. *Commonwealth v. Richmond, etc. R. R.*, 111 Va. 611 (1911). A statutory liability of a director for voting for the payment of a dividend out of capital was enforced in *Siegmán v. Kissel*, 71 N. J. Eq. 123 (1906), by a minority stockholder, even though a majority of the stockholders were opposed to the suit. Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was

openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. *Goodell v. Verdugo, etc. Co.*, 138 Cal. 308 (1903), the court saying, "the publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid." That the majority cannot bind the minority in such cases, see also *Hazard v. Durant*, 11 R. I. 195 (1875). See 156 S. W. Rep. 889.

<sup>1</sup> *Continental Securities Co. v. Belmont*, 206 N. N. 7 (1912).

<sup>2</sup> *Pollitz v. Wabash R. R.*, 207 N. Y. 113, 127 (1912). A suit by a stockholder against the taking up of debentures by an issue of stock and bonds of much greater par value is not defeated by the fact that a majority of the stockholders had approved the transaction. *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709 (1912).

<sup>3</sup> *Continental Ins. Co. v. New York, etc. R. R.*, 187 N. Y. 225 (1907). Where one railroad purchases the entire capital stock of another railroad upon credit, the stock being deposited with a trustee to secure payment of the purchase price, such stock may be voted by the purchaser in ratification of a traffic contract whereby the selling railroad and the purchasing railroad guarantee to a third railroad, in which the purchasing railroad is interested, traffic enough to pay the interest on the bonds and dividends of the stock of the third railroad. Such ratification is legal, even though a minority of the selling stockholders object. *Kissel v.*



A board of directors cannot release one of their number from liability for wasting the funds of the company.<sup>1</sup>

Where by the charter the directors' fees are limited, they cannot by appointing one of their number managing director increase his fees, and any increased fees of any of the directors may be recovered back, even though the stockholders in a general meeting had ratified the payment.<sup>2</sup> Where the board of directors have purchased at an excessive price real estate in which the dominating directors are personally interested, the latter may be held liable at the instance of a stockholder. Ratification of the transaction at a stockholders' meeting, which the dominating directors control, does not validate the transaction.<sup>3</sup>

A stockholder who holds stock which has been voted in favor of the act complained of cannot bring suit as the holder of that stock.<sup>4</sup> A

Chicago, etc. Co., 126 N. Y. App. Div. 852 (1908). In the case *Carson v. Allegany, etc. Co.*, 189 Fed. Rep. 791 (1911) it was held that although a corporation might avoid a contract on account of the fraud of its president and a majority stockholder, yet that this might not be sufficient to sustain a bill in equity by a minority stockholder for that purpose. Cf. §§ 649, 662, *supra*. Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 807 (1903). The court further said: "In *Leavenworth v. Chicago Ry. Co.*, 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In

the case of *Nye v. Storer*, 168 Mass. 53, and *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." Where a majority of the stockholders and also the directors have ratified a sale by a pledgee of property of the corporation a minority stockholder cannot cause the sale to be set aside, inasmuch as the pledgor might have originally consented to the sale. *Macon, etc. R. R. v. Shailer*, 141 Fed. Rep. 585 (1905). Even though in financing an insolvent railroad company the directors receive stock as a bonus, yet if the transaction was fair and in good faith and in aid of the company, a majority of the stockholders may ratify it. *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1912). Ratification by a holding company controlled by a common board of directors of another company may not be binding on the stockholders of the holding company. *Brooklyn Heights R. R. v. Brooklyn City R. R.*, 151 N. Y. App. Div. 465, 480 (1912).

<sup>1</sup> *Gilbert v. Finch*, 173 N. Y. 455 (1903). See *Galery v. National Exch. Bank*, 41 Mich. 169 (1879). See also §§ 669, 683, *supra*.

<sup>2</sup> *Boschoek, etc. Co. Ltd. v. Fuke*, [1906] 1 Ch. 148.

<sup>3</sup> *Klein v. Independent, etc. Assoc.*, 231 Ill. 594 (1907).

<sup>4</sup> See § 40, *supra*, and § 735, *infra*; *Re Syracuse, etc. R. R.*, 91 N. Y. 1



purchaser or pledgee of stock cannot complain of mismanagement and loss of funds which all the stockholders acquiesced in prior to his

(1883). *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (1903). Even though the vendors of property to a newly formed corporation receive an excessive price therefor in fully paid stock, yet if it is a closed transaction the corporation cannot thereafter hold them liable for the overvaluation, notwithstanding the corporation thereafter sells other stock to the public at par for cash without disclosing the transaction. *Old Dominion Copper, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908), the court saying: "At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land." The court said also that under the decisions a purchaser of stock from the vendors would have no claim excepting, of course, for actual fraud, and that the theory that the corporation is not bound until an independent board of directors passes upon the transaction has no basis in the decisions, and the court distinguished *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, aff'g 5 Ch. D. 73, on the ground that in the latter case the purchase was not completed until the stock had been taken by the public in ignorance of the facts. An interesting history of the Lewisohn and Bigelow litigation in New York and Massachusetts with an analysis of the various decisions is found in *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911), where the United States Court in New York refused to hold the Lewisohn estate liable. If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the allegations in the first suit. *Old Dominion, etc. Co. v. Lewisohn*, 202 Fed. Rep. 178 (1913). A railroad company has no legal power to subscribe for the stock of a land company nor become accom-

modation indorser of the latter's note, even though all the stockholders assent thereto, but a stockholder cannot complain, where the owner of his stock at the time of the act consented thereto, excepting that a mere authorization prior to his purchase of his stock will not sustain acts done after suit commenced by him, objecting to the same. *McCampbell v. Fountain, etc. R. R.*, 111 Tenn. 55 (1903). Where a mining company has sold all its property with the consent of the stockholders, a subsequent purchaser of the stock cannot complain. *Boldenweek v. Bullis*, 40 Colo. 253 (1907). Where a corporation has purchased all the assets of another corporation and issued stock in payment of the same, a stockholder in the former who became a stockholder after the transaction, cannot maintain a suit to have the issue declared void, especially where there is no offer to return the property. *Buford v. Keokuk, etc. Co.*, 69 Mo. 612 (1879), aff'g 3 Mo. App. 159. The purchaser of stock which was issued to directors cannot complain that the directors were guilty of fraud in the issue. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). Where the entire capital stock, \$500,000, is issued for patents, and the patentee transfers about one fifth of it back to the corporation, and it is then sold by the company at par as treasury stock, and the company is then dissolved, a purchaser of some of such treasury stock may maintain a bill to have the surplus assets over and above the debts applied to such treasury stock before anything is paid on the promoter's stock in distribution, it being shown that the patents had little or no value. No request to the receivers to bring such a suit need be made, because it is a personal suit. *Weber v. Nichols*, 75 N. J. Eq. 117 (1908). A stockholder who has given a release to another stockholder or officer cannot thereafter maintain a suit in behalf of the corporation to hold the latter liable; neither can a person to whom he transfers his



purchase or pledge.<sup>1</sup> A stockholder may maintain a suit to set aside an *ultra vires* act, even though the act was prior to the purchase of

stock, nor his personal representatives. *Babcock v. Farwell*, 245 Ill. 14 (1910). In *Brown v. Duluth, etc. Ry.*, 53 Fed. Rep. 889 (1893), the court refused to interfere where the transferee of the stock took with notice. The court said: "The complainant, as their transferee, is in no better situation than they are. He has no greater rights than his transferors as regards a remedy invalidating the transaction. The maxim *in pari delicto* applies, and a court of equity will not aid him. He cannot bring suit in behalf of other stockholders against the corporation or other parties participating in the issue, as his own title is tainted with the same fraud." A purchaser of stock which was voted in favor of a reorganization scheme cannot object to the scheme as being *ultra vires*, there being nothing illegal *per se* in it. *Hollins v. St. Paul, etc. R. R.*, 9 N. Y. Supp. 909 (1889). A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state — Pennsylvania. *Wood v. Corry, etc. Co.*, 44 Fed. Rep. 146 (1890). Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in part payment for the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. *Schilling, etc. Co. v. Schneider*, 110 Mo. 83 (1892). A stockholder who purchases his stock after the acts complained of took place cannot compel another stockholder to repay to the company dividends which he has received, due to contracts by which the company had sold coal to a railway company, for which railway company

such latter stockholder was purchasing agent. *Clark v. American Coal Co.*, 86 Iowa, 436 (1892). As to whether this same principle — that stock which has participated in a fraudulent act cannot afterwards be the basis of a suit to set aside that fraud — should be applied to bonds, so far as enforcing the covenants of the mortgage is concerned, such covenants being waived by a former owner of the bonds which complainant now owns, see *Belden v. Burke*, 147 N. Y. 542 (1895). In regard to this case and the famous litigation in which it was but a part, see § 766, *infra*. In Alabama it is held that, if the stock passes into *bona fide* hands, the *bona fide* holder may object to the fraudulent or *ultra vires* act, even though the stock itself was tainted with the fraud by reason of being held by one of the guilty parties at the time of the act. *Parsons v. Joseph*, 92 Ala. 403 (1891). But the weight of authority holds that if the stock purchased is tainted with the fraud — that is to say, if the persons guilty of the act complained of owned that stock when they did the act — no action will lie by a *bona fide* transferee of that stock. *Ffooks v. Southwestern Ry.*, 1 Sm. & G. 142 (1853). A transferee of stock that was voted in favor of the act cannot complain. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife, and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such

<sup>1</sup> *Erny v. Schmidt Co.*, 197 Pa. St. 475 (1901).



his stock and he knew thereof when he purchased.<sup>1</sup> Where the stockholder, with full knowledge, has accepted the benefit of an act, he cannot complain thereafter.<sup>2</sup>

The defense of an implied ratification is more difficult to establish.

relief. *Marbury v. Stone*, 17 N. Y. App. Div. 352 (1897); *aff'd*, 160 N. Y. 701. A purchaser of stock from a director may join in bringing suit against the directors for negligence to the injury of all the stockholders, even though the director knew of such negligence when he sold the stock. *Warren v. Robinson*, 25 Utah, 205 (1902). Where a corporation has sold all its property with the consent of all its stockholders the transaction cannot subsequently be attacked by a subsequent purchaser of stock. *City of Spokane v. Amsterdamsch, etc.*, 22 Wash. 172 (1900). A purchaser of stock which has assented to the corporation purchasing its own stock cannot complain. *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 90 (1902); *rev'd on another point* in 64 N. J. Eq. 807 (1903). Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute, the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. *Boston, etc. R. R. v. Graham*, 179 Mass. 62 (1901).

<sup>1</sup> *Ellis v. Penn Beef Co.*, 80 Atl. Rep. 666 (Del. 1911), holding that where two persons receive part of the stock of a corporation for property which has no substantial value and later induce a third person to subscribe for other stock and pay for it in cash, and the business is unprofitable and the parties disagree, the third stockholder may file a bill in equity to have the other stock canceled and a receiver appointed, even though he knew the facts when he subscribed for his stock.

A purchaser of stock may maintain in behalf of the corporation a cause of action arising before he purchased his stock unless he purchased it for the purpose of bringing suit or his vendor was estopped. *Just v. Idaho, etc. Co.*, 16 Idaho, 639 (1909). Even though \$40,000 of bonds and \$122,500 of stock are issued for property having a much less value, yet a stockholder who subscribed for stock knowing of the facts cannot complain, neither can his transferee. *O'Dea v. Hollywood, etc. Ass'n*, 154 Cal. 53 (1908).

<sup>2</sup> *London Assur. Co.'s Case*, 5 De G., M. & G. 465, 481 (1854). See also *Weed v. Little Falls, etc. Co.*, 31 Minn. 154 (1883). A party who has invested \$15,000 in obtaining a bridge franchise and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former \$15,000 out of \$80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue \$95,000 in bonds, \$80,000 in preferred stock, and \$60,000 in common stock for building the bridge at a cost of \$71,000; but if the former takes his \$15,000 preferred stock and keeps it for six years, he cannot then complain. *Jutte v. Hutchinson*, 189 Pa. St. 218 (1899). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue of stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders, who under protest subscribe for the new stock and then wait eighteen months before commencing



An implied ratification is generally spoken of as laches. It is the subject of the remainder of this chapter.<sup>1</sup>

§ 731. *Stockholder chargeable with laches only after he has a full knowledge of the facts.* — Laches is a defense only when the stockholder, with a full knowledge of the facts, has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense.<sup>2</sup> Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence.<sup>3</sup>

legal proceedings, are estopped from objecting. *Post v. Beacon, etc. Co.*, 84 Fed. Rep. 371 (1898). See also § 732, *infra*.

<sup>1</sup> See *First Nat. Bank v. Drake*, 29 Kan. 311 (1833), for a definition of ratification.

<sup>2</sup> See the leading case of *Cumberland Coal Co. v. Sherman*, 30 Barb. 553 (1859), quoting from Lewin on Trusts; and the equally important case of *Hoffman, etc. Co. v. Cumberland, etc. Co.*, 16 Md. 456 (1860). There can be no laches where there is no knowledge of the wrongful act, and the statute does not begin to run until such discovery. *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909).

<sup>3</sup> *Gilman, etc. R. R. v. Kelly*, 77 Ill. 426 (1875). Where the president, who is also a director, of an investment company waives security for a loan and takes securities of small value in exchange therefor, causing the loss of the loan, he may be held personally liable at the instance of a stockholder, and if the doubtful securities cannot be returned their value may be ascertained. The statutes of limitations and laches do not commence to run until the stockholder has discovered the facts. *Brinckerhoff v. Roosevelt*, 143 Fed. Rep. 478 (1906). A delay of four years may be excused by the fact that the complainant did not know the facts until three months before he instituted suit. *Kessler v. Ensley Co.*, 129 Fed. Rep. 397 (1904). There is no laches where the guilty party has kept the complaining stockholder in ignorance of the fraud, even though innocent stockholders

have come in in the meantime. *Backus v. Brooks*, 195 Fed. Rep. 452 (1912). Where the officers and directors of a lessee railroad are largely interested in the stock of the lessor and would be personally benefited by the lease being broken, and are really acting in the interest of the lessor, and settle accounts between the two companies without the ratification of the stockholders of the lessee, the lessee is not bound by such settlement. Ratification by the stockholders of such a settlement must be with knowledge and acquiescence or retention of benefits. *Brooklyn Heights R. R. v. Brooklyn City R. R.*, 151 N. Y. App. Div. 465 (1912). Where the stockholder relied on the officers and they deliberately kept her in ignorance and refused to allow the trustees of her estate to examine the books, and they ascertained the facts only by a bill in equity, there is no laches. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). Where a minority stockholder had no notice of meetings and no opportunity to examine the books he is not barred by laches from complaining of a misappropriation of money by the directors, provided he brings suit within a reasonable time after he learns the facts. Even though he is barred by laches as to one cause of complaint this is no bar as to other causes of complaint. *Joy v. Ft. Worth, etc. Co.*, 24 Tex. Civ. App. 94 (1900). The lapse of time without knowledge or means of knowledge is no bar. *Fox v. Robbins*, 62 S. W. Rep. 815 (Tex. 1901). Where there is not a full disclosure at a stockholders' meeting the members



For instance, an American stockholder in an English corporation is not estopped from complaining of an unfair, illegal scheme of reorganization, merely because he did not oppose it before it was sanctioned by the English courts in accordance with the English statute, where it is shown that he did not know anything about it.<sup>1</sup> Where, however, the facts would be well known to any intelligent man, and the means of knowledge are open to the stockholder, he is chargeable with knowledge from the date when he should have ascertained the facts.<sup>2</sup> To avoid the defense of laches, the complainant must allege and prove what he did, and in what respects he was diligent. The mere allegation that he did not discover the facts sooner is insufficient.<sup>3</sup>

Constructive notice, however, does not apply to a case of fraud, and constructive notice cannot relieve a party from responsibility

present are not bound by their assent. *Ives v. Smith*, 3 N. Y. Supp. 645 (1888). See 87 Atl. Rep. 230.

<sup>1</sup> *Bank of China v. Morse*, 168 N. Y. 458 (1901).

<sup>2</sup> A delay of eight years is not excused by an allegation that the complaining stockholder was informed of the fact only a few weeks prior to the commencement of the suit, especially where the facts were sufficient to put him on inquiry. On the other hand, the statute of limitations does not apply. *Edwards v. Mercantile, etc. Co.*, 124 Fed. Rep. 381 (1903). Means of knowledge are equivalent to knowledge. *Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882). "Means of knowledge, plainly within the reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge." *Jesup v. Illinois Cent. R. R.*, 43 Fed. Rep. 483 (1890). In a suit by a stockholder in a mining company to set aside an alleged fraudulent scheme by which the property was operated for the benefit of a railway company and finally abandoned, the delay of the plaintiff for five years after the slightest inquiry would have caused him to know of the facts is fatal. *Loomis v. Missouri, etc. Ry.*, 165 Mo. 469 (1901). Thirteen years' delay in attacking a consolidation as not being in compliance with statutory provisions is a bar. "Whatever is sufficient to excite attention, and put the party on

his guard and call for inquiry, is notice of everything to which the inquiry would have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." It is immaterial whether the court declare the consolidation void or voidable. *Leavenworth County v. Chicago, etc. R. R.*, 18 Fed. Rep. 209 (1883). Quoted and approved in *Cole v. Birmingham, etc. Ry.*, 143 Ala. 427 (1905). *Taylor v. South, etc. R. R.*, 13 Fed. Rep. 152 (1882), the court saying: "The means of knowledge are the same thing in effect as knowledge itself. . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." See also *Kelly v. Newburyport, etc. R. R.*, 141 Mass. 496 (1886). In *Phosphate, etc. Co. v. Green*, L. R. 7 C. P. 43 (1871), it was held that to show assent and acquiescence it is not necessary to prove the acquiescence of each individual shareholder. It is enough to show circumstances which are reasonably calculated to satisfy the court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry.

<sup>3</sup> *Cutter v. Iowa Water Co.*, 128 Fed. Rep. 505 (1904); rev'd on another ground in 140 Fed. Rep. 986. Cf. § 733, *infra*.



for a fraud.<sup>1</sup> It is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books.<sup>2</sup> Moreover, it is the well-established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay.<sup>3</sup> Mere delay is not laches, but is strong evidence of acquiescence. Laches is based upon estoppel where new rights have arisen.<sup>4</sup>

<sup>1</sup> *Converse v. Blumrich*, 14 Mich. 121 (1866); *Wilde v. Gibson*, 1 H. L. Cas. 623 (1848).

<sup>2</sup> Quoted and approved in *Anderson v. Scandia Min. Syndicate*, 26 S. Dak. 558 (1910). *Re Agriculturists'*, etc. Co., L. R. 1 Ch. App. 161, 511 (1866), where the court said: "It is no part of the duty of a shareholder to look into the management of the business. . . . It is not enough to show that they might have become acquainted with the mismanagement of their affairs. It must be shown that they did so." *Ryan v. Leavenworth*, etc. Ry., 21 Kan. 365 (1879). Also *Holmes v. Newcastle*, etc. Co., L. R. 1 Ch. D. 682 (1875), holding that knowledge of a sale of property is not knowledge of an illegal dividend from the proceeds. See also *Spackman v. Evans*, L. R. 3 H. L. 171 (1868); *Houldsworth v. Evans*, L. R. 3 H. L. 263 (1868).

<sup>3</sup> *Evans v. Smallecombe*, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court saying: "Lapse of time alone certainly would not make valid that which at the beginning was invalid. . . . Length of time may in many cases materially assist in establishing the presumption of acquiescence in an act which requires a confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one." *Ashhurst's Appeal*, 60 Pa. St. 290 (1869), where, however, the court says that "acquiescence is presumed from delay." Where minority stockholders did not discover that stock had been sold at less than par for cash until four years thereafter, they may then maintain a suit to have the sale set aside and they need not offer to restore to the purchaser the price he

paid. *Anderson v. Scandia Min. Syndicate*, 26 S. Dak. 558 (1910).

<sup>4</sup> *Montgomery, etc. Co. v. Lahey*, 121 Ala. 131 (1899). A person who buys stock in a corporation for the purpose of attacking a consolidation of that corporation, which consolidation took place six months previous to his purchase, will be denied relief where the former record owner of the stock had notice of the meetings leading up to the consolidation and made no objection, ninety-five per cent. of the stockholders having voted for the consolidation and large transactions in the new stock and changes in the property having taken place in the meantime. *Beling v. American, etc. Co.*, 72 N. J. Eq. 32 (1907). "Laches is a doctrine of equity. No hard and fast rule, applicable to all cases, has ever been laid down. In each instance the quest is for the equity of the particular case. . . . In cases of fraud, however, it usually takes something besides mere delay to make a chancellor close the door; for instance, a change of conditions, brought about by the complainant's apparent acquiescence in the wrong, which would make a present enforcement of the claim inequitable. . . . Owners of stock are not bound, at their peril, to search the corporate records for fraud. Until some notice of fraud is brought home to them or circumstances develop that would put a prudent person on inquiry, they may rest on the assumption that their directors are faithful." *Citizens', etc. Trust Co. v. Illinois Cent. R.*, 182 Fed. Rep. 607 (1910). Where a promoter obtains an option on property for \$12,000 and then organizes a company in which he is a director, and the remainder of the directors are dummies, and causes the corporation



A compromise or settlement, or receipt of the benefits of a fraudulent or *ultra vires* act, does not estop a stockholder from complaining, where he was not fully informed of the facts at the time of such compromise, settlement, or receipt of the benefits thereof.<sup>1</sup>

§ 732. *Silent acquiescence while changes are taking place is laches and is a bar to a suit — What length of time constitutes laches herein — Statute of limitations.* — After a stockholder has knowledge of or is chargeable with knowledge of an *ultra vires*, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter.<sup>2</sup> As to what will constitute a reasonable time

to purchase the land and pay therefor \$75,000 in full-paid stock and \$12,000 cash, and the balance of the capital stock is then sold to the public, an innocent purchaser of a portion of such balance of the stock may compel him to pay the company the sum of \$75,000 or return the stock for cancellation, it appearing that the property was worth no more than \$12,000. Four years' delay is not a bar if the complaining party had no knowledge of the facts in the meantime. Delay is not laches unless it has worked injury. *Wills v. Nehalem Coal Co.*, 52 Oreg. 70 (1908).

<sup>1</sup> Quoted and approved in *Smith v. Stone*, 128 Pac. Rep. 612 (1912). "A receipt of money as a part of the earnings of a corporation is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the money came from such business." *Central, etc. Bank v. Walker*, 66 N. Y. 424, 429 (1876). Where a corporation owns all of its bonds, excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet if that settlement was caused by misrepresentations as to the value of the securities, he is not

bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be allowed to participate the same as the bondholder who did not turn in his bonds. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). Where a suit to set aside a forfeiture of stock by the corporation, on the ground of fraud, is compromised, the same stockholder cannot eight years thereafter file another suit to set aside the assessment on the ground of frauds unknown to him when the first suit was compromised. *Marks v. Evans*, 62 Pac. Rep. 76 (Cal. 1900). See also § 730, *supra*.

<sup>2</sup> Quoted and approved in *Stoddard v. Decatur, etc. Co.*, 184 Ill. 53 (1900), and *McC Campbell v. Fountain, etc. R. R.*, 111 Tenn. 55 (1903). Where the stockholders of a telephone company do not object to a sale of its property to another company it is presumed that they acquiesce. *Badger, etc. Co. v. Wolf River, etc. Co.*, 120 Wis. 169 (1904). Where stock is sold by the corporation for non-payment of an assessment, levied at a meeting of the board of directors, where a quorum is not present, the sale may be set aside, unless the stockholders have acquiesced in the sale and the stock has passed into *bona fide* hands. *Hatch v. Lucky Bill Min. Co.*, 25 Utah, 405 (1903). Where the funds of a mining corporation are exhausted, and the stockholders refuse to advance money to continue work on a leasehold and it is forfeited and thereafter the president becomes interested in a new



depends on the circumstances of the case. Many illustrations of this principle of law are given in the notes below.<sup>1</sup> The length of time dur-

leasehold of the same mine, and it develops into a valuable mine, one of the stockholders who refused to advance further funds cannot complain. *Hall v. Nash*, 33 Colo. 500 (1905). Even though an officer sells corporate property without authority, yet if the stockholder does not object until the price advances, he cannot hold the officer liable. *Tevis v. Hammersmith*, 81 N. E. Rep. 614 (Ind. 1907). In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 (1875), Mr. Justice Miller gives a clear statement of the law herein. *Taylor v. South, etc. Ry.*, 13 Fed. Rep. 152 (1882); *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50 (1885); *Nashua, etc. R. R. v. Boston, etc. R. R.*, 27 Fed. Rep. 821, 826 (1886).

<sup>1</sup> Where the trustee sells trust property to himself personally, and the *cestuis que trust* are cognizant thereof and do not object for several years, they cannot set the transaction aside. *Hoyt v. Latham*, 143 U. S. 553 (1892). See also *Foster v. Mansfield, etc. R. R.*, 146 U. S. 88 (1892). A stockholder, who delays nearly four years before complaining of a consolidation, which he alleges was *ultra vires*, will not be granted any relief. *Dimpfel v. Ohio & M. Ry.*, 110 U. S. 209 (1884), *aff'g* 9 Biss. 127. In the case *St. Louis, etc. R. R. v. Terre Haute, etc. R. R.*, 145 U. S. 393 (1892), where a suit by the lessor of a railroad to set aside an illegal lease failed, the court said: "And so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by laches." A creditor who for six months does not object to a transfer of all the property of his insolvent debtor to a corporation to carry on the business for the benefit of all the creditors, cannot set the transaction aside, all other creditors having assented thereto. *Imperial, etc. Co. v. Longbottom*, 143 Fed. Rep. 483 (1906). A director or a corporation in which a director is interested may purchase corporate property from trustees to whom an embarrassed corporation has

conveyed the same to pay its debts, and return the remainder to such latter corporation, and especially is a stockholder estopped from complaining after four years' delay, with knowledge of the facts, large improvements having been made and the value of the property having greatly increased. *Kessler & Co. v. Ensley Co.*, 141 Fed. Rep. 130 (1905); *aff'd*, 148 Fed. Rep. 1019. Where a minority stockholder delays six months before objecting to a sale of the property and then delays over two years before commencing suit, and in the meantime the property has passed into new hands, it is too late even though another suit had been pending and had been dismissed without prejudice. *Smith v. Stone*, 128 Pac. Rep. 612 (Wyo. 1912). Although a receiver of one corporation votes stock in another corporation held in pledge and makes a personal profit by the manipulations, yet if the stockholders of the second corporation have acquiesced for a year it is too late to complain. *Strang v. Edison*, 198 Fed. Rep. 813 (1912). A stockholder's suit to compel his railroad company to take back certain stocks, bonds, mines, etc., in which the railroad had no power to invest and which the railroad had transferred to other companies, and asking that such property when taken back shall be sold and the assets distributed among the stockholders, is not multifarious, and on its face makes out a case, it being charged that part of the property had been put into a trusteeship and trust certificates therefor issued to stockholders of the railroad company, even though the transaction is eight years old. *Venner v. Great Northern Ry.*, 117 Minn. 447 (1912). Mere delay in a stockholder bringing suit to hold directors liable for illegal investments is no bar, if there has been no loss or prejudice to the directors by reason thereof. *Gerhard v. Welsh*, 82 Atl. Rep. 871 (N. J. 1912). Where a party contracts to purchase the stock of three sugar refining companies for \$8,250,000 preferred stock in a com-



ing which a stockholder may delay in bringing his suit varies with each case, according to the circumstances of that case. The court requires

pany to be formed, and then forms a company and becomes a director himself and sells the stock to the new company for \$8,250,000 preferred stock and \$10,000,000 common stock, he and his principal keeping the common stock, a preferred stockholder may compel these promoters to turn over to the company for cancellation on reduction of the capital stock the common stock mentioned above, even though eleven years have elapsed, the common stock still being in the original hands, and the preferred stockholders not having been informed fully of the facts, and even though the preferred stockholders had given proxies to the guilty parties, and the latter had voted such proxies ratifying the acts, but the promoters may keep dividends which were legally declared on the common stock more than six years prior to the suit. And even though the stockholders in their meetings had ratified the transaction this was not binding, the act being *ultra vires*. *Tooker v. National, etc. Co.*, 84 Atl. Rep. 10 (N. J. 1912). Where the lessee of a railroad which is being foreclosed is allowed to redeem from the foreclosure decree and be subrogated to the rights of the lessor, stockholders of the lessor will not be allowed to intervene to set aside the lease as fraudulent and to vacate the foreclosure sale, where they have delayed for two years in making their application. *United States T. Co. v. Chicago, etc. R. R.*, 188 Fed. Rep. 292 (1911). A stockholder who is a minor may subsequently bring a suit where other stockholders could not on account of laches. *Marr v. Marr*, 73 N. J. Eq. 643 (1908). Where a new contract is made between a street railway and a city on February 11th, and is not objected to by a stockholder until July 25th, and he does not commence suit until October 21st, and in the meantime great changes have taken place, he is guilty of laches. *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908). Even though in a sale of all the corporate assets to another com-

pany one of the directors of the former is to receive a salary from the latter and his vote is necessary to make a quorum of the directors, yet if it is not concealed and if all the stockholders acquiesce in that part of the contract for six years this cures the defect. *Kidd v. New York, etc. Co.*, 75 N. H. 154 (1909). Where property earning four per cent. interest on \$195,000,000 is sold to a reorganization committee for \$61,500,000 and the old stockholders are allowed to come into the new company on payment of an assessment of ten or fifteen per cent. aggregating a few million dollars, and the facts show that the stockholders became beneficiaries of the reorganization plan, a general creditor of the foreclosed company, who is not a party defendant and is not notified of the proceedings, may hold the reorganized company liable for his debt, even though the new stock sold at first for less than the assessment, it appearing that the assets taken over not covered by the mortgage were sufficient to pay such general claim. The court said (p. 801) that "it was the retention by the stockholders of an interest in the property which invalidated the transaction" and that it was a reorganization in fact and not a foreclosure sale in the strict sense, the concessions to the stockholders being obtained only upon compulsion by the stockholders in the reorganization, and the foreclosure sale being merely a step in the reorganization. A suit lies to reach such assets, even though twenty years have elapsed since the complainant commenced a suit against the old company to hold it liable, such suit having been carried on for that period of time. *Boyd v. Northern Pac. Ry.*, 170 Fed. Rep. 779 (1909); *aff'd*, 228 U. S. 482. Where the stockholders and mortgage bondholders unite in reorganizing leaving unsecured creditors unpaid, the latter may hold the new company liable for their debts, even though the old stockholders paid a certain amount for the new stock. Even though the



that reasonable promptness be exercised so that large investments of

complainant delayed over ten years in bringing suit, yet if another similar action was pending in the meantime, that was sufficient. *Northern Pac. Ry. v. Boyd*, 177 Fed. Rep. 804 (1910); aff'd, 228 U. S. 482. Five years after watered stock has been issued a stockholder who during that time has known all the facts, cannot maintain a suit to have a portion of such stock returned and canceled, the court intimating that that remedy was not available in any case. *Stephany v. Marsden*, 76 N. J. Eq. 611 (1910). Where a stockholder delays for over six years in objecting to a sale of the corporate assets to a majority stockholder, he is barred, it being shown that the sale was a fair one. *Roberts v. Herzog*, 110 Minn. 258 (1910). An insolvent corporation having \$1,000,000 common stock and \$600,000 preferred stock, may reorganize by reducing its stock to \$200,000 common and \$200,000 preferred, and issuing \$270,000 first preferred having priority over the old preferred, and a person who owns one per cent. of the old preferred cannot object after the reorganization has been carried out, the first preferred being issued to the creditors in part payment of their claims. *Ecker v. Kentucky, etc. Co.*, 144 Ky. 264 (1911). Even though a New York mining company dissolves and sells its property to a West Virginia company in order to avoid New York taxes, a share of stock and some bonds in the new company being given for each share of stock in the old company, and even though a dissenting stockholder is entitled to have a public sale of the property, yet if when the time for depositing the stock was about to expire he sells most of his stock to a business associate who makes the exchange, he cannot then insist on a public sale, especially where such sale would destroy a profitable concern, but the court will order that he be allowed to participate, notwithstanding that the time has expired, or that he be paid the value of his stock. *Treadwell v. United, etc. Co.*, 134 N. Y. App. Div. 394 (1909). Eight weeks'

delay, with full knowledge, in objecting to a consolidation of one tobacco company with another is a bar to a suit in equity to set it aside. *Dana v. American, etc. Co.*, 72 N. J. Eq. 44 (1907). A stockholder in a street railway cannot object that it has sold all its property to another company for stock in the latter where ten years have elapsed and he has known all about it for two years and the property has passed into still other hands. *Cole v. Birmingham, etc. Co.*, 143 Ala. 427 (1905). A statute that dissenting stock shall be appraised is not applicable where no appraisal proceedings are had, and hence the owner may claim new stock in exchange therefor, even though considerable time has elapsed. *Douglass v. Concord, etc. R. R.*, 72 N. H. 26 (1903). Even though a bridge company, which has made a long-time contract with a railroad company, and which has the same officers and directors and majority stockholders as the railroad company, modifies the contract so as to reduce the income of the bridge company, yet if for nineteen years the minority stockholders of the bridge company acquiesce therein, such modification is legal. *Pittsburg, etc. Ry. v. Dodd*, 115 Ky. 176 (1903). A stockholder cannot object to a lease of the corporate property on the ground that the stockholders' meeting authorizing it was not properly called, where he takes no action for a year, and in the meantime the lessee invests large sums of money. *Hill v. Atlantic, etc. R. R.*, 143 N. C. 539 (1906). Where a stockholder waits more than two years before objecting to a consolidation of railroads, in the meantime millions of dollars having been invested, relief will be denied, especially where the company offers to pay the full value of the stock. *Spencer v. Seaboard, etc. Co.*, 137 N. C. 107 (1904). Fourteen years' delay by stockholders in complaining that a construction company had the same directors as the railroad company is fatal. *Rice v. Shealy*, 71 S. C. 161 (1905). Thirty days' delay is not a bar, even though the plaintiff waited



new money or changes in the ownership of the stock or property may

for further developments and until something absolutely fraudulent was done in a scheme to freeze out minority stockholders. *Jacobus v. Diamond, etc. Co.*, 94 N. Y. App. Div. 366 (1904). A stockholder's suit to vacate a foreclosure decree seven years after it was entered and three years after a decision that he was entitled to make the application, the property in the meantime having passed into *bona fide* hands, is too late, his claim being that he was a stockholder in a company that was consolidated with another company and that the property of his corporation was sold on the foreclosure of a mortgage of the latter, which mortgage was executed prior to the consolidation. *Atlantic Trust Co. v. New York, etc. Co.*, 75 N. Y. App. Div. 354 (1902). Where for six years an issue of stock for services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto, and the party receiving the stock used a large portion of it to interest other persons in the company, and even though the stock so issued to him was \$125,000, being one half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the company. *Calivada, etc. Co. v. Hays*, 119 Fed. Rep. 202 (1902). Five years after a corporation has sold all its property to another corporation, and received the consideration, it cannot maintain a bill to set aside the sale as *ultra vires*, the rights of third parties having intervened in the meantime. *Bear Valley, etc. Co. v. Savings, etc. Co.*, 117 Fed. Rep. 941 (1902). A stockholder cannot, after ten years' delay, maintain a suit to cancel stock issued for patents, and to compel the holder of such stock to refund dividends thereon, the transaction having been spread on the records of the company and open to the stockholders. An allegation that the

patents were of no value is insufficient, even though the constitution of the state (Missouri) required that stock be issued only for "money paid, labor done, or money or property actually received," there being no allegation that the patents were known to be valueless at the time. *Kimbell v. Chicago, etc. Co.*, 119 Fed. Rep. 102 (1902). Where a stockholder delays for a year in complaining of a sale of corporate property to two of the directors, and innocent third parties have acquired rights in the property in the meantime, the stockholder's remedy is barred by laches. *Snow v. Boston, etc. Co.*, 158 Mass. 325 (1893). See § 733, *infra*. Although a shoe company employs as selling agents a firm in which the president and general manager of the corporation is a member, yet where this has been done for nine years without objection, a stockholder cannot claim for the corporation the benefit of the firm's profits from such contract. *Warren v. Para, etc. Co.*, 166 Mass. 97 (1896). Where a person buys land for \$24,000, and afterwards becomes a director and then sells it to the corporation for \$80,000, a majority of the board being disinterested, the company cannot, nine years afterwards, claim that it should pay only the then market value of the land. *Higgins v. Lansingh*, 154 Ill. 301 (1895). Delay for two years on the part of one who claims he is entitled to come into a reorganization is fatal. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 119 N. Y. 15 (1890), the purchaser having denied the existence of any reorganization agreement during that time. A stockholder who objects, but waits from October 17 to March 7, and then at the annual meeting tries to have action taken, is not guilty of laches. *Byrne v. Schuyler, etc. Co.*, 65 Conn. 336 (1895). A stockholder who is also a director cannot complain of a diversion of funds by the manager arising from an unauthorized "swapping" of checks, and is barred of relief where he had known of its continuance for two years. *Streight v. Junk*, 59 Fed. Rep. 321 (1893).



not be prevented or jeopardized by an unreasonable delay on the part of a stockholder in objecting to the transaction.<sup>1</sup>

Where for twenty-seven years no stockholder has complained of a lease of the property of the company to a lessee, although the lessee owned a majority of the stock of the lessor, it is too late to complain. *Wolf v. Pennsylvania R. R.*, 195 Pa. St. 91 (1900). A lease will not be set aside, even though a majority of the directors of the lessor are interested in the lessee, and even though after the lease was made they became stockholders and directors of the lessee, it being shown that the lessor had a floating and bonded debt and had no funds, and had never paid a dividend, and that as a result of the lease the stock advanced fifty per cent. in value, and the complaint is not made until eighteen months after the lease was made. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and a delay of three or four years, during which others became creditors of the new corporation and the latter becomes insolvent, will bar his claim for an equitable lien on the assets. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). Where one of the partners in a firm organized to locate, develop, and operate mines does not turn in to the firm a mine located by him, but transfers the same to the corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money, and the stock may have passed into other hands, the

court will refuse relief on the ground that the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. *Curtis v. Lakin*, 94 Fed. Rep. 251 (1899). Two years' delay on the part of a stockholder in complaining of a mortgage given by the corporation to raise money to pay a debt due to the president is fatal, even though the president had originally agreed to require payment only out of sales of property by the corporation. *Wills v. Porter*, 132 Cal. 516 (1901). The failure of a stockholder to discover for nearly six years a sale of corporate property to one of the directors is not laches. *Morgan v. King*, 27 Colo. 539 (1900). Where minority stockholders started a suit in the federal court to set aside a sale of the property of the company to another corporation, but did not bring in as a party defendant a railway company which was about to issue securities, in accordance with contracts with the two companies, and afterwards start a suit in the state court for the same relief, and bring in the railway company as party defendant, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). A stockholder is not guilty of laches in applying for an injunction against the ratification by the stockholders of an *ultra vires* sale of the corporate property by the board of directors, even though the sale was made by the directors on April 5th and the injunc-

<sup>1</sup> Quoted and approved in *Smith v. Stone*, 128 Pac. Rep. 612, 621 (Wyo. 1912). Where a company is insolvent and its credit exhausted and the stockholders decline to advance more money, and the majority stockholders then organize another corporation to purchase the property by paying the debts, and the minority stockholders

delay for a year in complaining, it is too late, especially where the majority stockholders still offer to allow the minority to take part in the new corporation on the same terms as they took part, and in the meantime bonds have been issued by the new company to outside parties. *Marks v. Merrill Paper Co.*, 203 Fed. Rep. 16 (1913).



There has been considerable doubt and difficulty in determining whether the statute of limitations will be applied by a court of equity

tion was not applied for until June 4th, two days before the date of the meeting of the stockholders to ratify the sale. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). See s. c., 22 Mont. 430 (1899). A delay of several years in attacking the issue of stock and a consolidation is fatal. *Drake v. New York, etc. Co.*, 26 App. Div. 499 (1898). Even though a company, organized to manufacture and sell soap, buys and sells soap, yet the stockholders who are guilty of laches cannot complain of the act as *ultra vires*. *Petrolia Mfg. Co. v. Jenkins*, 29 N. Y. App. Div. 403 (1898). Where for a long time an irrigation company acquiesces in a certain construction of an agreement to furnish water, and such construction is equitable, a stockholder cannot object, even though some of the directors are interested personally. *Foster v. Bear Valley Irr. Co.*, 65 Fed. Rep. 836 (1895). A stockholder who delays nine years before intervening in a foreclosure suit cannot then intervene after the sale is completed and the money ready for distribution. *Boston, etc. Trust Co. v. American Rapid Tel. Co.*, 67 Fed. Rep. 165 (1895). Where the directors of a failing linen-manufacturing corporation sell a part of the plant for stock of a knit-goods manufacturing corporation, a stockholder who does not complain for two years cannot hold the directors liable for his share of the property so exchanged for stock. *Pinkus v. Minneapolis Linen Mills*, 65 Minn. 40 (1896). Where the directors sell unissued stock at a discount to a party who resells part of it to a director other stockholders cannot, ten years afterwards, hold him liable. *Keeney v. Converse*, 99 Mich. 316 (1894). Four years' delay in bringing suit to compel a corporate officer to account for property purchased by him at an execution sale is fatal. *Horbach v. Marsh*, 37 Neb. 22 (1893). A stockholder who for two years knows that an illegal salary is being paid cannot afterwards object. *Brown v. De Young*, 167 Ill. 549 (1897). Even

though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. *Stetson v. Northern Inv. Co.*, 104 Iowa, 393 (1898). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. *Cullen v. Coal Creek, etc. Co.*, 42 S. W. Rep. 693 (Tenn. 1897).

A reorganization agreement cannot be successfully attacked by stockholders two years after it was made, especially where the stockholders do not offer to pay the debt due nor the expenses of foreclosure, and where "the relief they ask under their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly \$25,000,000, wholly due, and bearing a high rate of interest." *Carey v. Houston, etc. Ry.*, 52 Fed. Rep. 671 (1892). Three years' time having elapsed before a stockholder ascertained the facts as to a fraudulent sale of the company's stock by the directors to themselves, relief will be denied where that sale has been of great benefit to the remaining stock. *Squair v. Look-out Mountain Co.*, 42 Fed. Rep. 729 (1890). Thirteen years' delay by stockholders in complaining of a gift of town lots to the town by a committee of the stockholders upon the dissolution of the corporation is fatal. *Norton v. Kellogg*, 41 Fed. Rep. 452 (1890). A delay of twenty years in complaining that a lease taken by the company was due to the fact that a part of the directors were interested in the stock and bonds of the lessor company is fatal. *Jesup v. Illinois Cent. R. R.*, 43 Fed. Rep. 483 (1890). Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock



to cases of this nature. It has been held in England that the statute will be applied to a corporate action to compel a director to pay over

of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the five per cent. Four years' delay is no bar. *Sabre v. United, etc. Co.*, 156 Fed. Rep. 79 (1907). See 87 Atl. Rep. 230.

Laches is a bar to a suit against a corporation the same as against individuals, especially as new stockholders are continually coming in. *St. Paul, etc. Ry. v. Sage*, 49 Fed. Rep. 315 (1892). Eleven and one half years' delay is no bar to a stockholders' suit to set aside illegal bonds and a mortgage, where no attempt was made to enforce the bonds. *Chicago v. Cameron*, 120 Ill. 447 (1887). Eleven years' delay is fatal to a complaint that another corporation has purchased a majority of the stock of the corporation in which the complainant stockholder holds stock. *Alexander v. Searcy*, 81 Ga. 536 (1889). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97 (1892). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorpo-

ration, the object of the consolidation being different from that of the original corporation, yet where the stockholder delays applying to the court for nearly a year, and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedy is barred. *Rabe v. Dunlap*, 51 N. J. Eq. 40 (1893). Where a fraudulent foreclosure was made on April 5th, and the fraud became known on June 5th, and the suit was brought in September, the suit may be maintained, no one having been prejudiced by the delay. *Ex-Mission, etc. Co. v. Flash*, 97 Cal. 610 (1893). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. *Burgess v. St. Louis County R. R.*, 99 Mo. 496 (1890). Where a pledgee bank, having a right to sell at private sale and without notice, sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. *Raymond v. Palmer*, 41 La. Ann. 425 (1889). Laches is a bar. *Moore v. Silver, etc. Co.*, 104 N. C. 534 (1890). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. The stockholder then can only recover the value of his stock and past dividends. *Deposit Bank v. Barrett*, 13 S. W. Rep. 337 (Ky. 1890). Where a stockholder delays in bringing a suit for an unreasonable length of time for the purpose of ascertaining whether the act complained of will be profitable to him, his suit to set aside the act will fail. *Boyce v. Montauk, etc. Co.*, 37 W. Va. 73 (1892). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder



to the corporation money received by him as a bribe, and that the statute begins to run from the time when the corporation discovers

five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money; and the stockholders knew of the condition of things, but made no effort to prevent a sale; and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. *Osborne v. Monks*, 21 S. W. Rep. 101 (Ky. 1893). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. *Warren v. Bigelow Blue Stone Co.*, 74 Hun, 304 (1893). A hotel company having bought a competing hotel and paid for it in stock and held the property for two years, a stockholder cannot have the purchase set aside. *Steger v. Davis*, 8 Tex. Civ. App. 23 (1894). In *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894), it was held that where two corporations, having contract relations, are controlled by the same board of directors and a fraud is committed, the delay and acquiescence of a minority director did not prevent his suing to remedy the fraud. Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for ten years is fatal. *U. S. etc. Co. v. Reed*, 2 How. Pr. (N. S.) 253 (1885). See *N. Y. L. J.*, July 23, 1913.

See also *Downes v. Ship*, L. R. 3 H. L. 343 (1868); *Ashhurst's Appeal*, 60 Pa. St. 290 (1869); *Zabriskie v. Hackensack, etc. R. R.*, 18 N. J. Eq. 178 (1867); *Nashua, etc. R. R. v. Boston, etc. R. R.*, 27 Fed. Rep. 821, 826 (1886); *London, etc. Assoc. v. Kelk*, L. R. 26 Ch. D. 107 (1884); *McLoughlin v. Detroit, etc. Ry.*, 8 Mich. 100 (1860); *Gray v. Chaplin*, 2 Russ.

Ch. 126 (1826), where the stockholder had acquiesced forty-seven years in an *ultra vires* lease. In *Mills v. Central R. R.*, 41 N. J. Eq. 1, 9 (1886), it was very properly held that a delay of fifty-four days was no bar, and also that a failure to vote against the act was no bar. In *Gifford v. New Jersey R. R. & T. Co.*, 10 N. J. Eq. 171 (1854), a delay of twenty years was held to be a bar. In the following cases the court held delay to be a bar: *Peabody v. Flint*, 88 Mass. 52 (1863), the delay being three and a half years; *Gregory v. Patchett*, 33 Beav. 595 (1864), six years; *International, etc. R. R. v. Bremond*, 53 Tex. 96 (1880), two years; *Graham v. Birkenhead, etc. Co.*, 2 Macn. & G. 146 (1850), eighteen months; *Kitchen v. St. Louis, etc. Ry.*, 69 Mo. 224 (1878), five years; *Boston, etc. R. R. v. New York, etc. R. R.*, 13 R. I. 260 (1881); *Ashhurst's Appeal*, 60 Pa. St. 290 (1869), seven years; *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607 (1882), four years; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322 (1884); *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886); *Re Pinto Silver Min. Co.*, L. R. 8 Ch. D. 273 (1878); *Royal Bank v. Grand Junction R. R.*, 125 Mass. 490 (1878); *Re Magdalena, etc. Co.*, 6 Jur. (N. S.) 975 (1860), where a delay of two years was held a bar; *Brotherhood's Case*, 31 Beav. 365 (1862), twelve years; *Hervey v. Illinois, etc. Ry.*, 28 Fed. Rep. 169 (1884); *Thompson v. Lambert*, 44 Iowa, 239 (1876); *Vigers v. Pike*, 8 Cl. & F. 562, 650 (1840); *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859); *Allen v. Willson*, 28 Fed. Rep. 677 (1886). Cf. *Boardman v. Lake Shore, etc. Ry.*, 84 N. Y. 157 (1881); *Badger v. Badger*, 2 Wall. 87 (1864); *Harwood v. Railroad Co.*, 17 Wall. 78 (1872); *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 78 (1851); §§ 161, 162, 198, *supra*. Seventeen years' delay bars the right of preferred stockholders to reach a fund which was to be given them as a compromise by first bondholders, a foreclosure by second bonds having sub-



the facts.<sup>1</sup> In the United States the courts often apply to a suit, brought to remedy the frauds, *ultra vires* acts, or negligence of directors, the regular statute of limitations.<sup>2</sup> The supreme court of the United States

sequently followed. *Sullivan v. Portland, etc. R. R.*, 94 U. S. 806 (1877). Five years' delay in attacking a consolidation is too late. *Bell v. Pennsylvania, etc. R. R.*, 10 Atl. Rep. 741 N. J. (1887). But a delay of eleven years and a half was held not fatal to a stockholder's action to set aside an *ultra vires* issue of bonds, where the railroad had been abandoned, the bonds never dealt in nor enforced, and the complainant had in view the removal of the lien, and intended to proceed and construct the road. *Chicago v. Cameron*, 120 Ill. 447 (1887). Four years' delay in suing to set aside an *ultra vires* assignment of property held fatal. *Descombes v. Wood*, 91 Mo. 196 (1887). Where a corporation is insolvent, and turns in its property at a fair price to a creditor whose debt is also secured by the guaranty of the president of the corporation, and the creditor at once sells the property to the president at an advanced price, a stockholder who delays suit for two years, during which time the property becomes valuable and the president, who purchased, dies, is barred from complaining. *Hancock v. Holbrook*, 40 La. Ann. 53 (1888). Laches bars the right of preferred stockholders to object to an *ultra vires* lease. *Emerson v. N. Y. etc. R. R.*, 14 R. I. 555 (1894), aff'g *Boston, etc. R. R. v. New York, etc. R. R.*, 13 R. I. 260 (1881). Three years' delay is fatal to a stockholder's suit to hold the president liable for illegal acts, where the former was also treasurer. *Dunphy v. Traveller Assoc.*, 146 Mass. 495 (1888). A lease of corporate property may be ratified by one hundred days' delay of the company in repudiating it, the lessee in the meantime expending money thereon. *Hoosac, etc. Co. v. Donat*, 10 Colo. 529 (1888). A lessor railroad cannot, nineteen years after the lease, sue in equity to set aside the lease as *ultra vires*. Laches is a bar. *St. Louis etc. R. R. v. Terre Haute, etc. R. R.*, 33

Fed. Rep. 440 (1888); aff'd, 145 U. S. 393 (1892). Ten years' delay bars an action by a stockholder to set aside a fraudulent foreclosure of a mortgage given by the company. *Foster v. Mansfield, etc. R. R.*, 36 Fed. Rep. 627 (1888); aff'd, 146 U. S. 88 (1892). A lease of a water company's property to an ice company, with the privilege to the stockholders of the former to take stock in the latter, will not be set aside at the instance of stockholders who did not offer to take such stock until too late, and who delayed complaining until after the ice company proved a success. *Shaaber's Appeal*, 17 Atl. Rep. 209 (Pa. 1889). The time consumed by the guilty officers in legal proceedings to collect their gains is not included in the time which constitutes laches on the stockholders' part. *Davis v. Gemmell*, 70 Md. 356 (1889). See *Davis v. Gemmell*, 73 Md. 530.

<sup>1</sup> *Metropolitan Bank v. Heiron, L. R.* 5 Exch. D. 319 (1880). The statute of limitations is no bar to an action against a director for fraud, when notice of the fraud came only to the directors, part of whom were also implicated. *Re Fitzroy, etc. Co.*, 50 L. T. Rep. 144 (1884). The statute of limitations does not begin to run against a promoter who takes a secret profit until the facts are known to the stockholders. *Re Sale, etc. Co.*, 77 L. T. Rep. 681 (1897), reversed on another point in 78 L. T. Rep. 368 (1898).

<sup>2</sup> *Watt's Appeal*, 78 Pa. St. 370 (1875). See also *Taylor v. South, etc. R. R.*, 13 Fed. Rep. 152 (1882). As to California, see *Dannmeyer v. Coleman*, 11 Fed. Rep. 97 (1882), holding that under the statute in California the three-years' limitation to actions based on fraud after discovery thereof applies to directors' frauds herein. But see *Phillippi v. Philippe*, 115 U. S. 151 (1885); *Twin Lick, etc. Co. v. Marbury*, 91 U. S. 587 (1875); *Moyle v. Landers*, 21 Pac. Rep. 1133 (Cal. 1889); s. c., 83 Cal. 579 (1890). See,



says, however, "The doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute

in general, *Coit v. Campbell*, 82 N. Y. 509, 514 (1880); *Farnam v. Brooks*, 26 Mass. 212, 242 (1830); *Godden v. Kimmell*, 99 U. S. 201, 210 (1879); *Preston v. Preston*, 95 U. S. 200 (1877); *Badger v. Badger*, 2 Wall. 87 (1864); *Meador v. Norton*, 11 Wall. 442 (1870); *Bowman v. Wathen*, 1 How. 189 (1843); *Beckford v. Wade*, 17 Ves. Jr. 87 (1805). The statute of limitations is a bar to an action against directors for negligence in allowing overdrafts and illegal loans. *Williams v. Halliard*, 38 N. J. Eq. 373, 383 (1884). An action against a third person to recover money paid by the corporation to him for stock must be brought within six years or it is barred by the statute of limitations. *Pierson v. McCurdy*, 33 Hun, 520 (1884); aff'd, 100 N. Y. 608. But in *Pierson v. Morgan*, 20 Abb. N. Cas. 428 (N. Y. 1887), and *Brinkerhoff v. Bostwick*, 99 N. Y. 185 (1885), the ten-year statute was applied to fraud. In a suit brought by the attorney-general under the statutes of New York to hold directors liable for waste or neglect, several directors cannot be joined where the cause of action against one is not the same cause of action as against another. Each director is liable only for his own acts or omissions, unless he had knowledge from which he might reasonably have prevented a loss. An allegation in the alternative that a director participated in an act or was negligent in not ascertaining it will not save such complaint. Moreover the remedy against some of the directors may be in equity while as against others it may be at law. If there is a concurrent remedy at law and in equity the statute of limitations will be applied by a court of equity. *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908). The statute of limitations may constitute a bar to an action by the corporation against its secretary for funds appropriated by him. *Landis v. Saxton*, 105 Mo. 486 (1891). A bondholder who did not participate in a reorganization cannot complain thereof on the ground

of fraud where the statute of limitations relative to fraud is a bar. *Griffith v. Seattle, etc. Ry.*, 36 Wash. 627 (1905). Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six-years' statute of limitations, *Pietsch v. Milbrath*, 123 Wis. 647 (1904). The six-years' statute of limitations runs against an action to hold a director liable for investing corporate funds in the stock of another company. *Re Lands Allotment Co.*, [1894] 1 Ch. 616. An action by a receiver to recover money from directors is barred in six years, but a similar action by a stockholder, being in equity alone, is barred in ten years, in New York. *Mason v. Henry*, 83 Hun, 546 (1895); aff'd, 152 N. Y. 529. The statute of limitations does not run as against the president's misappropriation of funds, where the delay was due to his misrepresentations. *Coxe v. Huntsville Gas Light Co.*, 106 Ala. 373 (1895). The statute of limitations at law applies, since it is a legal right that is being enforced in equity. As to negligence the time is within six years from the negligent act, in Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six-years' statute of limitations is a bar to a stockholders' suit to hold them liable, no fraud being alleged. *Whitwam v. Watkin*, 78 L. T. Rep. 188 (1898). Directors guilty of malfeasance are held liable as trustees on the insolvency of the company, but the statute of limitations may be a



of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the non-action of the complainant operated to damage the defendant or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time."<sup>1</sup> It is established law that where equity and law have concurrent jurisdiction of a case, equity will apply the statute of limitations.<sup>2</sup> Laches is a bar to a suit to hold directors personally responsible to the corporation for diverting its property to their own use where the statute of limitations would be a bar.<sup>3</sup>

Where there are a series of transactions between the president and the company, the statute of limitations does not begin to run until his official connection ceases.<sup>4</sup> Laches is no bar where the illegal acts continue up to the date of the suit.<sup>5</sup> If the running of the statute has been stopped as to one complaining stockholder it is stopped as to

bar. *Boyd v. Mutual Fire Assoc.*, 116 Wis. 155 (1903). The statute of limitations is the only bar to a stockholders' suit to compel an officer to return funds which he has misappropriated. *Montgomery, etc. Co. v. Lahey*, 121 Ala. 131 (1899). A suit by a promoter to compel the delivery of stock to him on the ground that without his consent and knowledge an incorporation made in accordance with his contract had been abandoned and a new one adopted from which he had been excluded is a suit for breach of trust and not for fraud, and hence the statute of limitations applicable to the latter is not a bar. *Farris v. Wirt*, 16 Colo. App. 1 (1901). A stockholders' suit to hold a director liable for purchasing property of the corporation is a suit for breach of trust and not for a fraud separate from such breach, and hence a statute of limitations applicable to the former is the one applicable to such a case. *Morgan v. King*, 27 Colo. 539 (1900). See 203 Fed. Rep. 599. 204 id. 779.

<sup>1</sup> *Northern Pacific Ry. v. Boyd*, 228 U. S. 482 (1913), applying the above principle to the claim of an unsecured creditor of a railroad which has been foreclosed by consent decree and a reorganization had in which the stockholders participated.

<sup>2</sup> *Baker v. Cummings*, 169 U. S. 189 (1898). A stockholder's suit to hold a majority stockholder liable for con-

verting the corporate property to himself is barred, if the statute of limitations is a bar against the corporation itself bringing such suit. *Bates v. Boyce's Estate*, 135 Mich. 540 (1904). The statute of limitations may apply to a suit in equity for fraud, and will begin to run when the fraud is discovered. *Figge v. Bergenthal*, 130 Wis. 594 (1906). Even in equity the six-years' statute of limitation will be applied in a suit against directors for purchasing corporate property. *Barry v. Moeller*, 68 N. J. Eq. 483 (1904). Where there are concurrent remedies at law and in equity against directors, the statute of limitations at law is applied in equity. *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).

<sup>3</sup> *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1912).

<sup>4</sup> *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa. 1898). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. *National Bank, etc. v. Wade*, 84 Fed. Rep. 10 (1897).

<sup>5</sup> *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904).



all.<sup>1</sup> In general a court of equity will apply the statute or will not apply it, as may seem most just, and will even shorten the time.<sup>2</sup>

The statute of limitations may not be a bar to a receiver's action to recover back from directors a salary which was paid in breach of trust.<sup>3</sup>

§ 733. *Miscellaneous applications of the doctrine of laches herein.*—The ratification of an act which the stockholder might have complained of does not authorize or ratify in advance a repetition of that act.<sup>4</sup> A stockholder's right to object to a director's act can be exercised by him alone.<sup>5</sup> A stockholder who has been guilty of laches cannot base his suit on the objections of other stockholders who were not

<sup>1</sup> *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 194 (1885); *Cox v. Stokes*, 156 N. Y. 491 (1898). See also *Richmond v. Irons*, 121 U. S. 27 (1887). But see *Ashley's Case*, L. R. 9 Eq. Cas. 263 (1870); also § 163, *supra*.

<sup>2</sup> *Sullivan v. Portland, etc. R. R.*, 94 U. S. 806, 811 (1876). See also many cases in previous notes in this section and *Ernest v. Croysdill*, 2 De G., F. & J. 175 (1860); *Re Exchange Banking Co.*, L. R. 21 Ch. D. 519 (1882). A part owner in a mining claim placed in the hands of a trustee for development, cannot, if he has abandoned it, claim an interest therein eight years thereafter, even though the statute of limitations is ten years. *Patterson v. Hewitt*, 195 U. S. 309 (1904). Where the directors of a national bank know that excessive loans are being made to its president and others and they take no steps to reduce the loans or prevent their increase, and the bank becomes insolvent, they are liable for losses thereby incurred, and such liability may be enforced by a suit in equity, even though a suit at law will be barred by the statute of limitations. The fact that such a director could not attend to his duties by reason of ill health is no excuse. *Rankin v. Cooper*, 149 Fed. Rep. 1010 (1906). A delay of eight years is not excused by an allegation that the complaining stockholder was informed of the fact only a few weeks prior to the commencement of the suit, especially where the facts were sufficient to put him on inquiry. On the other hand, the statute of limitations does not apply. *Edwards v. Mercantile, etc. Co.*, 124 Fed. Rep. 381 (1903). A dividend

paid out of capital may be recovered back by a receiver at any time within six years after such payment if the stockholders did not know that the dividend was paid out of capital, but a court of equity will not apply the statute of limitations as regards officers and directors receiving such dividend. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

<sup>3</sup> *Ellis v. Ward*, 137 Ill. 509 (1890), holding that the statute of limitations is no bar, and that a court of equity is governed by the rules of laches instead. Directors are not technically trustees, and hence the statute of limitations relative to trustees is not applicable to a suit by a receiver against them for misfeasance. *Boyd v. Mutual Fire Assoc.*, 116 Wis. 155 (1903). Directors may set up the statute of limitations as against a receiver suing them for negligence. *Emerson v. Gaither*, 103 Md. 564 (1906). Where for ten years a receiver does not bring suit against the directors for negligence, the suit is barred by laches. *Ex parte Baker*, 67 S. C. 74 (1903).

<sup>4</sup> *Irvine v. Union Bank of Australia*, L. R. 2 App. 366 (1877); *Bloxam v. Metropolitan Ry.*, L. R. 3 Ch. 337, 354 (1868). A person taking part in a past issue of stock is not estopped from complaining of a future similar issue, he having acted in ignorance of the law in the past. *Mosely v. Koffyfontein Mines, Ltd.*, [1911] 1 Ch. 73.

<sup>5</sup> *Taylor v. Chichester, etc. R. R.*, L. R. 2 Exch. 356, 378 (1867). One stockholder cannot raise the objection that another stockholder was not notified of a meeting. *Foote v. Grei-*



guilty of laches.<sup>1</sup> The question of whether the majority may bind the minority on this subject of ratification is considered elsewhere.<sup>2</sup>

The fact that an officer of the company took part in a swindling scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme.<sup>3</sup> But the acquiescence of a stockholder bars an action by any transferee of that stock.<sup>4</sup> A stockholder who became such after the charter had been amended, authorizing a consolidation, cannot complain,<sup>5</sup> but ordinarily a purchaser of stock may complain of an act even though it occurred before he purchased his stock.<sup>6</sup>

If neither the defendants nor others have been induced by the delay to act upon the matters which are complained of, laches may not be a bar to the stockholder's action.<sup>7</sup> There is a difference of opinion as to whether it is necessary to allege that the stockholders have been free from acquiescence or laches, the weight of authority being that it is not necessary.<sup>8</sup> The question of laches should be raised by answer and not by demurrer,<sup>9</sup> unless the facts set forth in the complaint show laches.<sup>10</sup>

lick, 166 Mich. 636 (1911). See also § 599, *supra*.

<sup>1</sup> *Beling v. American, etc. Co.*, 72 N. J. Eq. 32 (1907).

<sup>2</sup> See § 730, *supra*, and §§ 669, 683, *supra*.

<sup>3</sup> *Farrow v. Holland Trust Co.*, 74 Hun, 585 (1893). See also §§ 649-651, 656, *supra*.

<sup>4</sup> See §§ 40, 730, *supra*, and § 735, *infra*.

<sup>5</sup> *Colgate v. United States, etc. Co.*, 73 N. J. Eq. 72 (1907); s. c., 75 N. J. Eq. 229 (1908).

<sup>6</sup> See § 736, *infra*.

<sup>7</sup> *Whitman v. Bowden*, 27 S. C. 53 (1887).

<sup>8</sup> *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196 (1889), holds that it is not. Cf. *Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882). In a stockholder's suit to hold directors to account for stock practically given away, it is no defense that the stockholder purchased his stock after the issue was made, and the complainant need not allege that his transferrer did not acquiesce in the transaction. *Continental Securities Co. v. Belmont*, 206 N. Y. 7 (1912). The plaintiff must allege that the officers have committed a breach of trust, and though requested, the corporation refuses to act or is controlled by the wrong-

doers, and that he has been diligent in prosecuting his remedy. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). To avoid the defense of laches, the complainant must allege and prove what he did, and in what respects he was diligent. The mere allegation that he did not discover the facts sooner is insufficient. *Cutter v. Iowa Water Co.*, 128 Fed. Rep. 505 (1904); *rev'd on another point in* 140 Fed. Rep. 986.

<sup>9</sup> A demurrer is not the proper way to raise the question of laches. *Zebbley v. Farmers' L. & T. Co.*, 139 N. Y. 461 (1893); *Sage v. Culver*, 147 N. Y. 241 (1895). Cf. *Crumlish v. Shenandoah Valley R. R.*, 28 W. Va. 623 (1886).

<sup>10</sup> Where the laches appears on the face of a stockholder's bill to examine corporate books and obtain an accounting a demurrer lies, and if the court has already sustained one demurrer it may dismiss the bill without leave to amend. *Foss v. People's, etc. Co.*, 241 Ill. 238 (1909). The complainant need not allege that he did not take part in the transaction, but the question of laches may be raised by demurrer. *George v. Central R. R. etc. Co.*, 101 Ala. 607 (1894). The bill for relief from fraud perpetrated a long time prior thereto must explain in



In New Jersey it has been held that a stockholder must allege that neither he nor any prior owner of his stock has acquiesced in the acts complained of, where the amount of the stock owned by him is very small, comparatively.<sup>1</sup> The defense of laches is pleaded sufficiently by alleging that the plaintiff has been guilty of such laches; that he is not entitled to maintain the action or have relief in the court.<sup>2</sup> Ratification is sufficiently pleaded by stating the facts and alleging "that the plaintiff with full knowledge thereof ratified and confirmed the same."<sup>3</sup>

Delay due to the fact that a bill had previously been filed and dismissed on technical grounds is not laches.<sup>4</sup> And a suit by one signer of a reorganization agreement, to enforce it, prevents laches being charged against other signers who do not commence suit until a long time subsequently.<sup>5</sup> Where all the other stockholders consent to the company buying property owned by one of the directors, a stockholder who was present and does not object cannot complain.<sup>6</sup> The assent of a few minor stockholders whose stock was given to them may be presumed, in case they have not objected to an agreement whereby some of the stockholders sell their stock to the others and take their pay from the corporation itself and resign their offices and substitute new parties as directors.<sup>7</sup> The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.<sup>8</sup> A stockholder who does not attend a

detail the reason of the delay. Laches may be raised by demurrer. *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898). The question of laches may be raised by demurrer where the complaint sets forth the facts which involve laches. *Mott v. N. Y. etc. Co.*, 29 N. Y. Misc. Rep. 39 (1899); *aff'd*, 52 App. Div. 623.

<sup>1</sup> *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901).

<sup>2</sup> *Pollitz v. Wabash R. R.*, 207 N. Y. 113 (1912).

<sup>3</sup> *Pollitz v. Wabash R. R.* 207 N. Y. 113 (1912).

<sup>4</sup> *Miner v. Belle Isle Ice Co.*, 93 Mich. 97 (1892).

<sup>5</sup> *Cox v. Stokes*, 156 N. Y. 491 (1898).

<sup>6</sup> *Steinway v. Steinway*, 2 N. Y. App. Div. 301 (1896); *aff'd*, 157 N. Y. 710, and in 163 N. Y. 183. A stockholder who takes part in and assents to the action of a stockholders' meeting which authorizes a sale of the property to another corporation in exchange

for stock of the latter to be issued to stockholders of the former cannot afterwards object thereto and demand cash, even though his assent was only by refraining from voting against the proposition. *Carr v. Rochester, etc. Co.*, 207 Pa. St. 392 (1904). A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata*. The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of \$25 worth of stock cannot enjoin a sale by those owning ninety-three per cent. of the entire capital stock. Such a sale is valid, although there were directors in common. *Pitcher v. Lone, etc. Co.*, 39 Wash. 608 (1905).  
<sup>7</sup> *Raymond v. Colton*, 104 Fed. Rep. 219 (1900).

<sup>8</sup> *McFadden v. Leeka*, 48 Ohio St. 513 (1891). A stockholder is not



meeting is not bound to know that it ratified an illegal sale of property to a director.<sup>1</sup> Ratification does not arise from the mere fact that the directors' minutes were ratified at a stockholders' meeting.<sup>2</sup> Where the directors own all of the capital stock there is no objection to their selling property to the company, and the price may be collected even though the company subsequently becomes insolvent.<sup>3</sup> A stockholder by voting for a consolidation agreement does not waive his right to keep his own stock and share in the profits of his company, especially where the consolidation agreement had a provision to that effect.<sup>4</sup>

If it is evident that the stockholder waited to see whether the unauthorized act would be profitable to the corporation, the court will refuse to grant him any relief.<sup>5</sup> So also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed, or money expended, or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred.<sup>6</sup> Thus

bound to attend a meeting and vote against an illegal merger. *Douglass v. Concord, etc. R. R.*, 72 N. H. 26 (1903). Failure to attend a corporate meeting is not a waiver of objections thereto. *Matter of Empire State, etc.*, 53 N. Y. Misc. Rep. 344 (1907). A stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who thereby acquired control of the company. *Morris v. Stevens*, 178 Pa. St. 563 (1897). Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon between them, it is legal that the consideration be a right extended by the new company to the old stockholders to demand partly paid up stock of the new company within a limited time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such a case to attend the meeting and vote against it if he objects. It is no excuse that he was ill or abroad or negligent in dissenting, under the English statute. *Burdett-Coutts v. True Blood, etc. Ltd.*, [1899] 2 Ch. 616.

<sup>1</sup> *Kessler & Co. v. Ensley Co.*, 129 Fed. Rep. 397 (1904).

<sup>2</sup> *Ives v. Smith*, 8 N. Y. Supp. 46 (1889). See also § 730, *supra*.

<sup>3</sup> *Attorney-General, etc. v. Standard, etc. Co. of New York*, [1911] A. C. 498.

<sup>4</sup> *Miller v. Chicago, etc. R. R.*, 193 Fed. Rep. 41 (1912). See also s. c., 204 Fed. Rep. 436.

<sup>5</sup> *Story, Eq. Jur.*, § 1539a; *Kitchen v. St. Louis, etc. Ry.*, 69 Mo. 224 (1878); *Gregory v. Patchett*, 33 Beav. 595 (1864); *Atchison, etc. R. R. v. Fletcher*, 35 Kan. 236, 250 (1886); *Banks v. Judah*, 8 Conn. 145 (1830); *Watts's Appeal*, 78 Pa. St. 370 (1875); *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607 (1882); *Boyes v. Montauk, etc. Co.*, 37 W. Va. 73 (1892). Quoted and approved in *Steger v. Davis*, 8 Tex. Civ. App. 23 (1894).

<sup>6</sup> Quoted and approved in *Wright v. Tacoma, etc. Co.*, 53 Wash. 262 (1909). Where a corporation allows its superintendent to lease its property to another corporation and knows that he owns a majority of the stock of the lessee and waits until large sums of money are expended in improvements by the lessee, it is too late to object. *Providence, etc. Co. v. Nicholson*, 178 Fed. Rep. 29 (1910). See § 732, *supra*; also *Houldsworth v. Evans*, L. R. 3 H. L. 263, 276 (1868). Delay of eight months held fatal. *Great Western Ry. v. Oxford, etc. Ry.*, 3



where a stockholder delays four months after full knowledge before objecting to a consolidation, and in the meantime the new securities are daily changing hands in the open market, and the business is being consolidated in such a way as to render a separation increasingly difficult, he is guilty of laches, and cannot complain.<sup>1</sup> But delay after the damage is done, and while the complaining stockholder served as a director in the hope of bettering things, is not a bar.<sup>2</sup> A defendant in a foreclosure suit cannot object to a sale on the ground that it did not comply with the federal statute, where he took no appeal and made no objection until after the sale had been confirmed.<sup>3</sup> Under the New York statutes a suit by a bank against its president for loaning money on worthless securities survives his death.<sup>4</sup>

An *ultra vires* or fraudulent act cannot be ratified by the majority so as to bind the minority;<sup>5</sup> neither can it be ratified by the board of directors.<sup>6</sup> The proper rule is that such a transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has power to set

De G., M. & G. 341 (1853). See also *Boston, etc. R. R. v. New York, etc. R. R.*, 13 R. I. 260 (1881); *Aurora, etc. Soc. v. Paddock*, 80 Ill. 263 (1875); *Stewart v. Erie, etc. Transp. Co.*, 17 Minn. 372 (1871); *Goodin v. Evans*, 18 Ohio St. 150 (1868). In *Covington, etc. R. R. v. Bowler*, 9 Bush (Ky.), 468 (1872), however, the court held that a delay of six years was not a bar to the stockholder's remedy; and the court said that "merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money or to alter their condition, and thereby render it unconscientious for him to enforce his rights." But see *Pacific R. R. of Mo. v. Missouri Pac. Ry.*, 111 U. S. 505 (1884), reversing 12 Fed. Rep. 641, holding that delay pending appeal is not fatal. See also §§ 161, 162, *supra*. A stockholder who lies by and allows his corporation, which is not a success, to be merged with other property into a new company, payment being made in stock of the latter company, and the enterprise proves a success, cannot cause to be set aside an assessment to pay a debt incurred for expenses in bringing about such results. *Taylor v.*

*North Star, etc. Co.*, 79 Cal. 285 (1889).

<sup>1</sup> *Dana v. American Tobacco Co.*, 69 Atl. Rep. 223 (N. J. 1908), aff'g 72 N. J. Eq. 44 (1907).

<sup>2</sup> *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895).

<sup>3</sup> *National, etc. Co. v. Nevada, etc. Syndicate*, 112 Fed. Rep. 44 (1901).

<sup>4</sup> *Seventeenth, etc. Bank v. Webster*, 67 N. Y. App. Div. 228 (1901). A cause of action against a director of a national bank for misconduct survives his death. *Allen v. Luke*, 141 Fed. Rep. 694 (1906); s. c., 163 Fed. Rep. 1018.

<sup>5</sup> See § 730, *supra*, and § 740, *infra*. *Bassett v. Fairchild*, 132 Cal. 637 (1901).

<sup>6</sup> See § 730, *supra*. Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is no bar to such suit for the balance. A release by the board of directors is no defense. *Gilbert v. Finch*, 72 N. Y. App. Div. 38 (1902); aff'd, 173 N. Y. 455. See also §§ 649, 652, 662, *supra*.



the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt in his application to the court. A court, however, may authorize its receiver to compromise such claims.<sup>1</sup>

Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him.<sup>2</sup>

Where a stockholder in a foreign corporation appeals in a suit to enjoin it from selling its assets, his remedy to preserve the *status quo* on appeal is not *mandamus*, but an injunction from the supreme court.<sup>3</sup>

<sup>1</sup> See § 701, *supra*. The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders, where such contract is a fair one, even though some of the stockholders dis-

sent. *People v. Anglo-American, etc. Assoc.*, 66 N. Y. App. Div. 9 (1901); s. c., 169 N. Y. 606.

<sup>2</sup> *Manhattan Hardware Co. v. Roland*, 128 Pa. St. 119 (1889).

<sup>3</sup> *Hitchcock v. Rohnert*, 144 Mich. 362 (1906).



## CHAPTER XLV.

### PARTIES, PLEADINGS, ETC., IN SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION — SUITS BY OR AGAINST THE CORPORATION IN GENERAL.

#### A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.

- § 734. Jurisdiction of the court — Jurisdiction of the federal courts in such cases — Jurisdiction over foreign corporations — When is the remedy in equity and when at law? — The complainant in equity must sue in behalf of himself and all other stockholders — The results of the suit belong to the corporation.
735. Parties plaintiff — Who may bring the suit — Unregistered transferees — Trustees — Pledges — Stock that has voted in favor of the act — Small stockholders, and payment to them of the actual value of their stock on an equitable basis — Corporate creditors — Receiver.
736. Rule when the plaintiff stockholder sues in the interest of a rival company, or purchases stock for the purpose of bringing suit.
737. Ninety-fourth rule in federal courts against suits by transferees.
738. Parties defendant herein — The corporation — Directors — Third persons — The receiver.
739. Complainant's bill must not improperly join two or more causes of action herein.
740. Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so — Request to receiver — Ninety-fourth rule of the federal courts on this subject.
741. When such an allegation may be omitted.
742. Miscellaneous allegations of the complaint.

- § 743. Prayer for relief.
744. Property received under the act objected to must be returned upon that act being set aside.
745. Injunction restraining the corporate officers and others from doing specific acts.
746. Appointment of a receiver — Removal of directors by the court or corporation.
747. Miscellaneous remedies.
748. The complaining stockholder controls the conduct of the suit — Right of other stockholders to come into the suit — Compromise and discontinuance — Costs and disbursements — Similar suits elsewhere, in federal or state courts.
749. No contribution among the directors — Joint and several liability.

#### B. SUITS BY OR AGAINST THE CORPORATION IN GENERAL.

750. The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with by the courts — Intervention by stockholders.
751. Suits by and against the corporation — Must be in corporate name.
752. Service on a domestic corporation — Appearance — Answer — Proofs.
753. Allegation and proof of incorporation.
754. Confession of judgment.
755. Injunction and contempt.
756. Contempt and sequestration.
757. Foreign corporations may sue and be sued — Stockholders' suits against foreign corporations — Garnishment — Statute of limitations — Usury.



§ 758. Service in suits against a foreign corporation — Jurisdiction where service is on an officer temporarily in the state — Rules in federal courts as to service.

§ 759. Jurisdiction of the federal courts — Removal of causes to federal courts — "Dummy" corporations — Federal corporations.

A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.

§ 734. *Jurisdiction of the court — Jurisdiction of the federal courts in such cases — Jurisdiction over foreign corporations — When is the remedy in equity and when at law? — The complainant in equity must sue in behalf of himself and all other stockholders — The results of the suit belong to the corporation.* — There has been some difficulty in determining whether the federal courts have jurisdiction of a stockholder's suit herein when the corporation and such directors as must be made parties are citizens of the same state, even though the complainant stockholder is a resident of another state. Inasmuch as the suit is for the benefit of the corporation, it has been claimed that the non-residence of the stockholder is insufficient to give jurisdiction. The federal courts have decided, however, that such jurisdiction exists, and it is in these courts that a large proportion of these suits are brought.<sup>1</sup> The aggregate interest of the complaining

<sup>1</sup> *Dodge v. Woolsey*, 18 How. 331 (1855); *Barnes v. Kornegay*, 62 Fed. Rep. 671 (1894); *Greenwood v. Freight Co.*, 105 U. S. 13 (1881); *Pond v. Vermont Valley R. R.*, 12 Blatchf. 280 (1874); s. c., 19 Fed. Cas. 976, the court holding also that the complainant might omit as party plaintiff a stockholder residing in the state of the corporation. See also *Hatch v. Chicago, etc. R. R.*, 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799; *Footte v. Linck*, 5 McLean, 616 (1853); s. c., 9 Fed. Cas. 366; *Bell v. Donohoe*, 17 Fed. Rep. 710 (1883), holding that the court has no jurisdiction if the stockholder and one of the defendants, a third person who is alleged to have defrauded the corporation, are citizens of the same state. See also *Burke v. Flood*, 1 Fed. Rep. 541 (1880). A resident of Colorado having a cause of action against a Colorado corporation for not allowing a transfer of stock may sell her claim to a non-resident and the latter may bring suit in the federal court. *O'Neil v. Wolcott Mining Co.*, 174 Fed. Rep. 527 (1909). A stockholder and bondholder in a New York

corporation may maintain a bill in equity in the United States court to enjoin the attorney-general of New York from enforcing an alleged unconstitutional statute affecting the property of the corporation, and he need not first comply with rule 94, inasmuch as jurisdiction depends on a constitutional question irrespective of citizenship. *Lindsley v. Natural, etc. Co.*, 162 Fed. Rep. 954 (1908). A citizen of California, who is a minority stockholder in an Arizona corporation, may maintain a suit in the United States court in New York against a New York citizen and a West Virginia corporation and a Mexican corporation to compel the former and the two corporations to account for property which belongs to the Arizona corporation, all of the defendants having put in a general appearance. *Kuchler v. Greene*, 163 Fed. Rep. 91 (1908). A preferred stockholder may bring suit to cause to be canceled an issue of \$10,000,000 of common stock in payment for services worth not more than \$1,000,000 in violation of the West Virginia statute, where it is



stockholder is the amount considered involved in the federal court on the question of jurisdiction.<sup>1</sup> And even though shares exceeding

alleged that such common stock controls the corporation and threatens the credit and dividend-paying capacity of the company. The directors being antagonistic, no request to them to bring the suit need be made. The defendant corporation will not be considered as complainant in determining jurisdiction. *Howard v. National Tel. Co.*, 182 Fed. Rep. 215 (1910). The United States court has no jurisdiction of a suit instituted by a citizen of Georgia as a member of a Tennessee church to obtain a decree that an attempt at merger with another church was illegal, and that the officers of the former were entitled to assume control, the defendants being officers and members all residents of Tennessee, and it appearing that the officers should be aligned as complainants. *Stephens v. Smartt*, 172 Fed. Rep. 466 (1909). A suit may be brought in the federal court by a non-resident stockholder, especially where the suit is based upon an alleged violation of the constitution of the United States. *Simpson v. Union Stock, etc. Co.*, 110 Fed. Rep. 799 (1901). A stockholder in a railroad company may enjoin the company and state officers from enforcing a state statute unreasonably reducing railroad rates, and the United States court has jurisdiction on the ground that it deprives the company of its property without due process of law and denies the equal protection of the law, but a preliminary injunction will not be granted if the railroad is already charging only the reduced rate. *Perkins v. Northern, etc. Ry.*, 155 Fed. Rep. 445 (1907). A suit in equity lies in the federal court to enjoin the collection of taxes on stock held by one corporation in another on the ground that it deprives the stockholder of the equal protection of the law, where the statutes of the state forbid such tax. *Louisville T. Co. v. Stone*, 107 Fed. Rep. 305 (1901). Rule

94 of the federal courts is not satisfied by an allegation that a request has been made to the board of directors and has been refused and that the suit is not collusive. Something more than this is necessary, and hence if the corporation defendant is of the same state as the other defendants the federal court has no jurisdiction, the corporation defendant being looked upon as the real complainant. *Elkins v. City of Chicago*, 119 Fed. Rep. 957 (1902), the court stating that it did not pass on whether such jurisdiction would exist if the corporation really was hostile to the complainant, and rule 94 had been complied with. A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts, and to have a receiver appointed. *Leary v. Columbia River, etc. Co.*, 32 Fed. Rep. 775 (1897). A suit in the federal court by a non-resident stockholder is not collusive to the extent of affecting the jurisdiction of the federal court, even though resident stockholders contribute to the expense. *Consumers', etc. Co. v. Quinby*, 137 Fed. Rep. 882 (1905). A non-resident stockholder may bring suit in the federal court, and such suit is not deemed collusive, unless it is shown that there is an agreement between him and the company in reference thereto. *Mills v. City of Chicago*, 143 Fed. Rep. 430 (1906); *aff'd*, 204 U. S. 321. The act of congress that the federal court shall not have jurisdiction in a suit by an assignee of a chose in action where the assignor could not sue in the federal court, does not apply to a purchaser of a certificate of stock in a suit to restrain *ultra vires* acts. *Consumers', etc. Co. v. Quinby*, 137 Fed. Rep. 882 (1905). A non-resident stockholder in an Illinois gas corporation may maintain a bill in equity in

<sup>1</sup> *Carpenter v. Knollwood Cemetery*, 198 Fed. Rep. 297 (1912).



in par value the jurisdictional amount are transferred out and out to a non-resident in order to enable him to bring a suit in the United States

the federal court to enjoin a city in Illinois from illegally reducing gas rates, the gas company being made also a party defendant, and the question of whether a request by the stockholder to the gas company to bring suit was collusive, will not be determined on demurrer. *Mills v. City of Chicago*, 127 Fed. Rep. 731 (1904). A non-resident stockholder may maintain a suit in the federal court, even though resident stockholders contribute towards the maintenance of the suit. *New Albany Waterworks v. Louisville, etc. Co.*, 122 Fed. Rep. 776 (1903). In a stockholder's suit in behalf of the corporation, the corporation is considered a party plaintiff on the question of federal jurisdiction. *Lucas v. Milliken*, 139 Fed. Rep. 816 (1905). A pledgee of the stock of a stockholder who lives in the same state as the corporation itself, cannot maintain a suit in the United States court against the corporation for a receiver and a distribution of the assets, the corporation being insolvent. *Gorman-Wright Co. v. Wright*, 134 Fed. Rep. 363 (1904). In a suit by a minority stockholder to hold a majority stockholder liable for bringing about a foreclosure of the corporate property and a purchase of the same, the corporation must be made a party defendant, and hence he cannot bring the suit in the federal court, if such minority stockholder and the corporation are citizens of the same state. *Redfield v. Baltimore, etc. R. R.*, 124 Fed. Rep. 929 (1903). A corporate creditor who does not question the jurisdiction of the federal court for sixteen months, during which time a receiver has sold the property and creditors' claims proved, cannot then question such jurisdiction on an issue of fact. *Briggs v. Traders' Co.*, 145 Fed. Rep. 254 (1906). In a stockholder's suit in the federal court to remove a fraudulent lien, the corporation will be considered as of the same state as the complainant, unless Rule 94 has been complied with. *Gage v. Riverside T. Co.*, 156 Fed. Rep. 1002

(1906). Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the five per cent. Four years' delay is no bar. *Sabre v. United, etc. Co.*, 156 Fed. Rep. 79 (1907). Where a corporation issues several million dollars of bonds, secured by a mortgage that represents that it covers many thousand acres of land, although, in fact, the company owned but a few hundred acres of land, a purchaser of such bonds may maintain a bill in equity in behalf of himself and other bondholders to hold the directors liable for false representations, and the corporation itself is not a necessary party defendant, a request to the trustee of the mortgage having first been made to bring suit. A provision in the mortgage against individual bondholders maintaining a suit before offering indemnity to the trustee is no bar to such a suit, that provision being applicable to remedies under the mortgage only. The suit may be maintained in the United States circuit court in New York, even though the corporation was organized in Missouri, it appearing that the directors reside in New York. *Slater T. Co. v. Randolph, etc. Co.*, 166 Fed. Rep. 171 (1908). In *Hawes v. Oakland*, 104 U. S. 450 (1881), the court vigorously denounced transfers of stock made for the purpose of giving the federal courts jurisdiction. The



court, yet he may maintain the suit, and his allegation that the par value of the stock is over that amount is sufficient.<sup>1</sup> The supreme

ninety-fourth rule (see 104 U. S. ix) was made in consequence thereof. Where "the parties on one side of the controversy are citizens of New Jersey, and those on the other side of the controversy are a New Jersey corporation and other citizens of New Jersey, as well as a Pennsylvania corporation and citizens of Pennsylvania and of Maryland, . . . all the parties on one side of this controversy not being citizens of different states from all those upon the other side, the citizenship of the parties did not bring the case within the jurisdiction of the circuit court." *New Jersey Cent. R. R. v. Mills*, 113 U. S. 249 (1885); *East Tennessee, etc. R. R. v. Grayson*, 119 U. S. 240 (1886). If the two parties in interest are both corporations of the same state, it seems that a stockholder cannot sue in the federal court by reason of his living in another state. *Quincy v. Steel*, 120 U. S. 241 (1887). See also *Huntington v. Palmer*, 104 U. S. 482 (1881). The federal court in New Jersey has no jurisdiction of a suit brought by stockholders in a Maine corporation against that corporation and a New Jersey corporation to set aside an illegal transfer of property from the Maine corporation to the New Jersey corporation, the property itself not being in New Jersey. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 455 (1900). Moreover, if the Maine corporation is not served and does not voluntarily appear, final relief cannot be granted and a preliminary injunction will be dissolved. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 457 (1900). In a stockholder's suit to set aside a sale by a Maine corporation of all its assets to a New Jersey corporation, the suit being in New Jersey, the Maine corporation is a necessary party defendant, and a

court in Maine will not appoint a receiver of the same for the sole purpose of appearing in the suit in New Jersey. *Hutchinson v. American, etc. Co.*, 104 Fed. Rep. 182 (1900). In the case *Stevens v. Missouri, etc. Ry.*, 106 Fed. Rep. 771 (1901), a New York stockholder brought suit in the circuit court of the United States in New York to set aside an alleged *ultra vires* and fraudulent consolidation of Kansas railroad companies. A minority stockholder of an alien corporation cannot file a bill in equity to have the company wound up and its assets distributed, even though he complains of the management, and even though the main purpose of the corporation is to acquire land in the state, it being shown that the corporation is solvent. *Sidway v. Missouri, etc. Co.*, 101 Fed. Rep. 481 (1900). The federal court in New Jersey has no jurisdiction of a suit brought by a Pennsylvania stockholder in a New Jersey corporation to enjoin the latter and its directors who are residents of still another state from issuing stock on an alleged illegal contract. *Lengel v. American, etc. Co.*, 110 Fed. Rep. 19 (1901). A Connecticut stockholder in a Maine corporation cannot bring suit in the federal court in Massachusetts for a receiver and other relief, even though the corporation has appointed an agent in Massachusetts to accept service. *Platt v. Massachusetts, etc. Co.*, 103 Fed. Rep. 705 (1900). The purchaser at foreclosure sale in the federal court may enjoin a subsequent suit in the state court by a stockholder to place the property in the hands of a receiver in disregard of the foreclosure decree. *James v. Central, etc. Co.*, 98 Fed. Rep. 489 (1899).

A suit pending in the United States court brought by the purchaser

<sup>1</sup> *Re Cleland*, 218 U. S. 120 (1910). In a stockholder's suit in the federal court to enjoin an illegal use of the corporate funds the amount involved is the amount of corporate funds involved. *Labaree v. Dolley*, 175 Fed. Rep. 365 (1909); *aff'd*, 219 U. S. 121.



court holds that a New Jersey stockholder in a New York corporation may file a bill in equity in the United States court to set aside a judgment obtained by a citizen of New York against the corporation fraudulently and collusively, and also to set aside a sale of property thereunder, where the corporation is controlled by the interests antagonistic to the complainant.<sup>1</sup> A stockholder in a railroad may maintain a suit in the United States court to have declared unconstitutional and void a statute which unreasonably reduces railroad rates to a point of confiscation. He may maintain such a suit, irrespective of citizenship, inasmuch as jurisdiction is based on taking property without

of municipal bonds from a railroad to compel the state treasurer to deliver them, the corporation being made a party defendant, does not prevent the state court issuing a *mandamus* at the instance of the municipality to have such bonds delivered up by the state treasurer for cancellation. *People v. State Treasurer*, 24 Mich. 468 (1872). In suits by one or more in behalf of others, others will not be allowed to come in as parties when to do so would oust the United States court of jurisdiction. *Stewart v. Dunham*, 115 U. S. 61 (1885); *Jackson, etc. Co. v. Burlington, etc. R. R.*, 29 Fed. Rep. 474 (1887). *Cf. Thouron v. East, etc. Ry.*, 38 Fed. Rep. 673 (1889). As to jurisdiction, see also *Peninsular Iron Co. v. Stone*, 121 U. S. 631 (1887). The United States court, which decreed a foreclosure, has jurisdiction to set aside a foreclosure as fraudulent irrespective of citizenship in the latter case. *Pacific R. R. of Mo. v. Missouri Pac. Ry.*, 111 U. S. 505 (1884), rev'g 12 Fed. Rep. 641. See also §§ 827, 562, notes, as to the jurisdiction of the United States courts. The United States court has no jurisdiction of a stockholder's suit for a receiver unless the actual value of the stock owned by him exceeds \$2,000, and unless he was a stockholder when the acts complained of occurred, and unless he has made an earnest effort to secure relief by the corporation itself. *Robinson v. W. Virginia L. Co.*, 90 Fed. Rep. 770 (1898). The federal court has no jurisdiction of a suit by a stockholder to enjoin a corporation from allowing certain stock to be voted on

various grounds where there is no allegation that the complainant's holdings of stock are worth upwards of \$2,000. *Harvey v. Raleigh & G. R. R.*, 89 Fed. Rep. 115 (1898). In ascertaining the jurisdiction of the United States court in a suit relative to stock, it is presumed to be worth par. *Bernier v. Griscom-Spencer Co.*, 161 Fed. Rep. 438 (1908). As to whether a stockholder whose interest is less than \$2,000 may file a bill in the United States court for a receiver, see *Colston v. Southern, etc. Assoc.*, 99 Fed. Rep. 305 (1899), and *Hill v. Glasgow R. R.*, 41 Fed. Rep. 610 (1888). A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts, and to have a receiver appointed. *Leary v. Columbia River, etc. Co.*, 82 Fed. Rep. 775 (1897). See also § 757, *infra*.

<sup>1</sup> *Doctor v. Harrington*, 196 U. S. 579 (1905). A stockholder in a foreign corporation may bring suit in the United States court to set aside a judgment obtained in that district against the corporation fraudulently by its officers and directors, and the latter cannot have the suit dismissed as to them, even though they are non-residents. *Schultz v. Diehl*, 217 U. S. 594 (1910). A stockholder cannot maintain a suit against a foreign corporation to impeach a judgment against the corporation in the state where it is incorporated, where the only allegations are general ones of fraud and collusion. *Kelly v. Thomas*, 234 Pa. St. 419 (1912).



due process of law and denying his company the equal protection of the law.<sup>1</sup>

A defendant corporation cannot remove the case to the federal court where indispensable parties defendant are participants in the act complained of and are of the same state as the complainants.<sup>2</sup> A suit, however, commenced by the stockholder against the corporation and against another party who has defrauded the corporation may be removed to the federal court, even though the stockholder and his corporation are citizens of the same state, it being shown that such corporation is desirous of having the complainant succeed in the suit.<sup>3</sup> A suit instituted by a New York stockholder in a Minnesota railroad corporation against that corporation and its president, also a citizen of Minnesota, to compel them to pay the corporation a profit which the latter made on property which he sold to the corporation may be removed to the United States court, the corporation not being aligned as a party complainant.<sup>4</sup> A suit by several stockholders against several of the directors to hold them liable for misappropriation of corporate funds cannot be removed to the federal court by one of the defendants on the ground that the controversy is separable.<sup>5</sup> The pendency of a suit in the state

<sup>1</sup> *Ex parte Young*, 209 U. S. 123 (1908).

<sup>2</sup> *Wilder v. Virginia, etc. Co.*, 46 Fed. Rep. 676 (1891).

<sup>3</sup> *Hutton v. Joseph Bancroft, etc. Co.*, 77 Fed. Rep. 481 (1896). In a stockholder's suit against a foreign corporation holding a majority of the stock of a domestic corporation and fraudulently refusing to perform its contract with the latter, the latter is a necessary party, and the case cannot be removed to the federal courts. *Douglas v. Richmond, etc. R. R.*, 106 N. C. 65 (1890). If the corporation is under the control of the guilty parties and is of the same state as the plaintiff, the case cannot be removed from the state to the federal court. *Crawford v. Seattle, etc. Ry.*, 198 Fed. Rep. 920 (1912).

<sup>4</sup> *Venner v. Great Northern Ry.*, 209 U. S. 24 (1908).

<sup>5</sup> *Fox v. Mackay*, 60 Fed. Rep. 4 (1894). A stockholder's suit cannot be removed to the federal court on the ground of local prejudice, where one of the defendants is a citizen of the same state as most of the complaining stockholders, and the controversy is not separable. *Gann v.*

*Northeastern R. R.*, 57 Fed. Rep. 417 (1891). In a suit against two directors for damages for misconduct, one director has such a separable controversy as to enable him to remove the case to the federal court, so far as he is concerned, no conspiracy being charged. *Youtsey v. Hoffman*, 108 Fed. Rep. 693 (1901). A stockholder's suit against the corporation and its majority stockholders to hold the latter liable may be removed by the latter to the federal court, even though the complainant and the corporation are citizens of the same state. *Lamm v. Parrot, etc. Co.*, 111 Fed. Rep. 241 (1901). In a suit in equity by a stockholder against the corporation and a stockholder who owns a majority of the stock, to enjoin an illegal disposition of the corporate property, the defendant stockholder cannot remove the case to the federal court on the ground of a separable controversy, the plaintiff and the corporation being citizens of the same state. *Hanover Nat. Bank v. Credits, etc. Co.*, 118 Fed. Rep. 110 (1902). Even though a resident stockholder in a foreign corporation in bringing suit against it for a receiver, under a statute authoriz-



court does not prevent the commencement of a similar suit in the United States court.<sup>1</sup>

So also the courts of equity of any state have jurisdiction, if they care to exercise it, to remedy the frauds or *ultra vires* acts of a foreign corporation or its directors, particularly where the acts were performed within the jurisdiction or some of the parties reside within the jurisdiction. A stockholder in a foreign corporation may sue in the courts of New York to enjoin fraudulent acts and hold the directors and third persons personally liable.<sup>2</sup> Thus where a person owning a majority of the stock of an Arizona corporation is president and controls all the officers, and transfers all its property to a Mexican corporation for stock of the latter which is appropriated by him to his own use, a New York stockholder in the old company may sue him and both companies in the New York courts to set aside the entire transaction and for an accounting, and service upon the Arizona company may be by publication.<sup>3</sup> And there have been many instances where such jurisdiction has been exercised.<sup>4</sup>

ing such a suit, joins the local manager as party defendant, yet this does not prevent the corporation removing the case to the federal court, if such local manager is merely a nominal defendant. *Sidway v. Missouri, etc. Co.*, 116 Fed. Rep. 381 (1902). A suit by a stockholder to enjoin a foreign corporation from maintaining and exercising control over the business of his corporation, both corporations being parties defendant, cannot be removed by the foreign corporation to the federal court, inasmuch as the controversy is not separable. *MacGinniss v. Boston, etc. Co.*, 119 Fed. Rep. 96 (1902). The defendant corporation cannot remove the case to the federal court as having a separable controversy, even though a receiver and an injunction are asked in a stockholder's suit against a non-resident corporation and its directors, to enjoin a stockholders' meeting and compel the directors to account for funds. *Campbell v. Milliken*, 119 Fed. Rep. 981 (1902).

<sup>1</sup> See § 743, *infra*.

<sup>2</sup> *Gray v. Fuller*, 17 N. Y. App. Div. 29 (1897).

<sup>3</sup> *Grant v. Cobre, etc. Co.*, 193 N. Y. 306 (1908). See also 141 N. W. Rep. 121.

<sup>4</sup> In the case *Harting v. American, etc. Co.*, 182 Ill. 551 (1899), an Illi-

nois stockholder in a New Jersey glucose manufacturing corporation enjoined in the courts of Illinois a transfer of the property of that corporation, including real estate in Illinois, to another New Jersey corporation, the latter being a trust formed to absorb practically all the glucose factories of the country, the court saying that it need not be proved that prices have actually been raised, but it is sufficient if it is within the power of the corporation to raise them. Where a Delaware corporation holds its directors' meetings and transacts its business in Illinois, even though its property is in Mexico, a dissenting stockholder may by a suit in Illinois compel the directors to account for misappropriation of funds. *Voorhees v. Mason*, 245 Ill. 256 (1910). An Illinois stockholder in an English corporation organized to carry out a contract with the state of Texas for the erection of a state capitol in consideration of 3,000,000 acres of land, may bring suit in Illinois to compel the directors to account for their acts, it being possible to bring all the parties before the court. *Babeock v. Farwell*, 245 Ill. 14 (1910). Where a Maine corporation does all its business in Massachusetts, and all its officers, except the secretary, reside in



In fact under some circumstances the only way to obtain relief is by suit where the guilty party resides.<sup>1</sup> It is discretionary, however,

Massachusetts, a Massachusetts stockholder may maintain in the courts of Massachusetts a suit to compel the directors to account for property misappropriated and to enjoin *ultra vires* acts, but a receiver will not be appointed unless special circumstances require it. *Richardson v. Clinton, etc. Co.*, 181 Mass. 580 (1902). See also cases in notes, *supra*. Even though a suit in New Jersey by a stockholder in a Maine corporation to enjoin a New Jersey corporation from taking over the assets of the Maine corporation joins the Maine corporation as a party defendant, and the latter is not served, yet the court may grant relief. *Wilson v. American, etc. Co.*, 67 N. J. Eq. 262 (1904). See also § 738, *infra*. A stockholder in a national bank may on account of fraudulent management maintain a suit in the state court and have a receiver appointed and an accounting had. *Grout v. First Nat. Bank*, 48 Colo. 557 (1910). Minnesota subscribers to stock in an Arizona corporation may maintain a suit in equity in Minnesota to compel the corporate officers who are residents of Minnesota to surrender for cancellation stock fraudulently obtained by them from the corporation as promoters, the plaintiffs having subscribed on misrepresentations. It is immaterial that jurisdiction cannot be obtained over the corporation itself. *Gere v. Dorr*, 114 Minn. 240 (1911). A stockholder in a foreign corporation may bring suit to hold the directors liable for fraud, even though a receiver has been appointed in the state where the corporation was organized, and he need not be made a party defendant and no demand need be made on him to bring the suit. *Reed v. Hollingsworth*, 135 N. W. Rep. 37 (Iowa, 1912). A suit in Michigan by a stockholder

against the directors in a New Jersey corporation was sustained in *Robinson v. De Luxe, etc. Co.*, 135 N. W. Rep. 897 (Mich. 1912). A stockholder in a Connecticut corporation, all of whose assets have been fraudulently transferred to a New Hampshire corporation, may maintain a suit in New Hampshire to set aside such transfer, even though the Connecticut corporation is not served, and does not appear, it being made a party defendant, and the stocks and bonds involved being located in the state of New Hampshire, although pledged to a New York trust company and actually in the possession of the latter. *Kidd v. New Hampshire, etc. Co.*, 72 N. H. 273 (1903). In the case *Selover v. Isle, etc. Co.*, 91 Minn. 451 (1904), the court granted specific performance of a contract by a foreign corporation for the issue of stock to a person in payment for property. A non-resident stockholder in a non-resident corporation may institute suit asking that the property in the state be applied to the debts, showing that otherwise it would be lost by attachments and by the extravagant management of the officers. *Culver, etc. Co. v. Culver*, 81 Ark. 102 (1906). A resident stockholder in a foreign corporation may file a bill to compel a local agent to account for sales made by him for the corporation, it being shown that such agent controlled the company and that his actions were fraudulent. *Sloan v. Clarkson*, 105 Md. 171 (1907). A non-resident has the same right to sue a foreign corporation that a resident has under the constitution of the United States. *Deatrick's Adm'r v. State, etc. Co.*, 107 Va. 602 (1907). A bill in equity may be filed by a citizen of New Jersey and a foreigner to have stock in a New Jersey corporation, then held by

<sup>1</sup> A stockholder in a New Jersey corporation cannot maintain a suit in New Jersey to set aside a license from such corporation to a New York corporation to use a patented device

where the New York corporation is not served and cannot be served in New Jersey. *Elmendorf v. American, etc. Co.*, 85 Atl. Rep. 199 (N. J. 1912).



with a court as to whether it will grant equitable relief against a foreign corporation. Especially is this the case in regard to suits brought by

foreigners, awarded to complainants and new certificates issued to the latter. Pending the suit the court may appoint a receiver of the stock and may enjoin transfer. Service on the defendant foreigners may be made by publication. *Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567 (1907). A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of the stock which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899). A New York stockholder in an Illinois corporation may bring suit in New York to set aside a fraudulent sale of all the assets. *Whitman v. Holmes, etc. Co.*, 33 N. Y. Misc. Rep. 47 (1900). Even though a notice of a meeting of the stockholders in an English corporation is so short as not to reach American stockholders in time for the meeting, yet if such notice was in accordance with the English law and was not in violation of the charter or by-laws, it is legal. *Republican, etc. Mines v. Brown*, 58 Fed. Rep. 644 (1893), *rev'g Brown v. Republican, etc. Mines*, 55 Fed. Rep. 7.

In *Ervin v. Oregon, etc. Nav. Co.*, 28 Hun, 269 (1882), the court sustained the jurisdiction where service on the directors was personal, even though the corporate property was not in the state. A West Virginia stockholder in a Pennsylvania construction company may sue a West Virginia railroad company which owes bonds to the construction company, and compel an accounting and distribution of such bond assets, when the Pennsylvania company is insolvent and has been dissolved. No request to the directors is necessary. *Crum-*

*lish v. Shenandoah Valley R. R.*, 28 W. Va. 623 (1886). It has been held that a resident stockholder of a foreign corporation may enjoin it from making an *ultra vires* extension of its line by building branches, etc. *Ives v. Smith*, 3 N. Y. Supp. 645 (1888). A resident stockholder may enjoin a foreign railroad corporation from constructing branch lines. *Ives v. Smith*, 8 N. Y. Supp. 46 (1889). A stockholder may file a bill against the estate of the deceased president of the corporation to compel such estate to make good corporate property misappropriated by him, and such suit may be maintained even though no assets of the corporation came into the hands of the executrix of the estate, and even though the corporation itself is a foreign corporation. *Wineburgh v. United States, etc. Co.*, 173 Mass. 60 (1899). A citizen of the Republic of Mexico may bring suit in Texas against an Illinois corporation for breach of contract, even though the corporate property is in the hands of a receiver appointed in Mexico. *American, etc. Works v. De Aguayo*, 53 S. W. Rep. 350 (Tex. 1899). Where an English corporation owning land in the United States sells a portion of such land in Louisiana at one seventh of its value, thereby causing a loss to the corporation of over \$2,000,000, and the board of directors refuse to take any action, a stockholder may bring suit in Louisiana to set aside the sale and may have a receiver appointed of the assets in that state. *Watkins v. North American, etc. Co.*, 107 La. 107 (1902). As to the power of a court to compel a foreign corporation to exhibit its books in the state to a resident stockholder, see ch. XXX, *supra*. A suit to compel a foreign corporation to issue new certificates of stock for certificates lost will lie. *Guilford v. Western U. Tel. Co.*, 59 Minn. 332 (1894). Where one foreign corporation is under obligation to issue stock to another foreign corporation, a resident stockholder of the latter may bring suit in New York courts to com-



stockholders. The courts will often refuse to grant relief, inasmuch as there may be no means of enforcing the decree. The strong tendency of the courts is to refuse to entertain jurisdiction, where the more proper forum is the state wherein the corporation itself is incorporated and exists.<sup>1</sup> Thus a stockholder's suit to enjoin the company from leasing

pel the issue of such stock. *Babcock v. Schuykill, etc. Ry.*, 9 N. Y. Supp. 845 (1890).

<sup>1</sup>A Pennsylvania minority stockholder in a New Jersey corporation cannot maintain a bill in equity in Pennsylvania to hold liable another Pennsylvania stockholder who is alleged to have defrauded the corporation. The suit must be in New Jersey. *Madden v. Penn. etc. Co.*, 199 Pa. St. 454 (1901). Where neither the business nor property of the corporation is within the state, the Pennsylvania courts will not entertain a suit by a stockholder to review internal corporate action. *Kelly v. Thomas*, 234 Pa. St. 419 (1912). Inasmuch as in New York an agreement of a contractor to divide with the officers of the company profits made in the construction of the railroad is legal, unless avoided by the corporation, and is not subject to collateral attack, such a contract will be sustained in Pennsylvania if the contract was made in New York and pertained to a New York corporation, even though such corporation was thereafter consolidated with a Pennsylvania corporation. *Rumsey v. New York, etc. R. R.*, 203 Pa. St. 579 (1902). A contributor to a fund to be invested by syndicate managers in stocks and other property has not such an interest in the stocks as enables him to maintain a suit in the state where the corporations are organized as against the non-resident syndicate managers. *Jones v. Gould*, 141 Fed. Rep. 698 (1905); *aff'd*, 149 Fed. Rep. 153. In *McCloskey v. Snowden*, 212 Pa. St. 249 (1905), the court held that where suit was brought by a resident stockholder against a foreign corporation for fraud in the purchase of property at a fraudulent price, the directors not being charged with the fraud, a mere allegation that they had been requested to commence suit and had

declined is insufficient. An Illinois stockholder in a Washington mining company cannot maintain a bill in Illinois to hold the directors liable for misconduct and illegal issue of stock even though directors' meetings are held in Illinois, but no business is done there. *Bradbury v. Waukegan & Washington Min. Co.*, 113 Ill. App. 600 (1904). Where, in a stockholder's suit in the federal court to set aside a sale of all the assets of the company to another company, an injunction has been denied on the giving of a bond, an injunction will not be granted in a similar suit by the same parties in the state court, especially where the purchaser is outside of the jurisdiction of the court, and the advantage to the complainant will be small as compared with the injury to the defendant. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). The courts of West Virginia will not take jurisdiction of a suit brought by a citizen of West Virginia against a New York mutual life insurance company to enjoin the imposition of alleged illegal assessments. *Taylor v. Mutual, etc. Assoc.*, 97 Va. 60 (1899). The New Jersey courts have no jurisdiction of a suit by a New York bondholder against a New York trust company to hold the latter liable for certifying to bonds issued by a New York corporation before certain improvements were made, which, according to the mortgage, were to be made before the bonds were certified. *Polhemus v. Holland T. Co.*, 59 N. J. Eq. 93 (1900). But by answering on the merits such objection to the jurisdiction is waived; *s. c.*, 61 N. J. Eq. 654 (1900). A court of equity cannot by injunction control the management of the internal affairs of a foreign corporation, even though the directors are within the state. *Jackson v. Hooper*, 76 N. J. Eq. 592 (1910). A New York



its property for an inadequate sum must be brought in the state where the company is incorporated.<sup>1</sup> Under the statutes of New York a

stockholder in a Connecticut railroad corporation cannot sue in the New York courts on behalf of himself and other stockholders to hold liable another Connecticut railroad corporation for acquiring a majority of the stock of the former railroad and fraudulently acquiring its assets where the first-named corporation has ceased to exist, and hence its assets should be administered in Connecticut by a suit brought there. *Howe v. New York, etc. R. R.*, 142 N. Y. App. Div. 451 (1911). A Missouri policy holder in a Minnesota mutual life insurance corporation cannot maintain a suit in Missouri for an investigation of its accounts and affairs and for a receiver, inasmuch as the court could not enforce its decree if it made one. *State v. Denton*, 229 Mo. 187 (1910). A Minnesota member of a New Hampshire mutual benefit corporation cannot by suit in Minnesota question its decision as to the amount of dues. *Van Dyke v. Railway Mail Ass'n*, 118 Minn. 390 (1912).

*Mandamus* does not lie in one state at the instance of persons claiming to be directors in a foreign corporation commanding other persons from refraining to act as directors, even though all the persons are residents. *Wason v. Buzzell*, 181 Mass. 338 (1902). Nor has the court jurisdiction where, of two bodies of men, each claim to be the rightful stockholders. *Wilkins v. Thorne*, 60 Md. 253 (1883). Nor will the court enjoin a foreign corporation from delivering stock and bonds to a construction company, though the plaintiff claims that he has the contract for construction. *Kansas, etc. R. R. v. Topeka, etc. R. R.*, 135 Mass. 34 (1883). A court will not order a domestic corporation to do an act in another state, such as opening ditches, etc. *Port Royal R. R. v. Hammond*, 58 Ga. 523 (1877). An American corporation cannot be sued in England by service upon a resident agent in that country, although three quarters of the stockholders reside in England, it appearing that all of

the directors reside in America. *Badcock v. Cumberland, etc. Co.*, [1893] 1 Ch. 362. The courts of Maryland will not issue a *mandamus* to compel a foreign corporation to annul a forfeiture of stock. This is a matter to be litigated in the courts of the state creating the corporation. *North State, etc. Co. v. Field*, 64 Md. 151 (1885). Ordinarily the court will not remedy the frauds of directors of a foreign corporation. *Moore v. Silver Valley Min. Co.*, 104 N. C. 534 (1890). Where the defendant is a foreign corporation, and has no property in the state which could be reached by sequestration, a court of chancery will not decree an injunction which cannot be enforced. *Bellows Falls Bank v. Rutland, etc. R. R.*, 28 Vt. 470 (1856). See 204 Fed. Rep. 681.

The courts of Massachusetts will not take jurisdiction of a suit by the stockholders of a Missouri corporation to enjoin the corporation from issuing bonds secured by mortgage on property in Missouri. *Kimball v. St. Louis, etc. Ry.*, 157 Mass. 7 (1892), reviewing the cases, the court saying that while it had jurisdiction and its judgment would be binding, even in Missouri, yet "it would be a misuse of our powers to attempt to control the action of those courts in a case like this by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law."

The courts have frequently refused to entertain jurisdiction over a foreign corporation in cases where the decree of the court cannot be enforced. *Williston v. Michigan, etc. R. R.*, 95 Mass. 400 (1866). *Gregory v. New York, etc. R. R.*, 40 N. J. Eq. 38 (1885), where a resident stockholder in a foreign corporation sought to set aside its lease to a resident corporation.

<sup>1</sup> *Madden v. Penn, etc. Co.*, 181 Pa. St. 617 (1897); s. c., 199 Pa. St. 454. An article on "Jurisdiction over foreign corporations" is found in 12 *Harvard Law Review*, 1 (1898).



director of a foreign corporation may maintain in the New York courts a suit to compel the president to account for property misappropriated or wasted by him, but the court will not appoint a general receiver and enjoin the corporation from exercising its powers, although it may enjoin the president from acting and may appoint a receiver of the property in New York state.<sup>1</sup>

<sup>1</sup> *Acken v. Coughlin*, 103 N. Y. 1 (1905). A director in a West Virginia corporation may maintain a suit in the New York courts to hold former directors liable for corporate property which they have misappropriated and wasted, where such corporation has always had its principal business and principal place of business in New York. A suit lies under the provisions of the New York code, and also, it seems, at common law. *Miller v. Quincy*, 179 N. Y. 294 (1904); *rev'g Miller v. Barlow*, 88 N. Y. App. Div. 529. The court may obtain jurisdiction of a stockholder's suit against a foreign corporation where service upon it is by service on its president who lives in the state, and attends to its business there. *Grant v. Cananea, etc. Co.*, 189 N. Y. 241 (1907). A New York stockholder in a New Jersey corporation, the officers of which have canceled a lease which it had with another corporation which they controlled, may bring suit in New York to set aside such cancellation, even though the property is real estate located in Mexico and the lessor is a Louisiana corporation. *Jacobs v. Mexican, etc. Co., Ltd.*, 104 N. Y. App. Div. 242 (1905). A New York court has power to appoint a receiver of corporate assets, within the state, of a New Jersey corporation, in a stockholder's suit, who alleges that the directors have turned over the business to one of their number who is winding up the business in violation of law and dissipating all the assets. *Reusens v. Manufacturing, etc. Co.*, 99 N. Y. App. Div. 214 (1904). A receiver of a foreign corporation will not be appointed at the instance of a resident stockholder on allegations that it had sold treasury stock on fraudulent representation and that the directors had been guilty of fraud and

mismanagement of the company; and that the assets had been conveyed to other corporations, parties defendant, and where the plaintiff did not allege that he purchased his stock by reason of the misrepresentations, he cannot maintain a suit to recover for the benefit of the corporation the moneys paid for stock. *Phillips v. Sonora Copper Co.*, 90 N. Y. App. Div. 140 (1904). Under the statutes of New York where a New Jersey corporation, doing business in New York, pays dividends from the capital stock, a director participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424 (1903). The New York courts will, at the instance of a New York stockholder in a New Jersey corporation, enjoin the latter from issuing stock as a bonus with bonds in violation of the New Jersey statute requiring stock to be issued for money or property, even though the actual value of the stock and bonds so issued does not exceed the par value of the bonds and the amount received by the corporation is the par value of the bonds. The fact that the company is in a failing condition does not change the effect of the statute. *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29 (1903). An Arizona corporation, formed by consolidation, may maintain in the New York courts a suit against a director in one of the constituent companies, to cancel an issue of stock to him, brought about by fraud in the issue of stock by the constituent company. *United, etc. Co. v. Smith*, 44 N. Y. Misc. Rep. 567 (1904). A New York court will not, at the instance of a New York stockholder in an Arizona mining



It is a well-established rule of law that a stockholder's suit to remedy a wrong done to the corporation must be in behalf of all the stockholders, since they are all equally interested in the results of the suit. Accordingly, the complainant or complainants must bring the suit in behalf of themselves and such others of the stockholders as care to come in.<sup>1</sup>

company, enjoin the company from transferring its property in Arizona and appoint a receiver thereof, inasmuch as such an injunction will not be effectual except with the aid of the Arizona courts, and the question involved is one relating to the internal affairs of the company, which should be controlled by the statutes and public policy of Arizona. The court, however, in the final decree, may set aside illegal sales, even though the property is beyond the jurisdiction. *Hallenborg v. Greene*, 66 N. Y. App. Div. 590 (1901). *Cunningham v. Pell*, 5 Paige, 607 (1836), holding that no personal judgment could be rendered against an absent director who was not personally served. A non-resident stockholder cannot enjoin a foreign corporation from making an *ultra vires* transfer of its property to still another foreign corporation. *Small v. Minneapolis, etc. Co.*, 10 N. Y. Supp. 456 (1890). A foreign corporation cannot sue another foreign corporation in New York to compel a conveyance of land located in another state. *Cumberland, etc. Co. v. Hoffman, etc. Co.*, 30 Barb. 159, 171 (1859). A court will not compel a foreign corporation to declare a dividend. *Berford v. New York Iron Mine*, 4 N. Y. Supp. 836 (1888); *Redmond v. Enfield Mfg. Co.*, 13 Abb. Pr. (N. S.) 332 (1872). The holders of preferred stock in a foreign corporation may maintain a suit in equity to compel a corporation to pay their arrears of dividends before paying any dividend on the common stock. *Prouty v. Michigan, etc. R. R.*, 1 Hun, 655 (1874). *Prouty v. Lake Shore, etc. R. R.*, 85 N. Y. 273 (1881). *Boardman v. Lake Shore, etc. Ry.*, 84 N. Y. 157 (1881). See also *Ervin v. Oregon, etc. Nav. Co.*, 28 Hun, 269 (1882), 35 Hun, 544 (1885). *Fisk v. Chicago, etc. R. R.*, 53 Barb. 513 (1868). The decision in *Howell v. Chicago, etc.*

*R. R.*, 51 Barb. 378 (1868), denying jurisdiction over a foreign corporation was overruled on that point in *Prouty v. Michigan, etc. R. R.*, 1 Hun, 655 (1874).

<sup>1</sup> *Wickersham v. Crittenden*, 93 Cal. 17 (1892); *Wallworth v. Holt*, 4 Myl. & C. 619 (1840); *Taylor v. Salmon*, 4 Myl. & C. 134 (1838), on the ground "that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others"; *Beman v. Rufford*, 1 Sim. (N. S.) 550 (1851); s. c., 6 Eng. L. & Eq. 106; *Baldwin v. Lawrence*, 2 Sim. & S. 18 (1824); *Bromley v. Smith*, 1 Sim. 8 (1826); *White v. Carmarthen, etc. Ry.*, 1 Hem & M. 786 (1863); *Bailey v. Birkenhead, etc. Ry.*, 12 Beav. 433 (1850); *Preston v. Grand Collier Dock Co.*, 11 Sim. 327 (1840); *Winsor v. Bailey*, 55 N. H. 218 (1875); *Blatchford v. Ross*, 54 Barb. 42 (1869); *Cunningham v. Pell*, 5 Paige, 607 (1836); *Fawcett v. Laurie*, 1 Dr. & Sm. 192 (1860); *March v. Eastern R. R.*, 40 N. H. 548 (1860); s. c., 43 N. H. 515; *Whitney v. Mayo*, 15 Ill. 251 (1853); *Bethune v. Wells*, 94 Ga. 486 (1894). See *Cass v. Ottawa, etc. Co.*, 22 Grant (U. C.), 512 (1875), and *Hoole v. Great Western Ry.*, L. R. 3 Ch. App. 262 (1867), to the effect that the rule is otherwise as regards *ultra vires* acts. If the allegations show that the suit is in behalf of all, the omission of a direct allegation to that effect may not be fatal. *Flynn v. Brooklyn, etc. R. R.*, 9 N. Y. App. Div. 269 (1896); aff'd, 158 N. Y. 493, but this suit failed on another ground. Of course, if all the stockholders are made parties, there is no need of the suit being brought in behalf of others who may choose to come in. *Rogers v. Lafayette Agric. Works*, 52 Ind. 296 (1875). Cf. *Bengley v. Wheeler*, 45 Mich. 493 (1881). Stockholders



But a suit by a stockholder to set aside an issue of stock by the corporation without allowing the old stockholders to take the stock *pro rata* is against the corporation, and hence should not be by the stockholder

should not be joined as parties defendant and the fact that all of them are joined does not obviate the necessity of alleging that the suit, which was against the president to account for funds misappropriated by him, was brought in behalf of all the stockholders. The court in such a case will not order a distribution of the proceeds of the suit. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70 (1906). A director's liability at common law in a national bank for mismanagement or misfeasance can be recovered only by the bank or for the benefit of all stockholders. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (1905). A stockholder, who with the creditors and bondholders of a company deposits his securities with a reorganization committee, under a plan by which they are to form a new corporation to take over the property, may hold them liable for bad faith, and his suit may be in behalf of himself and other depositors. *Mawhinney v. Bliss*, 117 N. Y. App. Div. 255 (1907); *aff'd*, 189 N. Y. 501. Several stockholders may join in bringing the suit. *Marie v. Garrison*, 83 N. Y. 14 (1880); followed in s. c., 13 Abb. N. C. 210. The bill must be filed in behalf of all. *Jefferson, etc. Bank v. Francis*, 115 Ala. 317 (1898). A stockholder in one railroad corporation cannot maintain a suit at law against another railroad corporation for damages to his shares of stock on account of the latter railroad corporation owning a majority of the stock of the former and so managing the former as to cause a mortgage to be foreclosed, resulting in a purchase of the property by the latter railroad corporation. *Niles v. N. Y. etc. R. R.*, 35 N. Y. Misc. Rep. 69 (1901); *aff'd*, 69 N. Y. App. Div. 144 (1902); and 176 N. Y. 119. A stockholder cannot maintain a suit to compel another corporation to accept a deed of land from his corporation and issue stock in payment therefor, the suit being not in behalf of the corpo-

ration, but in his own behalf. *Collier v. Deering, etc. Assoc.*, 66 S. W. Rep. 183 (Ky. 1902). A suit by a stockholder against the directors to hold them liable for violating the national bank act must be for the benefit of the corporation. *Zinn v. Baxter*, 65 Ohio St. 341 (1901). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. *Brehm v. Sperry*, 92 Md. 378 (1901). An agreement between an improvement company and purchasers of lots that the profits will be used for certain improvements may be enforced by one lot purchaser in behalf of all. *Whiting v. Elmira, etc. Assoc.*, 45 N. Y. App. Div. 349 (1899). A stockholder may hold liable in damages a person who has broken his agreement to loan money to the corporation, the consideration of such agreement having been furnished by the stockholder. But if the agreement did not provide for any particular duration of the loan, only nominal damages can be recovered. *Kelly v. Fahrney*, 97 Fed. Rep. 176 (1899). A purchaser of bonds secured by a mortgage which fraudulently represents the amount of land covered by it, may hold personally liable corporate officers who took part in the fraud. Such a suit may be brought by one bondholder in behalf of all the bondholders, and a provision in the mortgage against bondholders bringing a suit does not apply. The mortgagor is not a neces-



in behalf of the corporation, there being no proof that the issue changed the control or injured the corporate interests.<sup>1</sup> Where the officers of a company, which has paid from nine to fourteen per cent., "freeze out" minority stockholders by reducing the dividends and increasing their salaries and misrepresenting the condition of the company, and then after buying the minority stock increase the dividend, the minority stockholders may hold them liable by an action on the case for damages, even though they might have brought suit in behalf of the corporation.<sup>2</sup> A stockholder cannot collect damages from the majority stockholders on account of their acting as directors and sacrificing the corporate interests. The suit must be brought in behalf of all stockholders who come in and must be for the benefit of the corporation, and the corporation must be a party defendant.<sup>3</sup>

There has been considerable controversy as to whether a suit to hold directors liable for fraud, negligence, or *ultra vires* acts should be at law or in equity. The well-established rule is that such a suit, when brought by a stockholder, should be in equity, inasmuch as it is in the nature of an accounting or the prevention of illegal acts. A suit at

sary party defendant. *Slater T. Co. v. Randolph, etc. Co.*, 166 Fed. Rep. 171 (1908). As to intervention by others, see § 222, *supra*, and §§ 735, 748, 848, *infra*.

<sup>1</sup> *Waters v. Waters Co.*, 201 N. Y. 184 (1911). The majority stockholders may maintain a bill in equity to enjoin the board of directors, who represent a minority of the stock, from issuing unissued capital stock to one of themselves, thereby enabling them to control, such being the purpose of the issue. No request to the directors to bring a suit need be made and as to stock already issued no tender of the price need be made; neither need it be alleged that the suit is in behalf of all the stockholders or for the corporation. *Trask v. Chase*, 107 Me. 137 (1910).

<sup>2</sup> If the stock has no market value, the value may be proved by estimating the good-will, as shown by the net profits, and it is for the jury to decide how many years' net profits shall be considered in obtaining the average. The balance sheets are also admissible. *Von Au v. Magenheimer*, 126 N. Y. App. Div. 257 (1908); *aff'd*, 196 N. Y. 510. In the case *Johnson v. United Rys. etc.*, 227 Mo. 423 (1910), the

court, in refusing to set aside a lease, sale, and reorganization at the instance of a minority stockholder, said, "where minority stockholders do not consent to a sale of the corporate properties, and the sale has already gone into effect, rescission will not be decreed where it will be productive of more injury than would result from a refusal of it, or where the asking stockholder stands by until the rights of strangers not parties to the suit and the public generally have attached; that, when a person becomes the owner of shares in a corporation, his right to the equitable relief of rescission of corporate sale is modified by the fact that he holds a small portion of the stock, and, if such stockholder has an adequate remedy by a suit at law for his injuries from wrongful conduct whereby his stock is converted or its market value taken from him, the powers of an equity court will not be set in motion to work a rescission." The court intimated that possibly the stockholder might have sued at law for the wrongful conversion of the value of his stock.

<sup>3</sup> *Converse v. United Shoe, etc. Co.*, 209 Mass. 539 (1911).



law is not the proper remedy.<sup>1</sup> In such suit in equity the defendant cannot demand a trial by jury as a matter of right.<sup>2</sup> A stockholder

<sup>1</sup> The leading case on this point is *Smith v. Hurd*, 53 Mass. 371 (1847), the court saying: "An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders in common." *Brinkerhoff v. Bostwick*, 88 N. Y. 52 (1882); s. c., 105 N. Y. 567; *Craig v. Gregg*, 83 Pa. St. 19 (1876); *Eldred v. Ripley*, 97 Ill. App. 503 (1901). To same effect, *Allen v. Curtis*, 26 Conn. 456 (1857). *Deveny v. Hart Coal Co.*, 63 W. Va. 650 (1908). In a suit by a stockholder to hold liable for fraud another corporation that owns a majority of the stock of his corporation, and has diverted its business so that it became insolvent, the suit must be in equity, and his corporation is a necessary party defendant. A direct suit at law will not lie. *Niles v. N. Y.*, etc. R. R., 69 N. Y. App. Div. 144 (1902); *aff'd*, 176 N. Y. 119. "A fatal defect in the plaintiff's petition, both original and amended, is that it seeks no recovery in behalf of the corporation, but seeks a direct recovery of damages for the plaintiff individually, the case stated not entitling him to such a recovery." *Evans v. Brandon*, 53 Tex. 56 (1880); *Kent v. Jackson*, 2 De G., M. & G. 49 (1852). An action at law does not lie at the instance of a stockholder against a director for mismanagement of the corporation. *Howe v. Barney*, 45 Fed. Rep. 668 (1891). A stockholder's remedy for wilful waste on the part of a director is in equity, and not at law. *Hirsh v. Jones*, 56 Fed. Rep. 137 (1893). A stockholder of a dissolved corporation cannot reach corporate assets which have been fraudulently diverted except by a suit in equity. Under the statutes of New York an attachment cannot be obtained in a suit in equity. *Shiel v.*

*Patrick*, 59 Fed. Rep. 992 (1894). The stockholder's action may be in the nature of a suit in equity for conspiracy. *Fox v. Hale*, etc. Co., 108 Cal. 369, 475, 478 (1895). Where only a money judgment is sought by a minority stockholder against directors for incurring debts and allowing the corporate property to be sold on execution, the directors being personally interested in the contracts under which the work was done, a court of equity has no jurisdiction, there not being involved any discovery or accounting or setting aside of the sale or judgment. The mere fact that the contract made by the directors was voidable is no ground for the court of equity interfering in the absence of conspiracy or fraud. *Godfrey v. McConnell*, 151 Fed. Rep. 783 (1906). The stockholder's remedy is in equity, even though the suit if it had been brought by the corporation would have been at law, but by order of the court issues may be framed for trial by jury. *People v. Equitable*, etc. Soc., 124 N. Y. App. Div. 714 (1908). A stockholder cannot sue a director at law for damages for injuring his stock. *Eldred v. Ripley*, 97 Ill. App. 503 (1901). Where a stockholder brings a suit at law against a board of directors for negligence in allowing the cashier to wreck the bank, the directors having been such for different periods of time, there is a misjoinder of causes of action. *Sayles v. White*, 18 N. Y. App. Div. 590 (1897). A stockholder's remedy against directors for negligence is in equity. *Bloom v. National*, etc. Loan Co., 81 Hun, 120 (1894); *aff'd*, 152 N. Y. 114. The stockholder's remedy is not at law, although money of the corporation misappropriated by the defendant constitutes all the assets of the corporation. *Thompson v. Stanley*, 20 N. Y. Supp. 317 (1892);

<sup>2</sup> *Brinkerhoff v. Bostwick*, 105 N. Y. 567 (1887); *MacNaughton v. Osgood*, 114 N. Y. 574 (1889). Cf. *People*

*v. State Treasurer*, 24 Mich. 468 (1872). See also § 701, *supra*.



cannot maintain a suit against the directors for damages resulting from a conspiracy to wreck the corporation, inasmuch as a request to the

aff'd, 73 Hun, 248; 147 N. Y. 713. The suit is in equity and will not be construed as a suit for dissolution. *Watkins v. Watkins, etc. Co.*, 11 N. Y. App. Div. 517 (1896). A contract between a stockholder and a third person, by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors, it was illegal. *Kountze v. Flannagan*, 19 N. Y. Supp. 33 (1892). A stockholder's remedy to restore land to the corporation, he claiming that the land was sold under a mortgage which did not cover such land, is at law and not in equity, although he might have a receiver appointed to recover the land. *Knevals v. Florida, etc. R. R.*, 66 Fed. Rep. 224 (1894). See, in general, *Gardiner v. Pollard*, 10 Bosw. 674 (1863); *Craig v. Gregg*, 83 Pa. St. 19 (1876); and see § 701, *supra*. This principle of law is assumed in nearly all the cases cited in Part IV of this work. In a complicated case equity will take jurisdiction of a suit to hold a president liable for misappropriating funds. *Warner v. McMullin*, 131 Pa. St. 370 (1890). A vendee sued for the price of stock cannot set up that the plaintiff vendor had negligently managed the corporation and misappropriated its assets. *Mealey v. Nickerson*, 44 Minn. 430 (1890). In *Priest v. White*, 89 Mo. 609 (1886), an action at law by a corporate creditor for fraud and deceit failed. In *Kimmel v. Stoner*, 18 Pa. St. 155 (1851), and *Kimmell v. Geeting*, 2 Grant (Pa.) Cas. 125 (1853), where the corporation, through its directors, ordered an agent to pur-

chase for the corporation certain shares of its stock which the state was about to sell, and after the purchase the directors divided it among themselves, it was held that a stockholder could sue such director in an action on the case and obtain damages for the proportionate loss sustained by himself. See also §§ 157, 355, 651, *supra*, and § 747, *infra*. Cf. *Quincy v. Steel*, 120 U. S. 241 (1887).

A director's liability at common law in a national bank for mismanagement or misfeasance can be enforced only by the bank or for the benefit of all stockholders. *Yates v. Jones Nat. Bank*, 74 Neb. 734 (1905). In *Hanley v. Balch*, 94 Mich. 315 (1892), a stockholder sustained an action at law for damages against another stockholder who had wrecked the corporation and bought in the property in violation of an agreement to carry along the corporate debt. In a suit at law against corporate officers for damages for wrecking the corporation by creating false debts and causing all the property to be applied to their payment, the proceedings by which the property was so applied must be fully set forth. *Cottrell v. Tenney*, 48 Fed. Rep. 716 (1892). Where one telephone company has taken over the property of another without paying for it, a stockholder of the latter may by a suit at law recover his proportion of the value of the property from the company that took the property. *Bridges v. Southern Bell Tel. & Tel. Co.*, 76 S. E. Rep. 996 (Ga. 1913). A pledgor of stock cannot, in a suit brought by one of his creditors to reach the equity in a pledge, raise an issue as to the mismanagement of the corporation. *McMullen v. Ritchie*, 57 Fed. Rep. 104 (1893). In *Ritchie v. McMullen*, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits



corporation to bring such suit is first necessary and the damages, if recovered, belong to the corporation.<sup>1</sup> Although the corporation may have a right to treble damages on account of a violation of the anti-trust act of Congress, yet a stockholder or creditor of the corporation cannot maintain the suit on the ground of injury to his stock or debt.<sup>2</sup> Where the corporation itself sues its directors for neglect of duty, the action is at law.<sup>3</sup> An action by a receiver against directors for negli-

under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that, although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations. Where the president knows that he can sell the corporate property for a certain price and accordingly he buys a majority of the stock and then sells such stock at an advance, thus enabling the purchaser to buy the property from the corporation, the president is liable to the other stockholders for the profit he has made, even though the price at which the corporate property has been sold was a fair price, the price paid for the stock being really a part of the price paid for the corporate property, and the court may order the president to divide such profit among the stockholders. *Commonwealth, etc. Co. v. Seltzer*, 227 Pa. St. 410 (1910). See also § 320, *supra*, as to this. One promoter may hold another promoter liable for payments made by the former to the corporation for stock in the corporation which has purchased the promoter's properties, where the latter promoter was secretly interested in the properties before the promoters purchased them. The remedy may be an action at law for an actual fraud.

*Heckscher v. Edenborn*, 203 N. Y. 210 (1911), rev'g 131 N. Y. App. Div. 253. See § 705 on this question.

<sup>1</sup> *Niles v. N. Y. etc. R. R.*, 176 N. Y. 119 (1903). A stockholder cannot maintain an action at law against outside parties for conspiracy to injure and ruin the corporation. *Converse v. United, etc. Co.*, 185 Mass. 422 (1904).

<sup>2</sup> *Loeb v. Eastman Kodak Co.*, 183 Fed. Rep. 704 (1910). A suit by a stockholder to set aside an illegal transfer of the corporate property cannot at the same time ask for the treble damages given by the anti-trust act of Congress of July 2, 1890. Such a suit is multifarious, inasmuch as the treble damages would go to the plaintiff, while the damages generally would belong to the corporation. *Metcalf v. American, etc. Co.*, 108 Fed. Rep. 909 (1901); aff'd, 113 Fed. Rep. 1020. A stockholder in a telephone company cannot maintain a suit for treble damages under the anti-trust act of July 2nd, 1890, against another telephone company which obtained control of the former company and forced it into a receiver's hands, even though thereby the stockholder's stock was rendered worthless. The injury was to the corporation and the receiver of that corporation is the proper party to institute such a suit. *Ames v. American, etc. Co.*, 166 Fed. Rep. 820 (1909).

<sup>3</sup> See § 701, *supra*. The president of an insurance company may be held personally liable for its funds used by him for political purposes and also moneys expended on improvident agency contracts with members of his family, and the complaint may allege that he either caused the expenditure or negligently allowed it, and a suit by the company itself is at law. *Mutual, etc. Co. v. McCurdy*, 118 N. Y.



gence should also be at law, and there must be a separate suit against each director.<sup>1</sup>

Money or property recovered from directors or third persons, in a suit in equity instituted by a stockholder in behalf of all the stockholders, belongs to all the stockholders and not to the complaining stockholder. It goes to the corporation.<sup>2</sup> The decree must be for the benefit of the

App. Div. 815 (1907); *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 827 (1907). Where, however, the transactions cover thirteen years, the complaint may be ordered to be made more definite and certain. *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 828 (1907). At the same time the company may maintain a suit in equity to compel him to account for moneys paid out through false and fraudulent bills and vouchers and for unlawful purposes, the details of which the company does not know. *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 822 (1907). So also the vice-president, whose duty it was to approve disbursements and who knowingly or negligently allowed illegal payments, is personally liable. *Mutual, etc. Co. v. Grannis*, 118 N. Y. App. Div. 830 (1907).

<sup>1</sup> See § 701, *supra*.

<sup>2</sup> Funds which the court compels directors to repay at the instance of a dissenting stockholder should be repaid to the corporation and not distributed by the court among the stockholders. *Voorhees v. Mason*, 245 Ill. 256 (1910). The proceeds of the suit go to the corporation. *Howe v. Barney*, 45 Fed. Rep. 668 (1891). The results of a stockholder's suit against the directors for negligence belong to the corporation, and not to him. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). The proceeds of the suit belong to the corporation. An agreement that the attorneys shall have a contingent fee is good where all the stockholders stood by and allowed the work to go on. *Davis v. Gemmell*, 73 Md. 530 (1891). As to the attorney's fees in such a suit, see § 879, *infra*. Mismanagement by directors gives a right of action to the corporation or stockholder for its benefit, but not to a stockholder for damages to

him individually. *McMullen v. Ritchie*, 64 Fed. Rep. 253 (1894). The results of the suit belong to the corporation. *Grant v. Lookout Mountain Top Co.*, 93 Tenn. 691 (1894). The judgment is for the benefit of the corporation, and a receiver may be appointed to collect and distribute it. *Fox v. Hale, etc. Co.*, 108 Cal. 475 (1895). Moneys recovered in a stockholder's suit belong to the corporation, and not to him. *Thompson v. Stanley*, 20 N. Y. Supp. 317 (1892); *aff'd*, 73 Hun. 248; 147 N. Y. 713. Where a stockholder sues directors and also parties to whom the directors have illegally transferred property, and asks for a personal judgment in his own behalf, the complaint is multifarious. *Scharf v. Warren-Scharf, etc. Co.*, 5 N. Y. App. Div. 439 (1896). The complaining stockholder cannot ask for his share of the property or money involved. *Pratt v. Bacon*, 27 Mass. 123 (1830). That the money or property recovered belongs to the corporation, see *Evans v. Brandon*, 53 Tex. 56 (1880); *Dewing v. Perdicaries*, 96 U. S. 193, 198 (1877); *Smith v. Poor*, 40 Me. 415 (1855); *Carter v. Ford, etc. Co.*, 85 Ind. 180 (1882). A plaintiff may upon the trial be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation. *Brewster v. Hatch*, 122 N. Y. 349 (1890). Where a stockholders' suit enjoining illegal taxation is successful, the purchaser of the property of the corporation at a foreclosure sale succeeds to the benefit of that suit, and may refuse to pay the tax. *Secor v. Singleton*, 41 Fed. Rep. 725 (1890). A stockholder in an English holding corporation, which owns all the stock of an Illinois corporation, cannot maintain a bill to have the English



corporation and not for the complainant stockholders.<sup>1</sup> Damages cannot be awarded to the complaining minority stockholders for the depreciation in value of their stock, because the damage was to the corporation, and the stockholders having several interests cannot join in such an action.<sup>2</sup> Where, however, an illegal salary has been paid, with the consent of a majority of the stockholders, and a minority stockholder files a bill to compel repayment, the court may order the repayment to dissenting stockholders of such part of the salary as they would get if the whole salary was repaid to the corporation and a dividend made.<sup>3</sup> The supreme court of Massachusetts has held

corporation declared fraudulent and a dummy, and that the property of the Illinois corporation be declared joint property of the stockholders in the English corporation. *Terry v. Chicago Packing & Provision Co.*, 105 Ill. App. 663 (1903). Where two companies are consolidated this is practically a dissolution of the old companies and hence a stockholder in one of them may bring a suit in equity to have the value of his stock determined and insist upon payment therefor in cash. *Barnett v. Philadelphia, etc. Co.*, 218 Pa. St. 649 (1907), the court following *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. 42.

<sup>1</sup> *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1896).

<sup>2</sup> *Loewenstein v. Diamond, etc. Co.*, 94 N. Y. App. Div. 383 (1904). In a stockholder's suit to rectify a wrong to the corporation itself by the officers and persons in control, the court cannot decree to such stockholder the value of his stock. *Kelly v. Mississippi, etc. Co.*, 175 Fed. Rep. 482 (1909). A stockholder who has sold his stock cannot hold the directors liable in an action at law for damages for managing the corporation so as to decrease the value of his stock. *Wells v. Dane*, 101 Me. 67 (1905). Even though a bank which in accordance with the statute has paid taxes in behalf of its stockholders, has not deducted the same from dividends as it should have done, a stockholder who has paid his tax cannot hold the bank liable for his proportion of the taxes not collected by the bank from other stockholders. *Kennedy v. Citizens' Nat. Bank*, 128 Iowa, 561 (1905). In the case *Dud-*

*ley v. Armenia Ins. Co.*, 115 N. Y. App. Div. 380 (1906), it was held that a stockholder who with other stockholders pledged his stock to secure a debt from the corporation, and whose stock was sold out for the non-payment of the debt, cannot hold the pledgee liable in damages, even though he charges that the latter wrecked the corporation and thereby rendered the stock valueless, the decision being based on the theory that the depreciation in the value of the stock was due to a wrong perpetrated upon the corporation, for which the remedy in the first instance was with the corporation. A manager who is forced to resign and sell his stock because the corporation has been defrauded by other parties, cannot hold such other parties liable for the depreciation in the value of the stock or for his proportion of the amount out of which they had defrauded the corporation, nor for damages from his enforced resignation and injury to reputation. *Ninneman v. Fox*, 43 Wash. 43 (1906). The suit must be for the benefit of the corporation and not of the stockholders direct. *Hearst v. Putnam, etc. Co.*, 28 Utah, 184 (1904). In dismissing a minority stockholders' suit in equity, the court may do so without prejudice to an action at law by him for the value of the stock at the time of the consolidation which he complains of. *Beling v. American, etc. Co.*, 72 N. J. Eq. 32 (1907).

<sup>3</sup> *Brown v. De Young*, 167 Ill. 549 (1897). In *Eaton v. Robinson*, 19 R. I. 146 (1895), where illegal salaries had been paid, the court ordered the guilty parties to pay to each stock-



that in order to avoid circuity of action reimbursement may be made

holder his proportionate part of the money. The court may treat an illegal salary as in the nature of a fund on which a dividend is declared, and hence may order it repaid to the stockholders proportionately. *Adams v. Burke*, 102 Ill. App. 148 (1902); *aff'd*, 201 Ill. 395. In holding the president liable for an illegal salary the court should not order repayment direct to the stockholders. *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903). Stockholders should not be joined as parties defendant, and the fact that all of them are joined does not obviate the necessity of alleging that the suit, which was against the president to account for funds misappropriated by him, was brought in behalf of all the stockholders. The court in such a case will not order a distribution of the proceeds of the suit. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70 (1906). See also *Miller v. Crown, etc. Co.*, 125 N. Y. App. Div. 881 (1908). Where a majority stockholder who also controls the board of directors induces subscription on representations that the corporate expense would not exceed a certain amount a month, and he then votes himself a salary in excess of that amount, the court may compel him to repay the excess and may order a dividend to be paid therefrom. *Ritchie v. People's Tel. Co.*, 22 S. Dak. 598 (1909). Where the majority stockholders have appropriated the corporate assets a minority stockholder may have a receiver appointed and the court may direct payment to such minority stockholder of the amount which he would ultimately be entitled to. *Pride v. Pride Lumber Co.*, 84 Atl. Rep. 989 (Me. 1912). Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis quē trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. *Elias v. Schweyer*, 27 N. Y. App. Div. 69 (1898). Where a court decrees that salaries are illegal, it should not order distribution among the stock-

holders, because that is ordering a dividend at the instance of a minority stockholder. *Miller v. Crown, etc. Co.*, 125 N. Y. App. Div. 881 (1908). The court may distribute the proceeds of the suit among the stockholders or may have it paid over to the corporation. *North v. Union Savings, etc. Ass'n*, 59 Oreg. 483 (1911). A stockholder cannot sue at law for his proportionate part of illegal salaries paid to officers. *Rafferty v. Donnelly*, 197 Pa. St. 423 (1900). Where a corporation has been dissolved and its debts paid and ten per cent. of its stockholders complain of a fraud of the directors, which the other ninety per cent. do not complain of, the court may order the directors to pay to such ten per cent., ten per cent. of the amount for which the directors are liable. *Spaulding v. North Milwaukee, etc. Co.*, 106 Wis. 481 (1900). Where parties who suppose they own a timber tract worth \$500,000 sell the same to a corporation for \$500,000 full-paid stock, and it afterwards transpires that their title is defective as to a part of the property, and the corporation, in order to perfect the title, pays out \$215,000, although the stock actually issued for that part of the property was only \$55,000, the parties to whom the stock was so issued are liable only for the \$55,000, especially where a settlement has been made with some of them on that basis. A contract between the original parties by which some guaranteed others against liability on account of any defects in the title cannot be enforced by the corporation, and hence cannot be made the basis of the measure of damages. On the other hand, the parties receiving the \$55,000 of stock cannot return it and avoid liability on the ground that the consideration for the issue of the stock had failed. If the stockholders are few in number, the court may decree payment directly to the stockholders who complain, and directly to such of the stockholders who are entitled to participate in the distribution of the \$55,000. *Jenkins v. Bradley*, 104 Wis. 540 (1899).



to the individual stockholders, instead of to the corporation, if the exigencies of the case require it.<sup>1</sup>

§ 735. *Parties plaintiff—Who may bring the suit—Unregistered transferees—Trustees—Pledgees—Stock that has voted in favor of the act—Small stockholders and payment to them of the actual value of their stock on an equitable basis—Corporate creditors—Receiver.*—Ordinarily, a suit herein is instituted by one or more stockholders who are registered as such on the corporate books. It has been held, however, that the suit may be brought by a purchaser of a certificate of stock who has not as yet obtained a registry thereof in the corporate books.<sup>2</sup> A stockholder in a corporation which

<sup>1</sup> Von Arnim v. American Tube-works, 188 Mass. 515 (1905). In the case Clements v. Bowes, 17 Sim. 167 (1852); s. c., 1 Drew, 684, the plaintiff stockholders sued to compel parties to pay to them direct corporate funds which the defendants had taken.

<sup>2</sup> Bagshaw v. Eastern Union Ry., 7 Hare, 114 (1849); aff'd, 19 L. J. (Ch.) 410. Great Western Ry. v. Rushout, 5 De G. & Sm. 290 (1852); Ervin v. Oregon, etc. Nav. Co., 28 Hun, 269 (1882); Parrott v. Byers, 40 Cal. 614 (1871). Cf. Mills v. Northern Ry., L. R. 5 Ch. 621 (1870), *a quoere*. The complaint need not allege that the plaintiff is a stockholder of record. Carpenter v. Knollwood Cemetery, 198 Fed. Rep. 297 (1912). An unregistered holder of stock may, in a suit to hold the directors liable for a fraud, ask that the corporation transfer the stock on the books. Hingston v. Montgomery, 121 Mo. App. 451 (1906). An unregistered holder of stock may maintain a suit in equity to have a receiver appointed on the ground that the company is insolvent. Reinhardt v. Interstate, etc. Co., 71 N. J. Eq. 70 (1906). An unrecorded stockholder may maintain a suit to prevent the illegal voting of stock owned by the corporation itself. O'Connor v. International, etc. Co., 68 N. J. Eq. 67 (1904). An unregistered owner of stock maintained a bill in equity to enjoin an illegal voting of other stock at an election in O'Connor v. International, etc. Co., 68 N. J. Eq. 680 (1905). An unregistered stockholder brought suit in the case Houston, etc. Co. v. Drew, 13 Tex.

Civ. App. 536 (1896), and the party in whose name the stock stood on the books intervened in support of the bill. *Contra*, Ramsey v. Erie Ry., 7 Abb. Pr. (N. S.) 156 (1869); s. c., 38 How. Pr. 193; Heath v. Erie Ry., 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976; Hersey v. Veazie, 24 Me. 9 (1844); Hodge v. United States Steel Corp., 64 N. J. Eq. 90 (1902); rev'd on another point in 64 N. J. Eq. 807 (1903). An unregistered holder of certificates is very doubtfully entitled to bring the action. Moore v. Silver, etc. Co., 104 N. C. 534 (1889). An unrecorded stockholder may maintain a suit for a receiver for mismanagement, especially where the corporation has recognized him as a stockholder. Van Horn v. New Western, etc. Co., 54 Wash. 117 (1909). A person entitled to stock may after obtaining it commence suit to set aside a fraudulent lease of all the property by a majority of the stockholders to another corporation controlled by themselves. Citizens', etc. Trust Co. v. Illinois Cent. R., 182 Fed. Rep. 607 (1910). Plaintiff must allege that he was a stockholder when the suit was commenced. Elmergreen v. Weimer, 138 Wis. 112 (1909). Where the plaintiff's stock is transferred on the corporate books, until he obtains the stock again he cannot sue as a stockholder, even though he claims that the stock was transferred without consideration and on terms not performed. Lawson v. Stanley, 15 N. Y. Supp. 707 (1891). But such a stockholder cannot maintain a suit against directors for fraud where his stock



owns stock in another corporation may file a bill to enjoin an *ultra vires* act of the latter.<sup>1</sup> Stockholders who are disqualified from participating in the suit should not be joined as parties plaintiff.<sup>2</sup>

Where a person who holds stock as a trustee refuses to bring the suit, the *cestui que trust* may institute it, making the trustee a party defendant.<sup>3</sup> A person who has been deprived of his stock by fraud of the corporation may sue.<sup>4</sup> But a stockholder whose stock has been

has been transferred to another, and he has no interest therein; nor can he maintain his suit on the ground that he owns a certificate of stock standing in the name of another and transferred in blank on the back by the administratrix of the stockholder of record, no proof being given of the administratrix's being such or of having executed the transfer. *Thompson v. Stanley*, 73 Hun, 248 (1893); *aff'd*, 147 N. Y. 713. A purchaser of a certificate of stock who has not yet obtained a transfer of the same on the corporate books cannot complain of fraudulent or *ultra vires* acts. *Brown v. Duluth, etc. Ry.*, 53 Fed. Rep. 889 (1893). *Cf.* 156 N. Y. App. Div. 869.

<sup>1</sup> *Carter v. Producers', etc. Co.*, 164 Pa. St. 463 (1894). A stockholder in a railroad corporation that has taken a lease from another railroad corporation cannot object thereto, on the ground that the lessor had no power originally to acquire and own the railroad. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the

five per cent. Four years' delay is no bar. *Sabre v. United, etc. Co.*, 156 Fed. Rep. 79 (1907). See also § 317, *supra*.

<sup>2</sup> *Clements v. Bowes*, 1 Drew. 684 (1853); s. c., 17 Sim. 167. *Cf.* *Parrott v. Byers*, 40 Cal. 614 (1871), holding that if one of the complainants is competent it is immaterial that the others are not. See also *State Line R. R.'s Appeal*, 1 Ry. & Corp. L. J. 139 (Pa. 1886); *Burt v. British, etc. Assoc.*, 4 De G. & J. 158 (1859), where the court said that if the stockholders "sue by a plaintiff only who has personally precluded himself from suing, that suit cannot proceed." See *House v. Mullen*, 22 Wall. 42 (1874). Even though the board of directors have leased all the corporate property to a minority of the directors, yet the minority stockholders cannot have a receiver appointed unless it is shown that the lease was unfair, especially where one of the complaining stockholders has ratified the transaction. *Farwell v. Babcock*, 27 Tex. Civ. App. 162 (1901), a case involving a corporation owning 3,000,000 acres of land and 120,000,000 head of cattle, valued at \$10,000,000. *Cf.* 87 Atl. Rep. 230.

<sup>3</sup> *Great Western Ry. v. Rushout*, 5 De G. & Sm. 290 (1852); *Daft v. Daft, etc. Co.*, N. Y. L. J. Dec. 3, 1890. *Cf.* *Mayer v. Denver, etc. R. R.*, 38 Fed. Rep. 197 (1889).

<sup>4</sup> A person whose stock has been sold as a part of a conspiracy to deprive him of his interest, may maintain a stockholder's suit to set aside an alleged illegal issue of increased stock. *Witherbee v. Bowles*, 201 N. Y. 427 (1911). In a stockholders' suit to cancel stock which had been issued for a nominal consideration, stockholders who were induced by fraud to cancel their stock and accept bonds in exchange may join



sold on execution cannot maintain a suit in behalf of the corporation until he first has the sale set aside and a bill is multifarious which asks both remedies.<sup>1</sup> A preferred stockholder may sue.<sup>2</sup> An administrator holding stock may bring the suit.<sup>3</sup> A person who has sold his stock cannot sue;<sup>4</sup> neither can a subscriber who has not paid as required by charter.<sup>5</sup>

as parties complainant in order that the exchange may be canceled. *Price v. Union Land Co.*, 187 Fed. Rep. 886 (1911).

<sup>1</sup> *Empire Realty Co. v. Harton*, 57 S. Rep. 763 (Ala. 1911). See also § 939, *infra*.

<sup>2</sup> A preferred stockholder may bring suit to cause to be canceled an issue of \$10,000,000 of common stock in payment for services worth not more than \$1,000,000 in violation of the West Virginia statute, where it is alleged that such common stock controls the corporation and threatens the credit and dividend-paying capacity of the company. The directors being antagonistic, no request to them to bring the suit need be made. The defendant corporation will not be considered as complainant in determining jurisdiction. *Howard v. National Tel. Co.*, 182 Fed. Rep. 215 (1910).

<sup>3</sup> *Jones v. Pearl Min. Co.*, 20 Colo. 417 (1894).

<sup>4</sup> A person who is the registered holder of stock, but has actually sold the certificates or scrip, cannot maintain the bill, nor will the bill be sustained on the theory that he represents the purchaser of the certificates. *Doyle v. Muntz*, 5 Hare, 509 (1846). A stockholder in a national bank who has sold his stock cannot maintain a suit against the directors to hold them personally liable for violating the national bank act. *Zinn v. Baxter*, 65 Ohio St. 341 (1901). A stockholder who has sold his stock and has no interest in it cannot maintain a suit to remedy an alleged wrong done to the corporation, even though the stock still stands in his name. *MacVeagh v. Denver City, etc. Co.*, 107 Fed. Rep. 17 (1901). A stockholder who has sold his stock with knowledge that illegal salaries have

been paid cannot thereafter sue for his proportionate part of the claim. *Rafferty v. Donnelly*, 197 Pa. St. 423 (1900). A person who has sold his stock at the time of commencing suit cannot maintain the suit. *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 90 (1902); rev'd on another point in 64 N. J. Eq. 807 (1903).

<sup>5</sup> *Busey v. Hooper*, 35 Md. 15 (1872). See *Landes v. Globe, etc. Co.*, 73 Ga. 176 (1884), where a stockholder had not paid his subscription. Where the corporation refuses to allow a stockholder to examine the books in order that he might ascertain whether he wished to continue to make payments on his stock, a forfeiture by the corporation for refusal to make such payments will be set aside, and such forfeiture, even before it is set aside, is not a bar to the stockholder's suit to restrain illegal acts on the part of the corporation. *Buker v. Leighton, etc. Assoc.*, 164 N. Y. 557 (1900), rev'g 18 App. Div. 548. Where a person's stock has been sold for failure to pay an assessment he cannot maintain a suit in behalf of the corporation against the directors for misconduct, even though such misconduct caused the assessment to be levied. *Hanna v. People's National Bank*, 76 N. Y. App. Div. 224 (1902), modified on another point in 179 N. Y. 107. An assessment upon stock levied by a board of directors illegally elected, and a sale of the stock thereunder, does not put an end to the stockholders' suit to oust such board of directors and to set aside such assessment, and to set aside contracts made by such board. The complaint is not multifarious. *Whitehead v. Sweet*, 126 Cal. 67 (1899). A forfeiture of stock by sale at public auction for failure to pay assessments, made before the amount of stock required



A pledgee may sometimes sue.<sup>1</sup> For instance, the pledgee of a majority of the stock of a corporation may take control of its board of directors and cause it to bring suit against the directors to hold them personally responsible for aiding the insolvent pledgor to fraudulently borrow the money of the corporation.<sup>2</sup> A pledgor of stock may maintain the action.<sup>3</sup>

by statute to be subscribed before the assessment can be levied, may be set aside by a suit in equity, and the statute of limitations applicable to suits to set aside forfeitures on the ground of irregularities does not apply. A pledgee of the stock may maintain such a suit. *Herbert, etc. Bank v. Bank of Orland*, 133 Cal. 64 (1901).

<sup>1</sup> A pledgee of the stock of a stockholder who lives in the same state as the corporation itself, cannot maintain a suit in the United States court against the corporation for a receiver and a distribution of the assets, the corporation being insolvent. *Gorman-Wright Co. v. Wright*, 134 Fed. Rep. 363 (1904). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900). Pledgees of stock are not in any sense creditors of the corporation, and are bound by judgments against the corporation the same as stockholders. *Farmers' Bank, etc. v. Ohio River, etc. Co.*, 108 Ky. 447 (1900). The pledgee may institute a suit where his security has been impaired. *Green v. Hedenberg*, 159 Ill. 489 (1896). A pledgee of stock is as fully protected against *ultra vires* acts as a stockholder is. *Campbell v. American Zylonite Co.*, 122 N. Y. 455 (1890). Cf. § 468, *supra*. Sometimes he may sue though not

registered as a stockholder. *Baldwin v. Canfield*, 26 Minn. 43 (1879). Where, by the written consent of all the stockholders of a New Jersey corporation and the action of its board of directors a corporation sells all its property for stock and bonds of a new company to be distributed among the old stockholders a pledgee of one of the old stockholders cannot object, especially where the statute authorizes the pledgor of stock to represent the stock and no notice had been given of the pledge. *Elyea v. Lehigh, etc. Co.*, 169 N. Y. 29 (1901). Where the pledgor of stock votes at a corporate meeting in favor of selling the property, the pledgee is bound, the corporation having had no notice of the pledge. *City of Spokane v. Amsterdamsch, etc.*, 22 Wash. 172 (1900). An unregistered pledgee cannot maintain a suit under the New York statute against the treasurer for the penalty for refusing to furnish to him a statement of the affairs of the company. *Pray v. Todd*, 71 N. Y. App. Div. 391 (1902).

<sup>2</sup> *Cream City, etc. Co. v. Donahue*, 142 Wis. 651 (1910).

<sup>3</sup> *Fisher v. Patton*, 134 Mo. 32 (1895). The executor of an estate owning stock in a corporation may enjoin the corporation from paying a back salary to its president, who is a co-executor of the estate, even though the stock of the estate was pledged by the decedent and was transferred into the name of the pledgee. *Monmouth Inv. Co. v. Means*, 151 Fed. Rep. 159 (1906). A pledgee of stock may bring suit to set aside a fraudulent sale of all the corporate assets which will result in destroying the value of his stock. *Andrews Co. v. National Bank, etc.*, 129 Ga. 53 (1907).



Even though the plaintiff in a stockholders' suit is no longer a stockholder, and hence cannot maintain a suit, yet if another stockholder has come in and been made a party the suit may be maintained by the latter.<sup>1</sup> An officer who is not a stockholder cannot have a receiver appointed.<sup>2</sup>

A stockholder may not be entitled to institute such a suit as this where his stock is all "water," and illegal,<sup>3</sup> or the original business

<sup>1</sup> *Hanna v. Lyon*, 179 N. Y. 107 (1904). Even though the complainant is not the real party in interest, yet if other stockholders come in as co-complainants who are qualified to maintain the suit, the suit continues. *Warren v. Pim*, 65 N. J. Eq. 36 (1903). It may be shown that the plaintiff is not the real owner of the stock standing in his name. *MacGinniss v. Boston, etc. Co.*, 29 Mont. 428 (1904). A dummy director in whose name on the books one share of stock stands, but who has indorsed it in blank and delivered it back, cannot maintain a suit for a receiver of the corporation. *Hoopes v. Basic Co.*, 69 N. J. Eq. 679 (1905). An attorney was disbarred in *Matter of Lamb*, 105 N. Y. App. Div. 462 (1905), for knowingly instituting a suit in behalf of a person who was only a nominal stockholder. A stockholder who has sold his stock cannot hold the directors liable in an action at law for damages for managing the corporation so as to decrease the value of his stock. *Wells v. Dane*, 101 Me. 67 (1905). Where the trustees of the mortgage foreclose and buy the property for the bondholders, and the trustees do not turn over to the new corporation all the property purchased by them, and they have been guilty of malfeasance in other respects, a bondholder may hold them liable by a suit in equity, even though he deposited his bonds and took stock in exchange therefor, it appearing that he did not then know of the acts complained of. The new corporation is not a necessary party defendant and a purchaser of the stock in the new corporation cannot make such a complaint, but the complaint may be by one of the bondholders, even though he has sold his stock. *Dunning v. Bates*, 186 Mass. 123 (1904).

<sup>2</sup> *Viguerie v. Burguières, etc. Co.*, 121 La. 97 (1908). A director cannot maintain such a suit as such, inasmuch as he need not necessarily be a stockholder. *Wright v. Floyd*, 43 Ind. App. 546 (1909).

<sup>3</sup> A person to whom watered stock has been issued as full-paid stock is not such a *bona fide* stockholder as may compel a creditor to return bonds which were illegally issued. The stock is void under the Wisconsin statutes. *Hinckley v. Pfister*, 83 Wis. 64 (1892). Stock issued as full-paid for no consideration whatsoever is void under the constitutional provision that stock shall be issued only "for labor done, services performed, or money or property actually received." The original holders of such stock cannot institute a suit to remedy a wrong done to the corporation by its president. *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1899). The holder of stock issued at less than par may nevertheless maintain a suit to protect his rights as a stockholder. *Shaw v. Staight*, 107 Minn. 152 (1909). In *Sedgwick v. Seward, etc. Co.*, 144 N. Y. App. Div. 455 (1911), the court doubted whether an owner of bonus stock could maintain an action to remedy a wrong done to the corporation by the directors. Where the entire capital stock, \$500,000, is issued for patents, and the patentee transfers about one fifth of it back to the corporation, and it is then sold by the company at par as treasury stock, and the company is then dissolved, a purchaser of some of such treasury stock may maintain a bill to have the surplus assets over and above the debts applied to such treasury stock before anything is paid on the promoter's stock in distribution, it being shown that the patents had little or no value.



of the corporation was illegal.<sup>1</sup> Thus, where the real business of the corporation is an illegal one — a lottery — and where the stock is wholly fictitious, the courts will not aid a stockholder.<sup>2</sup> A stockholder cannot enjoin an issue of bonds by a corporation in which his corporation expects to become a stockholder.<sup>3</sup>

The right which a stockholder has to object to a fraudulent or *ultra vires* act inheres in his stock and hence passes to a purchaser of that stock, and such purchaser may bring suit to enjoin or set aside the act or to compel an accounting,<sup>4</sup> although the rule is different in the federal courts.<sup>5</sup> And there is a very important limitation to this rule even in the state courts, namely, that a stockholder who holds stock which has been voted in favor of the act complained of will fail in his suit. His stock is tainted with the fraud or illegality. This is a very important principle of law, and defeats many suits instituted by stockholders to remedy past wrongs. The law is clear that a stockholder who voted in favor of the transaction, or a holder of stock which at the time of the act complained of was held by a party who participated in the act, or acquiesced therein, or voted the stock therefor, cannot bring suit to set the transaction aside.<sup>6</sup>

Another important principle of law in this connection is that where the corporation is insolvent a stockholder cannot maintain a suit to hold the directors liable for fraud unless he alleges that the relief asked for will be of some benefit to him; in other words, that there will be a surplus for the stockholders after the creditors are paid.<sup>7</sup>

No request to the receivers to bring such a suit need be made, because it is a personal suit. *Weber v. Nichols*, 75 N. J. Eq. 117 (1908).

<sup>1</sup> A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder. *Coquard v. National L. S. Co.*, 171 Ill. 480 (1898). A stockholder who has received stock for nothing from a party who has consented to the issue of stock and bonds for an insufficient consideration, may not be able to complain thereof. *Ward v. Smith*, 95 N. Y. App. Div. 432 (1904).

<sup>2</sup> *Le Warne v. Meyer*, 38 Fed. Rep. 191 (1889).

<sup>3</sup> *Mayer v. Denver, etc. R. R.*, 38 Fed. Rep. 197 (1889).

<sup>4</sup> See § 736, *infra*.

<sup>5</sup> See § 737, *infra*.

<sup>6</sup> See §§ 40, 730, *supra*.

<sup>7</sup> Quoted and approved in *Williams v. Neville*, 98 Miss. 268 (1910). *Daragh v. Wetter Mfg. Co.*, 78 Fed. Rep. 7 (1897); *Corning v. Barrett*, 48 N. Y. Supp. 1013 (1898). See also *Smith v. Hurd*, 53 Mass. 371, 385 (1847). Where one corporation buys out another, a stockholder of the former cannot complain, even though a large amount of watered stock was issued in payment, and even though the directors of the purchasing company were personally interested in the selling company and had made large profits in the construction of the work, it appearing that the purchasing company had *no property at all* at the time of the purchase. In such



Moreover it is not every illegal act of a corporation that is *ultra vires*, in the sense that a stockholder may object. It has been held in England that a discrimination in rates by a railroad company cannot be the basis of a suit by a stockholder to prevent it.<sup>1</sup>

A stockholder who has been guilty of laches, or against whom the statute of limitations has run, cannot complain.<sup>2</sup>

The smallness of the stockholder's interest will not prevent his instituting a stockholder's suit to remedy a corporate wrong. An owner of one share is to be protected by a court of justice equally with the owner of a thousand shares. The old doctrine of *de minimis non curat lex* has sometimes been applied to this class of cases, but such decisions are not in accord with the weight of authority. If there are no suspicious circumstances connected with the suit, and a perfectly clear case is made out, this maxim of the law will not be applied to a case of this character.<sup>3</sup>

a case no damage is done to the stockholder, and hence suit by him does not lie. *Smith v. Ferries*, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897). Even though at a meeting of the stockholders of an insolvent railroad corporation the majority vote to sell the property to a company of which they are officers and stockholders, with no consideration except that the latter company shall pay the debts of the former, yet if the property was worth no more than that, the minority stockholders can claim only nominal damages for the technical breach of trust. *Thoman v. Mills*, 159 Mich. 402 (1909). See also § 848, *infra*.

<sup>1</sup> *Anderson v. Midland Ry.*, [1902] 1 Ch. 369. In the case *Carson v. Allegany, etc. Co.*, 189 Fed. Rep. 791 (1911) it was held that although a corporation might avoid a contract on account of the fraud of its president and a majority stockholder, yet that this might not be sufficient to sustain a bill in equity by a minority stockholder for that purpose. A suit by a stockholder against the taking up of debentures by an issue of stock and bonds of much greater par value is not defeated by the fact that a majority of the stockholders had approved the transaction. *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709 (1912). *Id.* 715, modified in 207 N. Y. 113.

<sup>2</sup> See ch. XLIV, *supra*.

<sup>3</sup> *Armstrong v. Church Soc.*, 13 Grant, Ch. (U. C.) 552 (1867), the court saying: "Every member of a corporation has a right to object to any illegal diversions of its funds; and in this respect those who contribute most have no greater rights than those who contribute least"; *Seaton v. Grant*, L. R. 2 Ch. 459 (1867), where the court said the maxim did not apply, since the stockholder sued not on his own behalf alone, but for himself and others. However, in the case *Dannmeyer v. Coleman*, 11 Fed. Rep. 97 (1882), the court said: "It is always a suspicious circumstance where a single stockholder among a large number in a corporation rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim *de minimis non curat lex* very properly applicable." *Cf. Ithaca Gaslight Co. v. Treman*, 93 N. Y. 660 (1883). If the complaining stockholder has but a small interest, he is aided only where he makes out a clear case. *Benedict v. Western Union Tel. Co.*, 9 Abb. N. Cas. 214, 222 (1878); *Gere v. New York Central, etc. R. R.*, 19 Abb. N. Cas. 193 (1885); *Reiff v. Western*



A court of equity, however, has very broad powers to work out equitable solutions of difficulties and under that power a court of equity

Union Tel. Co., N. Y. D. Reg., Aug. 23, 1887. Even though a stockholder has a very small amount of stock he may maintain a suit to enjoin an illegal issue of new stock. *Carver v. Southern etc. Co.*, 78 N. J. Eq. 81 (1910). The owner of a single share of stock in a street railway company may file a bill to enjoin the company from issuing stock and bonds to a construction company, where the par value of the stock and bonds is greater than the value of the construction work, and the construction company already controls the railway company and its board of directors. *Montgomery Traction Co. v. Harmon*, 140 Ala. 505 (1904). The amount of stock held by the plaintiff is to be considered when the good faith and good judgment of the act complained of is questioned. *Tanner v. Lindell Ry.*, 180 Mo. 1 (1904). A small stockholder may maintain a bill. *Teller v. Tonopah, etc. R. R.*, 155 Fed. Rep. 482 (1907). A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata*. The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of \$25 worth of stock cannot enjoin a sale by those owning ninety-three per cent of the entire capital stock. Such a sale is valid, although there were directors in common. *Pitcher v. Lone, etc. Co.*, 39 Wash. 608 (1905). Where the owner of one hundred shares out of seventy-four thousand shares files a bill to restrain the company from engaging in business not provided for in its charter, he must show a very clear case before he will be granted any relief, and must show that neither he nor any prior owner of his stock has acquiesced in such corporate business. *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of stock. *Geer v. Amalgamated, etc. Co.*, 61 N. J. Eq. 364 (1901). A court has no power as against the dissent of minority stockholders and bondholders, however small their holdings, to reorganize the company by authorizing the receivers to lease the property for a long period of time and allow the lessee to place a large mortgage on the property, even though the proceeds of the mortgage are to be used for rebuilding the property, especially where the rebuilding is not subject to the orders of the court or the wishes of the security holders. The court has no such power, even though the system is made up of a great many different street railways with different franchises, some of which have lapsed and there is danger that the entire property will be lost if the offer of the city to grant a new franchise on certain terms is not accepted. *Merchants', etc. Co. v. Chicago Rys.*, 158 Fed. Rep. 923 (1907), *rev'g Guaranty T. Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 913 (1907). Thereupon the trustees in their foreclosure suit applied for decrees of foreclosure and petitioned the court in the meantime to have the company operated by the reorganized company, and the court so ordered. *Guaranty Trust Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 1015 (1908). In *Montreal Tel. Co. v. Low*, 27 Lower Can. Jur. 257, 283 (1883), the court refused to set aside a lease at the instance of the holder of a single share, especially as he showed no injury to that share. In the case *Arents v. Blackwell's, etc. Co.*, 101 Fed. Rep. 338 (1900), where the



may determine the value of the dissenting stockholder's stock and decree that unless he accepts it his suit will be dismissed and he will be relegated to his remedy at law if he has any. It requires a very strong case, however, for a court of equity to make such decree.<sup>1</sup>

holders of 159,769 shares out of 160,000 shares of the stock of a tobacco company wished to accept the offer of another company to buy it out for \$2,800,000, and a person had purchased one share for the purpose of stopping the sale and having the charter repealed, the court appointed a receiver to sell the property as preliminary to a dissolution and distribution of the assets.

In *Charleton v. Newcastle, etc. Ry.*, 5 Jur. (N. S.) 1096 (1859), the court said: "A single shareholder, holding five or ten shares or less, is perfectly justified in applying to the court to restrain a company, on behalf of himself and the other shareholders, by injunction, from committing any illegal act beyond their powers. It does not signify if all the other shareholders are pitted together against this holder of ten shares; the court holds it is better for the real interests of the company that they should obey the law, and any one single shareholder who invokes the aid of the court is entitled to its aid for that purpose." See also, to the effect that the holder of a single share may bring the suit: *Beman v. Rufford*, 1 Sim. (N. S.) 550, 564 (1851); s. c., 6 Eng. L. & Eq. 106; *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381, 395 (1859); *Kean v. Johnson*, 9 N. J. Eq. 401, 410 (1853), reviewing the cases; *Gifford v. New Jersey R. R.*, 10 N. J. Eq. 171 (1854); *Elkins v. Camden, etc. R. R.*, 36 N. J. Eq. 5 (1882). As to the right of the owner of one share of stock to enjoin an election, see *Greenough v. Alabama, etc. R. R.*, 64 Fed. Rep. 22 (1894).

<sup>1</sup> Where the majority freeze out the minority by turning the corporate property over to another corporation which they own, without consideration, a minority stockholder may file a bill in equity for relief and the court may set the transaction aside or may give a money judgment in favor of

the minority stockholder. *Backus v. Brooks*, 195 Fed. Rep. 452 (1912). Where one corporation owns a majority of the stock of another and causes the latter to sell its property to the former, the minority stockholders if they all agree may have the sale set aside, but if only a few are objecting a court of equity may order a valuation to be made of the minority stock. *Binney v. Cumberland, etc. Co.*, 183 Fed. Rep. 650 (1910). In the case *Johnson v. United Rys. etc.*, 227 Mo. 423 (1910), the court, in refusing to set aside a lease, sale and reorganization at the instance of a minority stockholder, said, "where minority stockholders do not consent to a sale of the corporate properties and the sale has already gone into effect, rescission will not be decreed where it will be productive of more injury than would result from a refusal of it, or where the asking stockholder stands by until the rights of strangers not parties to the suit and the public generally have attached; that, when a person becomes the owner of shares in a corporation, his right to the equitable relief of rescission of corporate sale is modified by the fact that he holds a small portion of the stock, and, if such stockholder has an adequate remedy by a suit at law for his injuries from wrongful conduct whereby his stock is converted or its market value taken from him, the powers of an equity court will not be set in motion to work a rescission." The court intimated that possibly the stockholder might have sued at law for the wrongful conversion of the value of his stock. In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside



The stockholders cannot join with the corporation in bringing the suit.<sup>1</sup> Indeed, the proper party to institute the suit is the corporation, and it is only because the corporation fails to do so that a stockholder may bring the suit where fraud or *ultra vires* is involved. But both cannot join in bringing the suit. A fraudulent decree of foreclosure may subsequently be attacked by the corporation itself after it has passed into other hands, even though the officers, directors and stockholders who

the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906); s. c. 203 Fed. Rep. 945. In the case *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1889), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest. A minority stockholder may enjoin the sale of all the assets of a prosperous corporation to another corporation for stock of the latter, even though the selling corporation offers to give to such minority stockholder a bond that the dissenting stockholders should receive the value of their stock. A court has no power to compel dissenting stockholders to so dispose of their shares *in invito*. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). Where the president knows that he can sell the corporate property for a certain price and accordingly he buys a majority of the stock and then sells such stock at an advance, thus enabling the purchaser to buy the property from the corporation, the president is liable to the other stockholders for the profit he has made, even though the price at which the corporate property has been sold was a fair price, the price paid for the stock being

really a part of the price paid for the corporate property, and the court may order the president to divide such profit among the stockholders. *Commonwealth, etc. Co. v. Seltzer*, 227 Pa. St. 410 (1910). Where the majority of the stockholders in one corporation are the sole stockholders in another and they consolidate the two on a basis unfair to the minority stockholders of the first corporation, a court of equity will set aside the basis unless the complaining stockholders are paid the value of their stock. *Jones v. Missouri, etc. Co.*, 199 Fed. Rep. 64 (1912). In a suit by a stockholder to enjoin the company from selling its assets to another company for stock in the latter, each stockholder being given the privilege to take a certain amount of cash for his stock, which cash, however, was not one third of the intrinsic value of the stock, the court may refuse the injunction if the purchasing company gives a bond to pay the intrinsic value of the complaining stockholder's stock. *Jackson Co v. Gardiner Inv. Co.*, 200 Fed. Rep. 113 (1912).

<sup>1</sup> *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1889). Where a corporation has abandoned business for many years, and has no known board of directors, a stockholder may file a bill to wind up its affairs, but he should not join the corporation as a complainant with himself. In such a case no request to the directors is necessary. *Tennessee, etc. Co. v. Ayers*, 43 S. W. Rep. 744 (Tenn. 1897). See also § 629, *supra*. In the case *Pender v. Lushington*, L. R. 6 Ch. D. 70 (1877), the complaining stockholder joined the corporation as a party plaintiff and the court refused to strike out its name. In the case *Chicago, etc. Co. v. Baggiano*, 202 Ill. 312



were such at the time of the foreclosure acquiesced therein.<sup>1</sup> The subject of the intervention of stockholders in suits carried on by the corporation is considered elsewhere.<sup>2</sup>

May a corporate creditor institute a suit to make the officers account for a fraudulent or *ultra vires* act? A simple creditor certainly cannot. Until judgment is obtained and execution is returned unsatisfied, the corporate creditor has no interest in any specific corporate property. Moreover, in case his debt is finally paid, he has no interest in the management or assets of the corporation, nor in the acts of its officers and stockholders.<sup>3</sup>

(1903), the corporation was joined as a party plaintiff by the stockholder who brought the suit.

<sup>1</sup> *Pacific R. R. of Mo. v. Missouri, etc. Ry.*, 111 U. S. 505 (1884). See also § 734, *supra*. A consolidated company may maintain a suit against a director of one of the constituent companies for fraudulently, at the time of consolidation, causing an issue of a large amount of stock to him out of the treasury stock for past services, which stock was thereupon exchanged for stock in the constituent company, especially where such director as trustee of the treasury stock of both companies controlled them and voted such stock for the consolidation, and also voted proxies obtained on a notice of the meeting, which did not state that his compensation was to be voted upon. *United, etc. Co. v. Smith*, 44 N. Y. Misc. Rep. 567 (1904).

<sup>2</sup> See § 750, *infra*.

<sup>3</sup> A simple creditor has no standing to apply for a receiver of the corporation on the ground that it has been mismanaged, it being solvent. *Equitable, etc. v. Brown*, 213 U. S. 25 (1909). Simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity to obtain a seizure of their debtor's property and collect unpaid subscriptions and apply the same to the payment of their debts, even though they allege that an existing mortgage on the property is fraudulent, and that the company is insolvent, and a bill of foreclosure of the mortgage has been filed. Under cer-

tain conditions they might intervene. *Hollins v. Brierfield Coal, etc. Co.*, 150 U. S. 371 (1893), stating also that the federal courts will not even follow a state statute authorizing such a suit; nor does the fact that the foreclosure suit is in the federal court give jurisdiction of the creditor's suit. The court said: "Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, give to a simple contract creditor of the corporation any lien on its property, or charge any direct trust thereon." The court also held that the capital stock is a trust fund rather in the administration of the assets after possession by a court of equity than a trust attaching to the property as such for the direct benefit of either creditor or stockholder. Before a corporate creditor can attack a transfer of its property he must obtain judgment against the corporation. *Williams v. Commercial Nat. Bank*, 49 Oreg. 492 (1907). Before a corporate creditor can complain of the method in which the corporation has disposed of its property he must obtain judgment. *McKee v. City Garbage Co.*, 140 Mich. 497 (1905). A general creditor must first obtain a judgment against the corporation before filing a bill in equity to enforce such claim. *Virginia, etc. Co. v. Fisher*, 104 Va. 121 (1905). A creditor cannot charge directors with wasting assets unless he has established his claim at law or in equity and has exhausted other assets of the corporation in payment thereof. *Edwards v. National, etc. Assoc.*, 58



After judgment has been obtained, however, and execution returned unsatisfied, a corporate creditor may follow the corporate assets into the hands of corporate officers or of third persons who have received such assets fraudulently and to the injury of creditors. This principle applies where the corporation sells out all its property to another corporation in exchange for the stock or bonds of the latter.<sup>1</sup> Corporate creditors may also, under some circumstances, complain of the issue of "watered" stock,<sup>2</sup> illegally issued bonds,<sup>3</sup> illegal dividends,<sup>4</sup> and of the purchase by the corporation of its stock.<sup>5</sup> But a creditor of the corporation cannot complain of "watered" stock issued after he became a creditor,<sup>6</sup> nor of bonds issued at less than par before he became a creditor.<sup>7</sup> Directors may be personally liable to creditors of the company for authorizing a transfer of the property of the company to another corporation in payment for stock in such latter corporation, where

Atl. Rep. 527 (N. J. 1904). A policy holder in a mutual insurance company, without capital stock, may be granted a *mandamus* to be allowed to see the list of policy holders, but not where he is a professional litigant, and to allow him to see the list would divulge private and personal information. *People v. New York, etc. Co.*, 111 N. Y. App. Div. 183 (1906). Persons having an unexpired contract with a corporation cannot intervene to prevent a foreclosure, even though they allege that the foreclosure is collusive and fraudulent. *Wightman v. Evanston, etc. Co.*, 217 Ill. 371 (1905), the court holding that the right to intervene is very limited and the powers of the intervener still more limited. A corporate creditor who has not obtained judgment against the corporation cannot hold a director liable for assets which the latter has appropriated. *Ready v. Smith*, 170 Mo. 163 (1902). A corporate creditor seeking to set aside a fraudulent sale to a director must allege a judgment at law, and execution unsatisfied, or that the company has no property. *Kittel v. Augusta, etc. R. R.*, 65 Fed. Rep. 859 (1895). A simple contract creditor of a company cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt. *Mills v. Northern Ry. etc.*, L. R. 5 Ch. App. 621 (1870). A gen-

eral creditor who has not obtained a judgment against the corporation cannot hold directors liable for unauthorized acts. *Streight v. Junk*, 59 Fed. Rep. 321 (1893). *Cf.* §§ 848, 863, *infra*.

Where the corporation has been dissolved, and hence a judgment against it cannot be obtained, general creditors may file a bill in equity to reach assets illegally transferred away by the corporation. The suit must be in behalf of all creditors. All the transferees may be brought into one suit. *Pullman v. Stebbins*, 51 Fed. Rep. 10 (1892). As to other exceptions, authorizing a simple creditor to sue, see *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7, 16 (1891). A creditor of an insolvent bank may hold the directors liable for allowing the president to borrow, without good security, an unreasonably large sum, and for allowing him to purchase stock of the bank with bank funds. Such suit must be for the benefit of all creditors, and the results of the suit will be administered by the court. *Gores v. Day*, 99 Wis. 276 (1898).

<sup>1</sup> See ch. XL, §§ 672-674, *supra*.

<sup>2</sup> See ch. III, *supra*.

<sup>3</sup> See ch. XLVI, and § 848.

<sup>4</sup> See ch. XXXII, *supra*.

<sup>5</sup> See § 311 *supra*.

<sup>6</sup> See §§ 42, 46, *supra*, and § 848, *infra*.

<sup>7</sup> See § 848, *infra*.



such stock is distributed among the stockholders, leaving corporate creditors unpaid.<sup>1</sup> Many acts which would be fraudulent or illegal as against the stockholders are not so as against the creditors. A large number of illustrations of this important rule are given in the notes below.<sup>2</sup>

<sup>1</sup> See § 682, *supra*.

<sup>2</sup> "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." *Hollins v. Brierfield Coal, etc. Co.*, 150 U. S. 371, 385 (1893). Corporate creditors cannot have set aside an old sale of land by the corporation to the directors through "dummies," even though the sale was at a totally inadequate price. *Graham v. Railroad Co.*, 102 U. S. 148 (1880). Creditors cannot object to a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890). A corporate creditor cannot complain that a director has purchased property needed by the corporation. *Cornell v. Clark*, 104 N. Y. 451 (1887). Where, upon foreclosure of corporate property, the president and manager of the corporation purchases the property at its full value, other judgment creditors of the corporation cannot attack his purchase. *Inglehart v. Thousand, etc. Co.*, 109 N. Y. 454 (1888). A creditor of an insolvent bank cannot cause to be set aside a cancellation of a lease taken by the bank when prosperous, even though the bank built a building on the leased premises, it appearing that at the time of the cancellation the property was not paying fixed charges and the stockholders assented to the cancellation, which was made prudently and in good faith and was known to the creditor who subsequently complained on account of a rise in values. *Brown v. Schleier*, 194

U. S. 18 (1904). A creditor of a corporation may object to a mortgage given to secure the individual debts of its stockholders incurred in purchasing stock in the corporation, even though the creditor became such after the transaction. *In re Haas Co.*, 131 Fed. Rep. 232 (1904). Depositors in a national bank may join in maintaining a single suit against directors for negligence in conducting the affairs of the bank, it having become insolvent thereby. *Boyd v. Schneider*, 131 Fed. Rep. 223 (1904). A creditor of an insolvent mutual insurance company that is in the hands of a receiver may file a bill in behalf of himself and other creditors for the removal of the receiver for incompetency and for the purpose of holding the directors personally liable for malfeasance in office. *Powell v. Hinkley*, 93 N. Y. App. Div. 138 (1904). A depositor in a savings bank may maintain a bill in equity to prevent dissolution thereof, where the purpose is to turn over the business to a trust company. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425 (1903). A holder of a contract of a corporation, whereby he is to be entitled to a diamond on payment of certain money, is not a stockholder and cannot have a receiver appointed because of mismanagement. *Mann v. German, etc. Co.*, 70 Neb. 454 (1903). Persons who have been induced by fraud to purchase the debentures of a company which has become insolvent may file a bill in equity to wind up its affairs and to prevent the officers illegally taking its assets, even though the debentures are not yet matured. *Christian v. Michigan, etc. Co.*, 134 Mich. 171 (1903). A depositor in a bank which has gone into liquidation may maintain a suit to compel the president to turn over to the bank property which belongs to it. *Dundon v. McDonald*, 146 Cal. 585



A somewhat different class of cases is found, however, in regard to

(1905). In a judgment creditor's suit against the president to set aside a deed of corporate property to him, he cannot question the validity of the judgment already obtained by the creditor against the corporation. *Johnson v. Stebbins, etc. Co.*, 177 Mo. 581 (1903). A creditor cannot hold the directors liable for *ultra vires* acts, such acts not having been with him. *Dietrich v. Rothenberger*, 75 S. W. Rep. 271 (Ky. 1903). Where the company has been dissolved corporate creditors who are unpaid may maintain a suit to hold the directors liable for misappropriating the funds. *Lewisohn v. Stoddard*, 78 Conn. 575 (1906). Where with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays in connection with the contract. *Griffith v. Blackwater, etc. Co.*, 55 W. Va. 604 (1904). A judgment creditor of a corporation may bring suit to recover corporate property converted by an individual and may join both the corporation and such individual. *Oyster v. Iola Min. Co.*, 140 N. C. 135 (1905). A creditor cannot complain of salaries paid prior to his becoming a creditor. *Commercial, etc. v. Warthen*, 119 Ga. 990 (1904). Where, in a foreclosure suit and before sale, the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. *Farmers', etc. Co. v. Missouri, etc. Ry.*, 21 Fed. Rep. 264 (1884). In a suit by creditors to hold directors personally liable for violating the statutes in the conduct of the corporate business, the creditors must clearly set forth the character and existence of the amount they claim. *Boston, etc. R. R. v. Parr*, 104 Fed. Rep. 695 (1900). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and a delay of three or four years, during which others become creditors of the new corporation and the latter becomes insolvent, will bar his claim of an equitable lien on the assets. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). A creditor of an insolvent corporation who causes its property to be sold under execution cannot complain that a director purchased at the sale at a low price. *Potvin v. Denney Hotel Co.*, 26 Wash. 309 (1901). In a stockholder's suit against the directors for fraud a corporate creditor cannot intervene. *Smith v. Geo. T. Smith, etc. Co.*, 119 Mich. 11 (1898). Under the statutes of Wisconsin a corporate creditor may hold the directors liable for misconduct, although there exists no relationship of trustee and *cestui que trust*. *Killen v. Barnes*, 106 Wis. 546 (1900). A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that the transaction was not duly authorized by the board of directors or signed by the proper officers, where he has participated in the results of their action. *Swentzel v. Franklin, etc. Co.*, 168 Mo. 272 (1902). In a suit by a corporate creditor against the corporate officers to reach funds which they had diverted, it is not necessary that all of the wrong-doers be joined as defendants. *Morrison v. Blue Star, etc. Co.*, 26 Wash. 541 (1901). A corporate creditor cannot hold a director liable for a profit which he has made in purchasing a property at a foreclosure sale, even though the corporation was the equitable mortgagor of such property. *Ready v. Smith*, 170 Mo. 163 (1902). Corporate creditors cannot object that the corporation sold property to directors, where the sale has been ratified by the stockholders as well as directors. *Crymble v. Mulvaney*, 21 Colo. 203 (1895). A cred-



landholders and trustees representing bondholders. There the mortgage gives a specific lien on the property and hence anything endan-

itor whose debt was incurred after the directors' negligence complained of cannot sue in equity for false representations. Nor are the directors liable as trustees for the stockholders. They are liable in equity for moneys belonging to the company and received by them, but no further. *Landis v. Sea Isle, etc. Co.*, 43 N. J. Eq. 654 (1895). Where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company, who seeks to set the sale aside on the ground that the mortgage was invalid, is in the position of one who asks to be let in to redeem from a mortgagee in possession under an unforced mortgage. He cannot in the same action ask that the purchaser at foreclosure sale, who is about to bond the property, shall pay the judgment creditor's claim out of such bonds. *Meriman v. Chicago, etc. R. R.*, 64 Fed. Rep. 535 (1894). Where one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply. *Sidell v. Missouri Pac. Ry.*, 78 Fed. Rep. 724 (1897). Creditors cannot object to a contract between the corporation and a director, where the stockholders have assented thereto and the contract is a fair one. *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890). A creditor cannot complain of a mortgage or deed from his debtor, a corporation, even though the mortgage and deed were to another corporation having the same board of directors as the debtor corporation. A stockholder might com-

plain, but there is no fiduciary relation between corporate creditors and directors. The mortgage was given when the company was solvent, and the deed after it became insolvent. *O'Connor, etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614 (1891). The creditors of a corporation are not allowed to attack a corporate mortgage on the ground that its stockholders did not authorize it, as required by statute. *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889). A creditor cannot question the acts of the board of directors. *Winer v. Bank of Blytheville*, 89 Ark. 435 (1909). A general creditor cannot intervene the same as a stockholder. *Kansas, etc. Ry. v. Fitzgerald*, 33 Neb. 137 (1891). Where a corporation is insolvent or threatened with insolvency, a judgment creditor may maintain a suit to hold the directors liable for misapplication of corporate assets under the Wisconsin statute. *State v. Milwaukee, etc. Co.*, 136 Wis. 179 (1908). It is difficult for a corporate creditor to seek collection by making out a conspiracy. *Brackett v. Griswold*, 13 N. Y. Supp. 192 (1891). A suit in equity by a creditor of a national bank against a director for mismanagement does not lie where the statutes prescribe the remedy through the receiver. *National Exch. Bank v. Peters*, 44 Fed. Rep. 13 (1890). A creditor holding an unpaid promissory note cannot, by a bill in equity to collect the debt, unite with a claim that the company was not duly incorporated a claim to hold the directors liable for false representations, and also bring in a subsequent corporation that took all the assets of the first, as well as the persons who finally obtained such effects. *Jefferson Nat. Bank v. Texas Inv. Co.*, 74 Tex. 421 (1889). See also, in general, *Columbus, etc. R. R. v. Burke*, 20 Week. L. Bull. 287 (1888), and *Belden v. Burke*, referred to in § 766, note, *infra*; *Mills v. Northern Ry.*, L. R. 5 Ch. 621 (1870); *Consolidated, etc. Co. v. Kansas City Varnish, etc. Co.*, 45 Fed. Rep.



gering that property is sufficient to justify the bondholders or trustees applying to a court of equity for protection.<sup>1</sup> But a bondholder can-

7 (1891), and §§ 830, 869, *infra*. For various suits which corporate creditors have sustained in this connection, see *Warner v. Hopkins*, 111 Pa. St. 328 (1885); *Lothrop v. Stedman*, 42 Conn. 583 (U. S. C. C. 1875); s. c., 15 Fed. Cas. 922; *Brown v. Orr*, 112 Pa. St. 233 (1886); but see *Balliet v. Brown*, 103 Pa. St. 546 (1883); *Pond v. Framingham, etc. Co.*, 130 Mass. 194 (1881); *Gravestine's Appeal*, 49 Pa. St. 310 (1865); *Heath v. Erie Ry.*, 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976; *Currier v. New York, etc. R. R.*, 35 Hun, 355 (1885). See N. Y. Code Civ. Pro., §§ 1781, 1782; also *Conro v. Gray*, 4 How. Pr. 166 (1849); *Fisk v. Union Pac. R. R.*, 10 Blatchf. 518 (1873); s. c., 9 Fed. Cas. 167; *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301 (1875); s. c., 13 Fed. Cas. 100; *Van Weel v. Winston*, 115 U. S. 228 (1885); *Cole v. Knickerbocker, etc. Co.*, 23 Hun, 255 (1880); *aff'd*, 91 N. Y. 641; *Mills v. Northern Ry.*, L. R. 5 Ch. 621 (1870); *Paulsen v. Van Steenberg*, 65 How. Pr. 342 (1883). In *Bewley v. Equitable Life Ass. Soc.*, 61 How. Pr. 344 (1881), where a policy holder sought to hold liable for misuse of funds the directors who were elected by the holders of the \$100,000 of stock of that corporation, it was held that the action by him would not lie. If he had been a judgment creditor and the corporation had been insolvent, a different rule would have applied, thus distinguishing *Evans v. Coventry*, 5 De G., M. & G. 911 (1854); *Aldebert v. Leaf (or Kearns)*, 1 Hem. & M. 681 (1864); *Re State F. Ins. Co.*, 11 W. R. 746 (1863); *Belknap v. North America, etc. Co.*, 11 Hun, 282 (1877). Judgment creditors may attack a preference to other creditors forbidden by statute. *Wood v. Sidney, etc. Co.*, 92 Hun, 22 (1895). Where all the corporate assets have been misappropriated by the stockholders, corporate creditors may unite in a bill in equity to compel restitution. *Ellis v. Pullman*, 95 Ga. 445 (1895). A bill by judgment creditors to set aside illegal conveyances to directors, and to enforce

a statutory liability and also a subcription liability, is multifarious. *Von Auw v. Chicago Toy, etc. Co.*, 70 Fed. Rep. 939 (1895). Directors are liable for damages in an action on the case brought by depositors in a bank after it was insolvent, the directors having become informed of the insolvency. *Delano v. Case*, 121 Ill. 247 (1887), *aff'g* 17 Ill. App. 531. See § 701, *supra*, as to a request to the receiver to sue. For a suit by a creditor against directors under the Wisconsin statute, see *Hurlbut v. Marshall*, 62 Wis. 590 (1885). A stockholder who participates in a corporate act cannot, as a corporate creditor, attack that act. *Fort Madison Bank v. Alden*, 129 U. S. 372 (1889). See *Mellen v. Moline, etc. Works*, 131 U. S. 352 (1889); *Le Warne v. Meyer*, 38 Fed. Rep. 191 (1889). The creditors of an insolvent partnership are not entitled to a receiver of a corporation, even though they allege that one of the partners is president and is mingling the business of the two concerns in such a manner as to defraud the partnership. *Cabaniss v. Reco, etc. Co.*, 116 Fed. Rep. 318 (1902). A policy holder in a mutual insurance company cannot enjoin the merger of the company with another company, even though he is entitled to an interest in the surplus profits. *Russell v. Pittsburgh, etc. Co.*, 132 N. Y. App. Div. 217 (1909). A policy holder in an insurance company which has several hundred thousand policy holders, cannot have a receiver appointed on the ground of mismanagement, where it appears that the corporation is solvent, especially where the policy holders participate only in the surplus and the holders have discretion as to what part of the surplus shall be distributed. A claim that the stockholders of such a company are not entitled to the surplus cannot be litigated unless they are joined as parties defendant. *Equitable, etc. v. Brown*, 213 U. S. 25 (1909).

<sup>1</sup> See §§ 816, 830, 831, *infra*. A pledgee of bonds of an insolvent



not enjoin the payment of a dividend, even though his bonds by their terms may be convertible into stock.<sup>1</sup>

As to judgment creditors, there is authority for the proposition that only those creditors who complain are entitled to the benefit of the decree.<sup>2</sup> Directors may not be liable to corporate creditors for negligence in the management of the affairs of the corporation.<sup>3</sup>

A judgment creditor's remedy is not at law,<sup>4</sup> but is in equity,<sup>5</sup> and may be by intervention.<sup>6</sup>

Where a receiver has been appointed, it is for him and not for a stockholder to hold the directors responsible for mismanagement of the corporation.<sup>7</sup> But in a suit by a minority stockholder against

corporation, the interest not having been paid, may maintain a suit to wind up the company, and change the trustees of the mortgage (even though the existing trustee was appointed by a state court after the pledgee's suit was commenced) and have a receiver appointed and cancel fraudulent bonds, but the pledgor is a necessary party defendant. Service on non-resident bondholders may be by publication. *State Nat. Bank, etc. v. Syndicate Co.*, 178 Fed. Rep. 359 (1910). Bondholders may enjoin employees who have struck, from intimidating other employees, and no request to the trustee or corporation to bring such suit is necessary, if it is shown that unless relief is granted neither the principal nor interest will be paid. The company is not a necessary party defendant. *Carter v. Fortney*, 170 Fed. Rep. 463 (1909). See § 830, *infra*. A bondholder may maintain a suit to enjoin the collection of illegal taxes. *Commissioners, etc. Co. v. Bancroft*, 203 U. S. 112 (1906). A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president. *Hook v. Ayers*, 63 Fed. Rep. 347 (1894); s. c., 64 Fed. Rep. 660.

<sup>1</sup> *Gay v. Burgess Mills*, 30 R. I. 231 (1909).

<sup>2</sup> See §§ 42, 46, *supra*, and § 848, *infra*.

<sup>3</sup> *Deadrick v. Bank of Com.*, 100 Tenn. 457 (1898). Corporate creditors cannot hold directors liable for

mere non-feasance, but a receiver may hold them liable. *Stone v. Rottman*, 183 Mo. 552 (1904). The directors of a banking corporation are not liable to its creditors for violation or neglect of duty, there being no deceit. *Hart v. Hanson*, 14 N. Dak. 570 (1895). Bank directors who are guilty of negligence in the management of the bank may be held liable by a depositor. *Wolfe v. Simmons*, 75 Miss. 539 (1898). A suit by depositors to hold the directors personally liable for negligence in the management of a bank must be for the benefit of the assignee of the bank, and both the assignee and the bank must be joined as parties. *Gores v. Field*, 109 Wis. 408 (1901).

<sup>4</sup> *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508 (1891).

<sup>5</sup> *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7 (1891); *Pullman v. Stebbins*, 51 Fed. Rep. 10 (1892); *Cummings v. American Gear, etc. Co.*, 87 Hun, 598 (1895).

<sup>6</sup> See § 848, *infra*.

<sup>7</sup> *Howe v. Barney*, 45 Fed. Rep. 668 (1891). Where the receiver is authorized to commence suit for the benefit of such corporations as come in and give security for the cost and expenses of such suit, the suit being against stockholders, the defendants cannot defend on the ground that some of the creditors purchased their claims for the sole purpose of coming in under such order of the court. *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902). Where a receiver is in charge he only can hold the directors liable



the corporation and a majority stockholder to enjoin the foreclosure of a chattel mortgage, he may proceed to judgment even though after the commencement of the suit a receiver was appointed in the state court.<sup>1</sup> A receiver may hold liable a director, where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation and the company becomes insolvent.<sup>2</sup> A receiver may bring an action against directors to hold them liable for negligence.<sup>3</sup> But a stockholder or creditor may sometimes hold a director liable for negligence where a receiver cannot.<sup>4</sup> The receiver of an insolvent railroad corporation may file a bill in equity to compel the directors and their attorney to repay corporate funds which they divided among themselves.<sup>5</sup> Where an insolvent corporation has illegally transferred its property, a permanent receiver may bring a suit at law for conversion instead of suing in a court of equity.<sup>6</sup> A receiver may bring suit to set aside illegal transfers of property which have been made by the corporation to the directors.<sup>7</sup> Where a receiver

for negligence, and if he refuses a stockholder will not be allowed to bring suit if the court thinks that no case has been made out. *Du Pont v. Standard Arms Co.*, 82 Atl. Rep. 692 (Del. 1912).

<sup>1</sup> *Sims v. United Wireless, etc. Co.*, 179 Fed. Rep. 540 (1910).

<sup>2</sup> *Pierson v. Cronk*, 13 N. Y. Supp. 845 (1890); *Mason v. Cronk*, 125 N. Y. 496 (1891). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the insolvent bank through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. *Bridgens v. Dollar Sav. Bank*, 66 Fed. Rep. 9 (1895). The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been disposed of by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity. *Mason v. Henry*, 152 N. Y. 529 (1897). As to whether the suit is at law or in equity, see also § 701, *supra*. Where the officers and directors, in a conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful

payments made to the former directors, and the assets of the corporation are thereby lost, the first-named directors are personally responsible for their action and a receiver of the corporation may hold them liable. *Bosworth v. Allen*, 168 N. Y. 157 (1901).

<sup>3</sup> See § 701, *supra*.

<sup>4</sup> *Briggs v. Spaulding*, 141 U. S. 132, 150 (1891). A receiver of an insolvent corporation appointed by a court of equity can maintain only such suits as the corporation can maintain, and cannot maintain a suit which a dissenting stockholder might maintain to compel another stockholder in a building association to return to the corporation a note which had been canceled for stock. *Young v. Stevenson*, 180 Ill. 608 (1899). See also § 869, *infra*.

<sup>5</sup> *Gindrat v. Dane*, 4 Cliff. 260 (1874); s. c., 10 Fed. Cas. 434.

<sup>6</sup> *McQueen v. New*, 45 N. Y. App. Div. 579 (1899).

<sup>7</sup> *Jones v. Blun*, 145 N. Y. 333 (1895); *Varnum v. Hart*, 119 N. Y. 101 (1890); *Dutcher v. Importers', etc. Nat. Bank*, 59 N. Y. 5 (1874); *Robinson v. Bank of Attica*, 21 N. Y. 406 (1860); *Brouwer v. Harbeck*, 9 N. Y. 589 (1854); *Milbank v. De Riesthal*, 82 Hun, 537 (1894); *Nealis v. American Tube, etc. Co.*, 76 Hun, 220



has been appointed, he may bring an action to compel stockholders to refund corporate moneys which they have taken after paying in the same on their subscriptions,<sup>1</sup> or a judgment creditor may bring it.<sup>2</sup> If the receiver refuses to bring such an action, a creditor may apply to the court for permission to bring it, making the receiver a party defendant.<sup>3</sup> A receiver cannot sue himself, and hence a creditor may bring the suit where the receiver is one of the defendants.<sup>4</sup>

In Massachusetts it is held that a receiver cannot maintain a suit to hold promoters liable for fraud, but the suit must be in the name of the corporation.<sup>5</sup>

A receiver must obtain special permission from the court before commencing suit against directors for negligence and against stockholders to hold them liable on stock issued in payment for property at an alleged overvaluation.<sup>6</sup> The right of a receiver to bring suit in a foreign jurisdiction to hold a stockholder liable for stock and bonds illegally issued is limited.<sup>7</sup> A stockholder may bring a suit in behalf of the corporation where the directors are guilty of a fraud, even though

(1894); *aff'd*, 150 N. Y. 42; *Milbank v. Welch*, 74 Hun, 497 (1893); *Kingsley v. First Nat. Bank*, 31 Hun, 329 (1884).

<sup>1</sup> *South Bend, etc. Co. v. Pierre F. & M. Ins. Co.*, 4 S. Dak. 173 (1893).

<sup>2</sup> Even though a receiver is in charge, yet a judgment creditor may file a bill to compel a stockholder to pay back an illegal dividend and also to account for property transferred to him by the corporation for a portion of his stock, the receiver being made a party defendant. *Bowker v. Hill*, 115 Fed. Rep. 528 (1879).

<sup>3</sup> See § 740, *infra*.

<sup>4</sup> *Dilzell, etc. Co. v. Lehmann*, 120 La. 273 (1907). See also § 869, *infra*.

<sup>5</sup> Where promoters pay out less than \$30,000 to secure options on land and then sell the options to a corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as

promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900).

<sup>6</sup> *Simmons v. Taylor*, 106 Tenn. 729 (1901). Even though valid claims exist against directors for misconduct, and even though in proceedings to wind up the corporation they have filed claims as creditors, yet it is not the proper procedure to allow the receiver to file an answer and set-off in that suit, especially where no process is issued against the directors requiring them to answer. An order might have been entered withholding any distribution of assets to them until the claim against them had been litigated. *Youtsey v. Hoffman*, 108 Fed. Rep. 693 (1901).

<sup>7</sup> *Great Western, etc. Co. v. Harris*, 198 U. S. 561 (1905).



a receiver of the corporation has been appointed in another state.<sup>1</sup> A stockholder in this class of cases should not sue in the double capacity of stockholder and creditor.<sup>2</sup>

The attorney-general cannot maintain a suit to recover back funds and to remove directors of a street railway company on account of their using corporate funds to bribe public officers and obtain franchises.<sup>3</sup>

§ 736. *Rule when the plaintiff stockholder sues in the interest of a rival company, or purchases stock for the purpose of bringing suit.* — The law is well settled that if a stockholder institutes a suit, in behalf of himself and other stockholders to enjoin or to bring to an accounting the corporate directors, and such suit is instituted, not to protect and benefit the stockholders' interest in the corporation, but to benefit some other corporation, the court will refuse to entertain the suit and will dismiss it.<sup>4</sup> The application, however, of a stock-

<sup>1</sup> *Fitzgerald v. Fitzgerald, etc.* Constr. Co., 41 Neb. 374 (1894). As to a suit after dissolution, see § 741, *infra*.

<sup>2</sup> See § 739, *infra*.

<sup>3</sup> *State v. Milwaukee, etc. Co.*, 136 Wis. 179 (1908). See also § 635, *supra*.

<sup>4</sup> A bill filed by a stockholder under the terms of a statute to bring about a dissolution and winding up of the corporation will be dismissed where it is shown that the suit is brought in the interest of rival corporations. The reason for dismissal is that the suit is a fraud upon the court. *Watson v. Le Grand, etc. Co.*, 177 Ill. 203 (1898). A preliminary injunction restraining a lease of one street railway to another will not be granted at the instance of a stockholder in the former company, where such stockholder does not deny that he has brought the suit in the interest of a competing steam railroad. *Jenkins v. Auburn City Ry.*, 27 N. Y. App. Div. 553 (1898). If the plaintiff is merely a nominal holder and is acting in the interest of a rival company, his suit will be dismissed. *Breeze v. Lone, etc. Co.*, 39 Wash. 602 (1905). The difficulty herein is in proving that the complainant is suing for the rival company. If, however, the latter is paying the costs of the suit, that is sufficient proof. *Forrest v. Manchester, etc. Ry.*, 4 De G., F. & J. 126 (1861); *Belmont v.*

*Erie Ry.*, 52 Barb. 637 (1869); *Filder v. London, etc. Ry.*, 1 Hem. & M. 489 (1863); *Camblos v. Philadelphia, etc. R. R.*, 4 Brewst. 563 (U. S. C. C. 1873); s. c., 4 Fed. Cas. 1089; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157 (1867); *Rogers v. Oxford, etc. Ry.*, 2 De G. & J. 662 (1858). Where the stockholder's suit is brought at the instance of a competing company, which directs the suit and pays the costs, the suit will fail. *Beshoar v. Chappell*, 6 Colo. App. 323 (1895). See, however, *Dinsmore v. Central R. R.*, 19 Fed. Rep. 153 (1883), holding that the fact that the complainant stockholder has business relations with the rival company and is aided by it in preparing his case is no bar, and that, if it were, the objection is to be raised by a plea in abatement. *Ffooks v. Southwestern Ry.*, 1 Sm. & G. 142 (1853). See also where this defense failed, *Sandford v. Railroad*, 24 Pa. St. 378 (1855); *Colman v. Eastern Counties Ry.*, 10 Beav. 1 (1846), where a rival company instigated the suit; *Central R. R. v. Collins*, 40 Ga. 582 (1869), where the plaintiff was interested in a rival company. *Jenkins v. Auburn, etc. Ry.*, 27 N. Y. App. Div. 553 (1898). See also §§ 386, 391, *supra*. A stockholder's suit to enjoin the issue of watered stock may be sustained, even though he was induced to bring the



holder herein to a court of equity will not be denied merely because it is for the interest of the public or of the corporation, or of the stockholder himself, that the act complained of be allowed to stand.<sup>1</sup>

The common law clearly is that a stockholder has the same right to bring the suit that his transferrer had, even though he purchased the stock for the purpose of bringing the suit.<sup>2</sup> The law has nothing

suit by another stockholder who pays the expenses and directs the suit, a public policy being involved. *Carver v. Southern, etc. Co.*, 78 N. J. Eq. 81 (1910).

<sup>1</sup> *Hoole v. Great Western Ry., L. R. 3 Ch. 262* (1867); *Stevens v. Rutland, etc. R. R.*, 29 Vt. 545 (1851).

<sup>2</sup> A stockholder may maintain a suit in behalf of the corporation for acts prior to the time he acquired his stock. *Pollitz v. Gould*, 202 N. Y. 11 (1911), referring to the decisions in the various states and in the federal courts. A suit by a stockholder in an interstate consolidated railroad to prevent the issue of preferred stock, where one of the states in which it is incorporated forbids such issue except upon unanimous consent, is not defeated by the defense that he purchased his stock after the plan was formulated and knew of it when he purchased. *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709 (1912); s. c., 207 N. Y. 113. In a stockholder's suit to hold directors to account for stock practically given away, it is no defense that the stockholder purchased his stock after the issue was made, and the complainant need not allege that his transferrer did not acquiesce in the transaction. *Continental Securities Co. v. Belmont*, 206 N. Y. 7 (1912). *Winsor v. Bailey*, 55 N. H. 218 (1875); *Bloxam v. Metropolitan Ry., L. R. 3 Ch. 337* (1868), where the complainant, on December 13, 1867, advertised to induce the stockholders to combine; on January 15, 1868, purchased stock himself, and on January 25, 1868, commenced suit. So also see *Seaton v. Grant*, L. R. 2 Ch. 459 (1867), where the court sustained the suit, although it said: "He buys five shares in the company, and then files this bill in order to induce the company to buy off the litigation. That, no doubt,

is a course of conduct which would meet with little approval in this court, or, indeed, in any other court; and such conduct might be material at the hearing with reference to the amount of relief which the plaintiff could obtain, or whether he was entitled to any relief at all." Nevertheless the court said, also, that however questionable the mode of the plaintiff's introduction to the company may have been, he has an actual interest in the subject-matter of the suit. See also *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883); *Achison, etc. R. R. v. Fletcher*, 35 Kan. 236 (1886); *Ervin v. Oregon, etc. Nav. Co.*, 35 Hun, 544 (1885); s. c., 28 Hun, 269 (1882); *Young v. Drake*, 8 Hun, 61 (1876). A purchaser of stock for the very purpose of enjoining an *ultra vires* act which will injure another enterprise of the plaintiff may obtain an injunction. *Carson v. Iowa City, etc. Co.*, 80 Iowa, 638 (1890). A person may buy stock to commence a suit. *Frothingham v. Broadway, etc. R. R.*, 9 N. Y. Civ. Proc. 304 (1886). But where a railroad contracts to run trains on Sunday, and afterwards a person buys five shares of stock and brings suit to enjoin the company, his real object being to preserve the Sabbath, equity will not aid him. *Sparhawk v. Union Pass. Ry.*, 54 Pa. St. 401, 453 (1867). A stockholder may enjoin the ratification by the stockholders of an *ultra vires* sale of all the property of a prosperous mining corporation to another corporation for stock of the latter, even though he purchased his stock after the sale had been made, such stock, however, not having voted for or acquiesced in such sale. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). The complaining stockholder need not show when and where he acquired his stock.



to do with the motive of a legal act.<sup>1</sup> Parties, however, buying stock for the mere purpose of bringing suit are not favored by the courts, and an injunction will be denied where their rights can be preserved by damages.<sup>2</sup>

*Montgomery, etc. Co. v. Lahey*, 121 Ala. 131 (1899). Where property mortgaged to secure bonds is of doubtful value and there is a financial stringency in the market, a corporation may sell \$40,000 of its mortgage bonds and \$5,000 of its stock for \$33,000, and a subsequent purchaser of stock of the company with notice of the facts cannot attack the validity of the mortgage. The defense of usury is not good where the issue was made in New York state, although the corporation was organized in New Jersey. *Franklin T. Co. v. Rutherford, etc. Co.*, 57 N. J. Eq. 42 (1898). If, however, the transferor participated or acquiesced in the act complained of, then the transferee is also barred. See §§ 40, 730, *supra*. A person who acted as a broker in purchasing the stock of one railroad corporation for another railroad corporation cannot, by purchasing shares in the latter corporation, hold its directors personally liable for the *ultra vires* purchase. *Whitwam v. Watkin*, 78 L. T. Rep. 188 (1898). A stockholder who became such after the charter has been amended, authorizing a consolidation, cannot complain. *Colgate v. United States, etc. Co.*, 73 N. J. Eq. 72 (1907); but see same case, 75 N. J. Eq. 229 (1908). Where a corporation has purchased all the assets of another corporation and issued stock in payment of the same, the stockholder in the former who became a stockholder after the transaction cannot maintain a suit to have the issue declared void, especially where there is no offer to return the property. *Buford v. Keokuk, etc. Co.*, 69 Mo. 612 (1879), *aff'g* 3 Mo. App. 159.

<sup>1</sup> Cases *supra*; also *Elkins v. Camden, etc. R. R.*, 36 N. J. Eq. 5 (1882); *Ramsey v. Gould*, 57 Barb. 398 (1870), where the motive was "bringing men to justice"; *Salisbury v. Metropolitan Ry.*, 38 L. J. (Ch.) 249 (1869); s. c.,

on further hearing, 22 L. T. Rep. 839. The right of a stockholder to enjoin an interference with an election is not defeated by the fact that a rival company purchased his stock for him. *Camden, etc. R. R. v. Elkins*, 37 N. J. Eq. 273 (1883). A bondholder's foreclosure is valid even though he purchased the bonds at the instigation of certain interests hostile to the railroad, and even though he expects those interests to protect him from loss. If he owns the bonds himself this is sufficient. *McFadden v. May's Landing, etc. R. R.*, 49 N. J. Eq. 176 (1891). The motive of a stockholder in instituting a suit to prevent the corporation converting bonds into stock is immaterial. *Hodge v. United States, etc. Corp.*, 64 N. J. Eq. 111 (1902). *MacGinniss v. Boston, etc. Co.*, 29 Mont. 428 (1904). *South Dakota v. North Carolina*, 192 U. S. 286 (1904). As regards the motive of a stockholder, see also *Clark v. American Coal Co.*, 86 Iowa, 436 (1892). The motive of a bondholder foreclosing a mortgage is immaterial. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168, 177 (1894). Where a stockholder is enforcing his legal rights against corporate acts the court will not question his personal interest or motive. *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709, 715 (1912); s. c., 207 N. Y. 113. The motive of the trustee in foreclosing is immaterial, even though such motive is to close out the minority stockholders. *Guardian, etc. Co. v. White Cliffs, etc. Co.*, 109 Fed. Rep. 523 (1901).

<sup>2</sup> *Kingman v. Rome, etc. R. R.*, 30 Hun, 73 (1883). A person who purchases stock with full knowledge of the situation cannot then maintain a suit for a receiver on the ground of bad management. *Von Schlemmer v. Keystone, etc. Co.*, 121 La. 987 (1908). Where a farmers' mercantile corporation is boycotted by competitors, and in their behalf a person buys stock in



But where the transfer is merely nominal the transferee cannot bring such a suit, since he has no pecuniary interests of his own to protect, and equity will not aid him.<sup>1</sup>

§ 737. *Rule 94 in federal courts against suits by transferees.* — In the federal courts peculiar rules prevail. It was found that transfers of stock were frequently made for the purpose of securing jurisdiction of the case in the federal courts. Litigation that properly belonged to the state courts was added to the already overburdened calendars of the United States courts.<sup>2</sup> Accordingly the supreme court of the United States made it a rule of the federal courts that a transferee of stock cannot sustain a stockholder's suit to remedy a corporate wrong which was perpetrated before he became a stockholder.<sup>3</sup> Equity

the former in order to aid such boycott, the court will refuse a *mandamus* to compel the corporation to transfer the stock, and will refuse an order authorizing him to examine its books, the court saying that he was "a malicious meddler," and purchased the stock to betray the company to its competitors. *Funk v. Farmers', etc. Co.*, 142 Iowa, 621 (1909). In the case *Venner v. Atchison, etc. R. R. Co.*, 28 Fed. Rep. 589 (1886), the court said: "It would not be tolerable for a party to buy into a company with the purpose of invoking the aid of the courts to compel the company to desist from a policy which it was pursuing satisfactorily to its then stockholders." In a suit by a stockholder in a trust company to enjoin it from receiving deposits on the ground that its charter did not allow such action, the court said: "Whatever may be the plaintiff's motive in instituting such an action, it is clear that the suit is not for the purpose of promoting the interest of the other stockholders or the welfare of the corporation; and a court of equity might well hesitate to grant injunctive relief in a case wherein neither public nor private interests are to be protected." *Venner v. Farmers', etc. T. Co.*, 54 N. Y. App. Div. 271 (1900); *aff'd*, 176 N. Y. 549.  
<sup>1</sup> Quoted and approved in *Breeze v. Lone, etc. Co.*, 39 Wash. 602 (1905). *M'Donnell v. Grand Canal Co.*, 3 Ir. Ch. Rep. (N. S.) 578 (1853); *Robson v. Dodds, L. R.* 8 Eq. 301 (1869).

such transfers by Mr. Justice Miller, in *Hawes v. Oakland*, 104 U. S. 450 (1881). In the case *North v. Union Savings, etc. Ass'n*, 59 Oreg. 483 (1911), the court held that the rule in the United States court preventing a stockholder from complaining in that court of acts committed before they became stockholders is salutary and prevents collusive suits in that court, but still left open the state courts for such stockholders.

<sup>3</sup> Rule 94, as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified by oath, must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance." Promulgated January 23, 1882. (See 104 U. S. ix.) See *Dimpfel v. Ohio, etc. Ry.*, 110 U. S. 209 (1884). But see *Leo v. Union Pac. Ry.*, 17 Fed. Rep. 273 (1883); *s. c.*, 19 Fed. Rep. 283. In *Lafayette Co. v. Neely*, 21 Fed. Rep. 738 (1884), it is held that this rule does not bar the stockholder's right to bring the action after the dissolution of the corporation. Rule 94, in the United States court, against a purchaser of stock bringing suit on certain causes

<sup>2</sup> See the vigorous denunciation of



rule 94, requiring an allegation that the plaintiff was a shareholder at the time of the transaction complained of, does not prevent the court acquiring jurisdiction of the case, but the rule dismisses the complaint on the ground that it does not state facts sufficient to constitute a cause of action.<sup>1</sup> Where the complainant is merely the nominal holder of the stock, the defendant may set up that the complainant holds the stock merely to give jurisdiction to the United States court.<sup>2</sup> In a few of the states also the rule of the federal courts has been adopted that a subsequent stockholder cannot complain.<sup>3</sup> The rule in the United

of action accruing before he purchases the stock, does not apply to causes removed from the state court. *Evans v. Union Pac. Ry.*, 58 Fed. Rep. 497 (1893); *Earle v. Seattle, etc. Ry.*, 56 Fed. Rep. 909 (1893). "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock." *United Elec. Securities Co. v. Louisiana Elec. Light Co.*, 68 Fed. Rep. 673, 675 (1895). See also *Whittemore v. Amoskeag Nat. Bank*, 26 Fed. Rep. 819 (1885); rev'd on another point in 134 U. S. 527; *Venner v. Atchison, etc. R. R.*, 28 Fed. Rep. 581 (1886). Under equity rule 94, one who purchases shares of stock in a corporation after a plan of reorganization has been adopted and partially carried out, is not in a position to maintain a suit to set the same aside on the ground of fraud and neglect of duty by its trustees and other parties. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). A municipal bondholder receiving stock of a railroad in payment for the bonds which had been declared void, may complain of corporate acts prior to the time he became a stockholder. *Citizens', etc. Co. v. Illinois, etc. R. R.*, 182 Fed. Rep. 607 (1910).

The United States court has no jurisdiction of a stockholder's suit for a receiver unless the actual value of the stock owned by him exceeds \$2,000, and unless he was a stockholder when the acts complained of occurred, and unless he has made an earnest effort to secure relief by the corporation itself. *Robinson v. W. Virginia L. Co.*, 90 Fed. Rep. 770 (1898). A stock-

holder bringing suit in the federal court to cancel an alleged illegal issue of stock must allege a demand to the corporation or its receiver and a refusal to sue, and that he was a stockholder at the time of the transaction complained of, or that the stock has come to him since that time by operation of law. *Bimber v. Calivada, etc. Co.*, 110 Fed. Rep. 58 (1901). A purchaser of stock and bonds of an insolvent railroad company may maintain a suit in equity in the United States court for the appointment of a receiver, even though the stock and bonds were transferred to him for that purpose, the transfer being absolute. *Cole v. Philadelphia, etc. Ry.*, 140 Fed. Rep. 944 (1905). The supreme court of Montana in the case *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898), points out that if the rule of the United States court were applied in all courts, the holders of stock purchased even in good faith after the doing of an *ultra vires* act would be without remedy in any court.

<sup>1</sup> *Venner v. Great Northern Ry.*, 209 U. S. 24 (1908), aff'g 153 Fed. Rep. 408.

<sup>2</sup> *MacVeagh v. Denver City W. W. Co.*, 85 Fed. Rep. 74 (1897). An attorney may be disbarred for organizing a sham corporation without capital or business but for the purpose of bringing suits in the United States court where he brings suits in its name in the state court after it has been adjudged illegal by the United States court. *Gelders v. Haygood*, 182 Fed. Rep. 109 (1910).

<sup>3</sup> *Alexander v. Searcy*, 81 Ga. 536 (1888). In Nebraska it is held that



States court that a stockholder cannot complain of matters which occurred before he became a stockholder, applies to a suit removed from the state court to the federal court, the court holding that this rule is based on equitable jurisprudence and is not due to arbitrary action on the part of the United States courts.<sup>1</sup>

§ 738. *Parties defendant herein — The corporation — Directors — Third persons — The receiver.* — The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong which the corporation itself should have remedied.<sup>2</sup>

a purchaser of stock cannot complain of dividends illegally paid prior to his becoming a stockholder, where it would be inequitable to allow him to do so. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (1903). A stockholder cannot complain of illegal salaries paid before he was a stockholder. *Rankin v. Southwestern, etc. Co.*, 12 N. M. 54 (1903).

<sup>1</sup> *Venner v. Great Northern Ry.*, 153 Fed. Rep. 408 (1907); *aff'd*, 209 U. S. 24. Even though a stockholder's suit is commenced in the state court and then removed to the United States court, yet unless he was a stockholder at the time of the act complained of the suit will be dismissed under Rule 94. *Hitchings v. Cobalt, etc. Co.*, 189 Fed. Rep. 241 (1910).

<sup>2</sup> *Davenport v. Dows*, 18 Wall. 626 (1873). *Peck v. Peck*, 33 Colo. 421 (1905). *Coxe v. Hart*, 53 Mich. 557 (1884); *Black v. Huggins*, 2 Tenn. Ch. 780 (1877); *Samuel v. Holladay*, Woolw. 400 (1869); *s. c.*, 21 Fed. Cas. 306; *Allen v. New Jersey, etc. R. R.*, 49 How. Pr. 14 (1875); *Bagshaw v. Eastern Union Ry.*, 7 Hare, 114 (1849); *aff'd*, 19 L. J. (Ch.) 410; *Gregory v. Patchett*, 33 Beav. 595 (1864); *Charleston, etc. Co. v. Sebring*, 5 Rich. Eq. (S. C.) 342 (1853); *Brinckerhoff v. Bostwick*, 88 N. Y. 52 (1882); *s. c.*, 105 N. Y. 567; *Bruschke v. Nord Chicago, etc. Verein*, 145 Ill. 433 (1893); *Mount v. Radford Trust Co.*, 93 Va. 427 (1896); *Hamilton v. Desjardins Canal Co.*, 1 Grant, Ch. (Can.) 1 (1849); *Putnam v. Ruch*, 54 Fed. Rep. 216 (1893); *Byers v. Rolins*, 13 Colo. 22 (1889); *Chicago v. Cameron*, 120 Ill. 447 (1887); *Stromeyer v. Combes*, 2 N. Y. Supp. 232

(1888); *American, etc. Co. v. Linn*, 93 Ala. 610 (1890). As to why the company must be made a party, see *Wilmington v. Chicago, etc. Co.*, 50 N. J. Eq. 656 (1892). The corporation must actually be served as a party defendant especially where no demand has been made on the directors to bring suit, because they were involved, there being no allegation that it was impossible to serve the corporation. *Kelly v. Thomas*, 234 Pa. St. 419 (1912). In *Consolidated Water Co. v. Babcock*, 76 Fed. Rep. 243 (1896), the court held that where the owner of the bonds and most of the stock of a water company wished to enjoin the city from contracting with another water company in violation of the rights of the former water company, the former water company was a necessary party to the suit. The company is a necessary party defendant and may be compelled to make a disclosure of the facts. *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124. One stockholder cannot collect damages from the majority stockholders on account of their acting as directors and sacrificing the corporate interests. The suit must be brought in behalf of all stockholders who come in and must be for the benefit of the corporation, and the corporation must be a party defendant. *Converse v. United Shoe, etc. Co.*, 209 Mass. 539 (1911). The corporation must be made a party defendant. *Starr v. Heald*, 28 Okla. 792 (1911). In a stockholder's suit the corporation is a party defendant if the officers and persons in control of it are opposed to the suit. *Kelly v. Mississippi, etc. Co.*, 175 Fed. Rep. 482 (1909).



This rule is due to the fact that the corporation is entitled to be heard, a similar possible suit by the corporation is thereby prevented, and the remedy made effective against the corporation as well as others. The corporation is a necessary party defendant, and must be actually brought into court by service or otherwise, even though it is a foreign corporation and cannot be served and refuses to appear.<sup>1</sup>

Stockholders who participate in the acts complained of may be joined as parties defendant, even though no relief is asked against them.<sup>2</sup>

Even though the charter has expired, a stockholder may maintain a suit to hold the directors liable for fraud. *Hoag v. Edwards*, 69 N. Y. Misc. Rep. 237 (1910). In a stockholder's suit to set aside a transfer of the corporate assets the corporation is a necessary party. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 457 (1900), except where all the directors, officers, and stockholders are joined. *Kyle v. Wagner*, 45 W. Va. 349 (1898). In a suit by a stockholder to hold liable for fraud another corporation that owns a majority of the stock of his corporation, and has diverted its business so that it became insolvent, the suit must be in equity, and his corporation is a necessary party defendant. A direct suit at law will not lie. *Niles v. N. Y. etc. R. R.*, 69 N. Y. App. Div. 144 (1902); *aff'd*, 176 N. Y. 119. A stockholder may file a bill against the estate of the deceased president of the corporation to compel such estate to make good corporate property misappropriated by him, and such suit may be maintained even though no assets of the corporation came into the hands of the executrix of the estate, and even though the corporation itself is a foreign corporation. *Wineburgh v. United States, etc. Co.*, 173 Mass. 60 (1899). In a suit to enjoin a corporation from owning the stock of competing railroads, the latter are necessary parties defendant. *Minnesota v. Northern, etc. Co.*, 184 U. S. 199 (1902); *Taylor v. Southern Pac. Ry.*, 122 Fed. Rep. 147 (1903). In a suit by a dissenting stockholder to declare void an agreement of sale of the corporate assets to another company for stock of the latter, the vendee corporation is a necessary party defendant. *Doughty*

*v. Lomagunda Reefs, Limited*, [1903] 1 Ch. 673. Where on a consolidation the president of a constituent company receives for the benefit of all the stockholders the stock in the new company and also certain assets of the old company, a stockholder in a suit to compel him to account must join the constituent company and also other stockholders. *Knickerbocker v. Conger*, 110 N. Y. App. Div. 125 (1905). The corporation is not a necessary party defendant if it has been dissolved. *Lewisohn v. Stoddard*, 78 Conn. 575 (1906).

<sup>1</sup> *Deming v. Beatty Oil Co.*, 72 Kan. 614 (1906). The corporation is a necessary party defendant, but if a non-resident, service may be made outside of the state. *Kidd v. New Hampshire, etc. Co.*, 72 N. H. 273 (1903). *Cf.* § 734, *supra*. *Cunningham v. Pell*, 5 Paige, 607 (1836), holding also that, if the corporation is foreign, service may be by publication. If the company is not made a party and the case is removed to the United States court, the latter will dismiss the case and not remand it, even though service cannot be made in that jurisdiction on the company. *Lawrence v. Southern Pac. Co.*, 180 Fed. Rep. 822 (1910). See *Bogert v. Southern Pacific Co.*, 228 U. S. 137 (1913).

<sup>2</sup> *Stone v. Pontiac, etc. R. R.*, 139 Mich. 265 (1905). Stockholders should not be joined as parties defendant, and the fact that all of them are joined does not obviate the necessity of alleging that the suit, which was against the president to account for funds misappropriated by him, was brought in behalf of all the stockholders. The court in such a case will not order a distribution of the proceeds of the suit. *McCrea v. McClenahan*, 114



In a stockholder's suit to set aside an illegal transfer of property the directors are not necessary parties, and if joined may be proper, but are merely nominal parties.<sup>1</sup> The decree against the corporation is effective and binding upon all the officers of the corporation.<sup>2</sup> Where, however, the object of the suit is to hold the directors personally liable for frauds or for negligence, the rule is different. In such cases they of course are necessary parties defendant.<sup>3</sup>

N. Y. App. Div. 70 (1906). Stockholders who did not participate in the act complained of are not proper parties defendant. *McCrea v. Robertson*, 192 N. Y. 150 (1908). A court cannot enjoin the payment of dividends and the election of directors and adoption of by-laws on account of the fraud of individuals, unless the stockholders are brought in as parties defendant. *Willis v. Lauridsen*, 161 Cal. 106 (1911). Where the corporation has been practically eliminated by the majority taking all the assets, a minority stockholder may hold them personally liable for his share of the assets. *Kingsbury v. Phillips*, 142 S. W. Rep. 73 (Tex. 1911). A stockholder is not a party to a suit merely because the corporation is a party. *Hearn v. Clare*, 131 Ga. 374 (1908).

<sup>1</sup> *Geer v. Mathieson, etc. Works*, 190 U. S. 428 (1903). Directors of the company are not necessary parties defendant and a director who became such after the transaction complained of is not even a proper party. *Muhleran v. Gebhardt*, 93 N. Y. App. Div. 98 (1904). In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906). A president and secretary should not be joined in a suit by a stockholder against the corporation to have a dividend declared, etc. *Schell v. Alston Mfg. Co.*,

149 Fed. Rep. 439 (1906). In a suit by a stockholder to set aside an issue of stock and bonds by his railroad in exchange for a prior issue of bonds, the directors are not necessary parties, neither are the holders of the bonds which are to be retired. *Politz v. Wabash R. R.*, 153 Fed. Rep. 941 (1907); rev'd on another ground in 176 Fed. Rep. 333.

<sup>2</sup> See §§ 745, 746, 752, 755, *infra*; *Winch v. Birkenhead, etc. Ry.*, 5 De G. & Sm. 562 (1852), where the court said: "I do not think it is necessary that the directors should be parties. The act that is sought to be restrained is the act of the company. The company itself cannot act except by means of its officers;" *Pioneer, etc. Co. v. Baker*, 20 Fed. Rep. 4 (1884); *Heath v. Erie Ry.*, 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976; *Chase v. Vanderbilt*, 62 N. Y. 307, 314 (1875); *Bagshaw v. Eastern Union Ry.*, 7 Hare, 114 (1849); aff'd, 19 L. J. (Ch.) 410; *Allen v. New Jersey, etc. R. R.*, 49 How. Pr. 14 (1875), the court saying: "They are represented by the corporation of which they are alleged to be directors, and when the corporation itself is made a party defendant it is improper to add the trustees or directors as parties when no personal claim or judgment is asked against them." But see *Ribon v. Railroad Cos.*, 16 Wall. 446 (1872); *Slattery v. St. Louis, etc. Co.*, 91 Mo. 217 (1886). Where the minority sue to set aside fraudulent acts of the majority, the guilty directors are not necessary parties defendant. *Woodroof v. Howes*, 88 Cal. 184 (1891).

<sup>3</sup> The director who sold property to the corporation is a necessary party defendant in a stockholder's action attacking the transaction. *Tutwiler v. Tuskalooza, etc. Co.*, 89 Ala. 391



It is not necessary to join all the guilty parties.<sup>1</sup> Outside parties

(1889). Where the directors are personally liable one or more of them may be joined. *Sigwald v. City Bank*, 82 S. C. 382 (1909). The omission of part of the guilty directors as parties defendant is not fatal. *Ander-ton v. Wolf*, 41 Hun, 571 (1886). The directors taking part in an *ultra vires* transfer of property are proper parties defendant to an injunction suit. *Small v. Minneapolis, etc. Co.*, 10 N. Y. Supp. 456 (1890). See also cases ch. XXXIX, XL, and XLII, *supra*; *Duckett v. Gover*, L. R. 6 Ch. D. 82 (1877); *Mason v. Harris*, L. R. 11 Ch. D. 97 (1879); *Ferguson v. Wilson*, L. R. 2 Ch. App. 77, 90 (1866); *Imperial, etc. Assoc. v. Coleman*, L. R. 6 H. L. 189 (1873), rev'g L. R. 6 Ch. App. 558; *Bryson v. Warwick, etc. Co.*, 1 Sm. & G. 447 (1853). The executor of a deceased director who is guilty of unlawful use of corporate funds may be joined as a party defendant with the other directors. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside, the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved. *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781 (1906). Officers may be joined as parties defendant in order that they may answer interrogatories attached to the bill for the purpose of enabling the complainant to know whom to examine as witnesses. Such answers need not be made under oath. *Gulf, etc. Co. v. Crenshaw*, 138 Ala. 134 (1903). The president should not be joined as a party defendant for purposes of discovery only. *Tutwiler v. Tuska-loosa, etc. Co.*, 89 Ala. 391 (1889). Where a person in control of a company obtains control of a rival company, and allows judgments against the latter and the sale of its bonds

at execution at nine cents on the dollar, and executes a mortgage and controls the business, all for the benefit of the former corporation, he and the dummy directors and third persons may be joined in a bill filed by a minority stockholder to enjoin their acts and obtain a personal judgment. *Gray v. Fuller*, 17 N. Y. App. Div. 29 (1897). In a suit against a corporation for breach of contract, fraud, and collusion, the president may be joined as a party defendant, he being also charged with the fraud. *Berwind v. Van Horne*, 104 Fed. Rep. 581 (1900). A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus*. *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940 (1898). But where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for non-joinder of the guilty parties. *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942 (1898); *Morse v. Bay State Gas Co.*, 91 Fed. Rep. 944 (1898).

<sup>1</sup> *Von Arnim v. American Tube-works*, 188 Mass. 515 (1905). In a stockholder's suit to hold directors liable for purchasing property from the corporation all of the guilty parties need not be joined, and it is no defense that some of the defendants are chargeable for different periods from the period pertaining to the others. *Barry v. Moeller*, 68 N. J. Eq. 483 (1904). But a receiver's bill in equity against directors of a bank to hold the directors of a bank liable for wrongful acts need not join all of them. *Gaither v. Bauernschmidt*, 108 Md. 1 (1908). A suit by a stockholder in an interstate consolidated railroad to prevent the issue of preferred stock, where one of the states in which it is incorporated forbids such issue except upon unanimous consent, is not defeated by the defense that the purchasers of the new stock



are to be joined as parties defendant whenever the relief asked would affect their rights.<sup>1</sup>

and bonds are not joined as parties. *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709 (1912); s. c., 207 N. Y. 113. A stockholder may maintain a suit to adjudge illegal a plan of issuing bonds and stock in exchange for debentures on the basis of about two for one, and the complaint is not multifarious, even though the transaction is attacked as *ultra vires* and also because the directors were personally interested, nor because different defendants will be affected differently, nor because the plaintiff asks more relief than he is entitled to. It is not necessary to join as parties defendant persons who have already made the exchange, inasmuch as the defendant directors may be liable as to them. The depository of the bonds and the registrar of the stock are not necessary parties defendant. *Pollitz v. Wabash R. R.*, 142 N. Y. App. Div. 755 (1911); s. c., 150 Id., 715 and 207 N. Y. 113.

<sup>1</sup> *Russell v. Wakefield, etc. Co.*, L. R. 20 Eq. 474 (1875), the court saying: "When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the *ultra vires* agreement. You may be entitled to have money paid back which has been paid under the *ultra vires* agreement, . . . and you may be entitled to have property returned or other acts done." In the important case *Minnesota v. Northern, etc. Co.*, 184 U. S. 199 (1902), where the state of Minnesota filed an original bill of equity in the supreme court of the United States to enjoin the Northern Securities Company from acquiring, owning, or voting a majority of the capital stock of the Great Northern Railway Company and the Northern Pacific Railway Company, two competing railroad corporations of that state, the court held that it would not entertain the suit, for the reason that the two railway

companies were not made parties, and no relief would be granted by a court of equity affecting absent persons materially interested, and no amendment would be allowed, inasmuch as it would bring them in as parties and would destroy the jurisdiction of the court. See also *Hare v. London, etc. Ry.*, 1 Johns. & H. 252, (1860); s. c., 2 Johns. & H. 80; 30 L. J. (Ch.) 817, holding that in an action to set aside a traffic contract all the corporations who were parties to the contract are necessary parties; *Tyson v. Virginia, etc. R. R.*, 1 Hughes, 80 (1871); s. c., 24 Fed. Cas. 493, to the effect that, in an action to set aside a consolidation, the other corporation is a necessary party; *Bell v. Donohoe*, 17 Fed. Rep. 710 (1883); *Taylor v. Miami, etc. Co.*, 5 Ohio, 162 (1831), where a guilty stockholder was made a party defendant; *Abbot v. American Hard Rubber Co.*, 4 Blatchf. 489 (1861); s. c., 1 Fed. Cas. 13, holding that an expected purchaser is not a necessary party defendant; *Bengley v. Wheeler*, 45 Mich. 493 (1881); *Shawhan v. Zinn*, 79 Ky. 300 (1881), holding that the objection to a defect of parties herein may be raised at the trial, and need not be raised by demurrer; *Cass v. Ottawa, etc. Co.*, 22 Grant (U. C.), 512 (1875), holding that the attorney-general is not a necessary party defendant. Cf. *Ryan v. Ray*, 33 Alb. L. J. 321 (Ind. 1886). A stockholder's suit to set aside an alleged illegal conveyance of corporate property to an individual must join him as a party defendant. *Maeder v. Buffalo, etc. Co.*, 132 Fed. Rep. 280 (1904). Sometimes the directors of another corporation are proper parties defendant. See *Terhune v. Midland R. R.*, 38 N. J. Eq. 423 (1884). Where a copartnership is the general manager and agent of the company and a member of the copartnership is a director and misappropriates the company's property, the company has recourse against his separate estate as well as against the joint estate of the copartnership.



After a receiver has been appointed, a stockholder's suit against officers to compel them to account for fraudulent misappropriations of corporate property must join the receiver as a party defendant.<sup>1</sup> But

*Re MacFadyen*, [1908] 2 K. B. 817. In a suit by a minority of the stockholders of a railroad company to restrain it and a trust company from issuing bonds to a construction company, the charge being made that the majority stockholders controlled also the construction company and the issue of bonds was corrupt, the trustee is a necessary and not merely a nominal party. *Mayer v. Denver, etc. R. R.*, 41 Fed. Rep. 723 (1890). The action may be continued against the executor of a deceased defendant. *Fox v. Hale, etc. Co.*, 108 Cal. 478 (1895). Parties in league and the guilty officers may be made parties defendant. *Meyers v. Scott*, 2 N. Y. Supp. 753 (1888). The question of when the directors or officers may be joined for purposes of discovery is discussed elsewhere. See § 519, *supra*. In a suit to set aside a lease, both the lessor and lessee railroad companies are necessary parties. *New Jersey Cent. R. R. v. Mills*, 113 U. S. 249 (1885); *East Tennessee, etc. R. R. v. Grayson*, 119 U. S. 240 (1886). A director who resigned before the acts complained of were done is not to be made

a defendant, even though the resignation was never accepted. Nor is a director liable who was absent by reason of sickness. *Movius v. Lee*, 30 Fed. Rep. 298 (1887); *aff'd*, 141 U. S. 132. In a suit to compel directors to turn over the corporation profits improperly realized by them, a separate action may be brought against each director. *Langdon v. Fogg*, 18 Fed. Rep. 5 (1883). See *Chandler v. Bacon*, 30 Fed. Rep. 538 (1887), holding that the liability is joint and several, the court saying: "When the conduct of parties operates as a fraud or deceit upon third persons, whatever their private intention, the relation of partnership may be said to exist as to such third persons." To same effect, *Ervin v. Oregon, etc. Nav. Co.*, 20 Fed. Rep. 577 (1884). In a stockholder's suit to set aside an illegal transfer of the assets of his corporation to another corporation and to compel a retransfer, the persons through whom the property was transferred need not be made parties if the persons in possession of the assets are made parties. *Eldred v. American, etc. Co.*, 99 Fed. Rep. 168 (1900).

<sup>1</sup> *Porter v. Sabin*, 149 U. S. 473 (1893); *Swope v. Villard*, 61 Fed. Rep. 417 (1894). Where a statutory receiver has been appointed he may be made a party defendant instead of the corporation. *Barry v. Moeller*, 68 N. J. Eq. 483 (1904). Where a receiver was himself one of the directors charged with fraud, a stockholder will be allowed to bring suit making the receiver a party defendant, and it is no defense that the receivership has been running for two years. *Weslosky v. Quarterman*, 123 Ga. 312 (1905). If a receiver refuses and fails to bring the suit after being requested, he may be joined as a party defendant. *Ellis v. Gates, etc. Co.*, 60 S. Rep. 649 (Miss. 1913). In a suit by a stockholder of a dissolved corporation, in behalf of himself and others, to

hold an officer liable in damages for having wrecked the company and acquired all its property at foreclosure sale, the receiver is a necessary party defendant, or, if he has been discharged, the trustees of the dissolved corporation. *Michel v. Betz*, 108 N. Y. App. Div. 241 (1905). In a stockholder's suit in behalf of a dissolved corporation, the receiver is a necessary party. *Clark v. San Francisco*, 53 Cal. 306 (1878). A suit by depositors to hold the directors personally liable for negligence in the management of a bank must be for the benefit of the assignee of the bank, and both the assignee and the bank must be joined as parties. *Gores v. Field*, 109 Wis. 408 (1901). See also § 740, *infra*, on request to receiver, and § 735, *supra*, as to suits by receivers.



where the receiver has exhausted the assets and been discharged, he is not a necessary party defendant to a suit by corporate creditors to hold a director personally liable on his promise to pay all the corporate debts, provided he was allowed to acquire the corporate property at a judicial sale.<sup>1</sup> And a stockholder in a foreign corporation may bring suit to hold the directors liable for fraud, even though a receiver has been appointed in the state where the corporation was organized, and he need not be made a party defendant and no demand need be made on him to bring the suit.<sup>2</sup>

§ 739. *Complainant's bill must not improperly join two or more causes of action herein.*—If the complainant's bill is multifarious, it of course cannot succeed as against the objection of the defendants. Thus, it has been held that the stockholders cannot join an

Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association and sells it out to a corporation organized by himself, the minority stockholders of the association may compel him to account for the property. As regards the person to whom the stock was issued, however, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. *Booth v. Dodge*, 60 N. Y. App. Div. 23 (1901). In a suit by a stockholder to restrain a sale of the property the proposed vendee has no right to intervene. *Lewisohn Bros. v. Anaconda, etc. Co.*, 29 N. Y. App. Div. 552 (1898). A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. *Ingraham v. National Salt Co.*, 36 N. Y. Misc. Rep. 646 (1902); *aff'd*, 72 N. Y. App. Div. 582; appeal dismissed, 172 N. Y. 644. Where minority stockholders started a suit in the federal court to set aside a sale of the property of the company to another corporation, but did not bring in as a party defendant a railway company which was about to issue securities, in accordance with contracts with the two companies, and afterwards started a suit in the state court for the same relief, and brought

in the railway company as party defendant, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). See § 656, *supra*.

<sup>1</sup> *Lilienthal v. Betz*, 185 N. Y. 153 (1906); *rev'g* 108 App. Div. 222.

<sup>2</sup> *Reed v. Hollingsworth*, 135 N. W. Rep. 37 (Iowa, 1912). A stockholder in an underground railroad in New York City may file a bill to set aside a sale by the other stockholders of their stock to a holding company, which holding company has acquired a majority of the capital stocks of such underground road and of the surface railways (the elevated railways being already leased to the underground railway), thereby suppressing competition and creating a combination of competing railroads, the plaintiff alleging also that the holding company has issued ninety million dollars of watered stock and two hundred million dollars of bonds without proper payment therefor. Even though the surface roads have passed into a receiver's hands, such receiver need not be made a party defendant, although a proper party defendant with the consent of the court which appointed him. *Continental Securities Co. v. Interborough, etc. Co.*, 165 Fed. Rep. 945 (1908); *s. c.*, 183 Fed. Rep. 132; *cf. s. c.*, 203 Fed. Rep. 521 (1913).



action in reference to dividends with one for an injunction to restrain the corporate directors committing a fraud.<sup>1</sup> A bill combining an action to restrain the corporation from investing in the stock of another company, and one to restrain it from aiding that company, has been held to be multifarious.<sup>2</sup> The stockholders cannot join a suit against the corporation with one against third persons in behalf of the corporation.<sup>3</sup> An action to be allowed to enter a reorganized company and one to hold its officers liable for fraud cannot be joined.<sup>4</sup> The plaintiff cannot join causes of action accruing to himself personally with the cause of action which he brings suit upon in behalf of the company.<sup>5</sup> A bill seeking to attack a fraudulent sale of property by a director to the corporation, and also to enjoin a sale of complainant's stock under a forfeiture for non-payment of a subscription, is multifarious.<sup>6</sup> Where a suit by a stockholder in behalf of the corporation is to hold a director liable for stock and bonds issued illegally under a contract, and is also

<sup>1</sup> Winsor v. Bailey, 55 N. H. 218 (1875). In a stockholder's suit at law for a dividend which has been declared, he cannot include a cause of action in equity against the directors for a conspiracy to illegally increase the capital stock and to enjoin them from doing so. Searles v. Gebbie, 115 N. Y. App. Div. 778 (1906); aff'd, 190 N. Y. 31. A stockholder's suit is not multifarious, although it is to compel the treasurer to pay back certain funds, and also to have a dividend declared therefrom. Dunphy v. Traveller Newsp. Assoc., 146 Mass. 495 (1888); Stroud v. Lawson, [1898] 2 Q. B. 44. A suit to hold the directors liable for declaring a dividend out of the capital stock and thereby inducing the plaintiff to purchase the stock cannot at the same time seek to hold the directors liable to the corporation for the dividend so declared. Stroud v. Lawson, [1898] 2 Q. B. 44.

<sup>2</sup> Salomons v. Laing, 12 Beav. 339 (1850). But a bill by stockholders and creditors to restrain acts and have a dissolution is not multifarious. Mills v. Hurd, 32 Fed. Rep. 127 (1887).

<sup>3</sup> Thomas v. Hobler, 4 De G., F. & J. 199 (1862). And see, in general, on multifariousness herein, Merchants', etc. Line v. Waganer, 71 Ala. 581 (1882); Smith v. Rathbun, 22 Hun, 150 (1880); Lewarne v. Mexican

Int. Imp. Co., 38 Fed. Rep. 629 (1889).

<sup>4</sup> Stanton v. Missouri Pac. Ry., 15 N. Y. Civ. Pro. 296 (1888).

<sup>5</sup> Whitney v. Fairbanks, 54 Fed. Rep. 985 (1893). An assessment upon stock levied by a board of directors illegally elected and a sale of the stock thereunder does not put an end to the stockholders' suit to oust such board of directors and to set aside such assessment and to set aside contracts made by such board. The complaint is not multifarious. Whitehead v. Sweet, 126 Cal. 67 (1899). A suit by a stockholder to set aside an illegal transfer of the corporate property cannot at the same time ask for the treble damages given by the anti-trust act of congress of July 2, 1890. Such a suit is multifarious, inasmuch as the treble damages would go to the plaintiff, while the damages generally would belong to the corporation. Metcalf v. American, etc. Co., 108 Fed. Rep. 909 (1901); aff'd, 113 Fed. Rep. 1020.

<sup>6</sup> Tutwiler v. Tuskaloosa, etc. Co., 89 Ala. 391 (1889). A stockholder whose stock is about to be forfeited to pay an illegal assessment, may, in a suit to enjoin such forfeiture, join a cause of action against the directors for illegal salaries and other illegal acts. McConnell v. Combination, etc. Co., 30 Mont. 239 (1904).



to hold a director liable for bonds which had been pledged by the company to secure a debt, which pledge and bonds the director had acquired, the suit is multifarious, even though one claim is not good.<sup>1</sup> But a stockholder's suit to set aside an issue of stock for a nominal consideration may also ask that a fraudulent sale of the corporate property to the defendant be set aside.<sup>2</sup> A stockholder suing in behalf of the corporation for fraud on the part of the majority in selling the corporate property to another corporation in which they are interested, cannot join a cause of action of the corporation itself against such majority for breach of contract.<sup>3</sup> In a suit to foreclose a mortgage there cannot be joined a claim for dividends illegally paid.<sup>4</sup> A stockholder cannot in the same bill ask relief as a stockholder and also ask to have the title to his stock cleared up.<sup>5</sup> A complaint, however, by a stockholder to set aside an illegal sale of new stock is not multifarious, even though it contains allegations relative to injuries to the corporation.<sup>6</sup> A stockholder cannot join in one suit a cause of action for breach of contract with another stockholder by which the former was to receive a certain salary from the corporation, and a cause of action against the latter for misappropriating corporate funds.<sup>7</sup> A bill is multifarious where there are several defendants and no combination between them is shown.<sup>8</sup> But a stockholder's bill may not be multifarious, even though some of the defendants are not interested in some of the matters complained of.<sup>9</sup> In a stockholder's suit to set aside a contract on the ground that it is void, if parties are joined who are in nowise connected with it in order to obtain relief on still other grounds, the bill is multifarious.<sup>10</sup> Although the complaint is multifarious and obscure, yet a demurrer

<sup>1</sup> *O'Connor v. Virginia, etc. Co.*, 184 N. Y. 46 (1906). In a suit by a corporate creditor to set aside a conveyance as an illegal preference he cannot also hold a director liable on watered stock. *El Cajon, etc. Co. v. Robert, etc. Co.*, 165 Fed. Rep. 619 (1908). A suit to hold directors liable for losses due to fraud and for profits made illegally and for the depreciation in the value of the capital stock, is multifarious. *Kelly v. Thomas*, 234 Pa. St. 419 (1912).

<sup>2</sup> *Price v. Union Land Co.*, 187 Fed. Rep. 886 (1911).

<sup>3</sup> *Backus v. Brooks*, 195 Fed. Rep. 452 (1912).

<sup>4</sup> *New Hampshire Sav. Bank v. Richey*, 121 Fed. Rep. 956 (1903).

<sup>5</sup> *Inman v. New York, etc. Co.*, 131 Fed. Rep. 997 (1904). See also § 735,

*supra*. A transfer of certificates of stock on the corporate books by a stockholder to his children may be attacked by one of them after his death on the ground of undue influence and unsound mental condition, but such a suit to set aside the transfers should not be joined with one for the dissolution of the corporation and a receivership. *Bannon v. Bannon, etc. Co.*, 136 Ky. 556 (1909).

<sup>6</sup> *Witherbee v. Bowles*, 201 N. Y. 427 (1911).

<sup>7</sup> *Stoddard v. Bell & Co.*, 100 N. Y. App. Div. 389 (1905).

<sup>8</sup> *American, etc. Co. v. Linn*, 93 Ala. 610 (1890).

<sup>9</sup> *Ellis v. Vandergrift*, 173 Ala. 142 (1911).

<sup>10</sup> *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908).



does not necessarily lie.<sup>1</sup> A stockholder cannot join a personal action against parties with an action brought as a stockholder in behalf of himself and other stockholders against the same parties defendant.<sup>2</sup> A suit to enforce the statutory liability of stockholders cannot include a cause of action against the directors for mismanagement.<sup>3</sup> A stockholder's bill to compel others to pay their subscriptions and to hold some of them liable for illegal acts is multifarious.<sup>4</sup> The bill is multifarious where it seeks to hold certain directors liable for acts done in one year and other directors for acts in another year.<sup>5</sup> A bill by a stockholder

<sup>1</sup> *Moyle v. Landers*, 83 Cal. 579 (1890). The defense that a complaint by a stockholder against a director for negligence and also for paying illegal dividends is multifarious must be raised by demurrer. *Weed v. First Nat. Bank*, 106 N. Y. App. Div. 285 (1905).

<sup>2</sup> *Farrow v. Holland Trust Co.*, 74 Hun, 585 (1893). An action to set aside a sale of stock cannot be joined with an action to hold the vendee liable as an officer in the corporation. *Niven v. Peoples*, 136 N. W. Rep. 73 (N. Dak. 1912).

<sup>3</sup> *Sturtevant-Larrabee Co. v. Mast, etc. Co.*, 66 Minn. 437 (1896).

<sup>4</sup> *Holton v. Wallace*, 66 Fed. Rep. 409 (1895). A judgment creditor's suit against the stockholders to reach assets which they have distributed among themselves may also pray that they be held liable for their unpaid subscriptions. *Jahn v. Champagne, etc. Co.*, 147 Fed. Rep. 631 (1906); *aff'd*, 152 Fed. Rep. 669, and 157 Fed. Rep. 407.

<sup>5</sup> *Nash v. Hall Signal Co.*, 90 Hun, 354 (1895). If the various acts complained of were committed by different directors the bill is multifarious. *Higgins v. Tefft*, 4 N. Y. App. Div. 62 (1896). See also § 701, *supra*. A bill is not multifarious even though the defendants are not to be held liable to the same extent or in the same way, inasmuch as the court may mold its decree so as to do equity to all. *Gray v. Fuller*, 17 N. Y. App. Div. 29 (1897). The receiver of a bank may by suit in equity hold the directors liable for gross negligence, but if some of the defendant directors had nothing to do with some of the

acts complained of the bill is multifarious as to them. *Emerson v. Gaither*, 103 Md. 564 (1906). A depositor in a suit against directors for false statements inducing him to make a deposit, cannot join other directors who were not directors at the time the statements were made, but who, it is alleged, made other misrepresentations which caused plaintiff not to withdraw such deposits. *Warner v. James*, 88 N. Y. App. Div. 567 (1903). A suit against the president for fraud in purchasing real estate and against other defendants for fraud in obtaining stock from the corporation, and another defendant for fraudulently receiving stock and selling it to the corporation, is multifarious. *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). In a suit brought by the attorney-general under the statutes of New York to hold directors liable for waste or neglect, several directors cannot be joined where the cause of action against one is not the same cause of action as against another. Each director is liable only for his own acts or omissions, unless he had knowledge from which he might reasonably have prevented a loss. An allegation in the alternative that a director participated in an act or was negligent in not ascertaining it will not save such a complaint. Moreover the remedy against some of the directors may be in equity, while as against others it may be at law. If there is a concurrent remedy at law and in equity the statute of limitations will be applied by a court of equity. *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).



and creditor in behalf of himself and all other stockholders and creditors, to set aside a sale of the corporate property for stock to be divided between the creditors and preferred stockholders, is multifarious in that the stockholders' rights may clash with each other or with creditors' rights, and the same complainant cannot represent all.<sup>1</sup> A bill asking for a dissolution and a distribution of assets so as to pay first those stockholders who were fraudulently induced to purchase is multifarious. The averment, moreover, must be definite and certain.<sup>2</sup> A suit to have a company wound up as not legally organized and also to have another company removed as trustee and a new trustee appointed and to hold it liable for failure to file reports, is multifarious.<sup>3</sup> A creditor's bill to hold the president liable for fraud in converting the corporate assets, and also to collect unpaid subscriptions, is multifarious.<sup>4</sup> A bill to rescind a subscription on the ground of fraud and also to have a receiver appointed on account of the mismanagement of directors is multifarious.<sup>5</sup> A stockholder's suit to enjoin an increase of the capital stock and also to have a receiver appointed is multifarious.<sup>6</sup>

Various instances of multifariousness are given in the notes below.<sup>7</sup>

<sup>1</sup> *Ward v. Sittingbourne, etc. Ry.*, L. R. 9 Ch. App. 488 (1874). See also *Hoole v. Great Western Ry.*, L. R. 3 Ch. App. 262 (1867), holding that, where there are different classes of stockholders, a stockholder may file a bill in behalf of his class. A bill filed by plaintiffs as "stockholders and bondholders" should be amended by striking out the words "and bondholders." *Arnold v. Searing*, 73 N. J. Eq. 262 (1907).

<sup>2</sup> *Watson v. U. S. Sugar Ref.*, 68 Fed. Rep. 769 (1895). Where the entire capital stock, \$500,000, is issued for patents, and the patentee transfers about one fifth of it back to the corporation, and it is then sold by the company at par as treasury stock, and the company is then dissolved, a purchaser of some of such treasury stock may maintain a bill to have the surplus assets over and above the debts applied to such treasury stock before anything is paid on the promoter's stock in distribution, it being shown that the patents had little or no value. No request to the receivers to bring such a suit need be made because it is a personal suit. *Weber v. Nichols*, 75 N. J. Eq. 117 (1908).

<sup>3</sup> *Patterson v. Northern Trust Co.*, 238 Ill. 601 (1909).

<sup>4</sup> *Montserratt Min. Co. v. Johnson, etc. Co.*, 141 Mo. 149 (1897). A suit by stockholders in behalf of the corporation to set aside a fraudulent issue of stock for a nominal consideration cannot contain also a claim for damages for fraud in inducing them to subscribe. *Price v. Union Land Co.*, 187 Fed. Rep. 886 (1911). In a suit by a vendor of stock to the corporation to cancel the sale for fraud, the court cannot in the same suit order the officers to repay to the corporation funds illegally taken by them for salaries. *Pellio v. Bulls Head, etc. Co.*, 224 Pa. St. 379 (1909).

<sup>5</sup> *Davis v. Peabody*, 170 Mass. 397 (1898).

<sup>6</sup> *Rodman v. Manganese, etc. Co.*, 75 N. J. Eq. 295 (1909).

<sup>7</sup> A bill to cancel a subscription for fraud and also to have a receiver appointed on the ground of mismanagement is multifarious. *Emmons v. National, etc. Ass'n*, 135 Fed. Rep. 689 (1905). A suit by a stockholder to compel a stock dividend and to prevent the issue of increased capital stock and to compel the corporation to issue twenty-five stock certificates



§ 740. *Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so — Request to receiver — Rule 94 of the federal courts on this subject.* — Inasmuch as a fraudulent, *ultra vires*, or negligent act of the directors of a corporation is an injury done to the corporation itself,

for one share each in exchange for one certificate for twenty-five shares, is multifarious both as to parties and subject-matter. *Schell v. Alston Mfg. Co.*, 149 Fed. Rep. 439 (1906). A trustee holding property for various persons cannot transfer it to a corporation in exchange for stock of the latter, even though the trust agreement authorizes a sale and provides that the proceeds of the sale shall be divided among the beneficiaries. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy should not be joined. *Moody v. Flagg*, 125 Fed. Rep. 819 (1903). In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906). A corporate creditor suing a stockholder for his unpaid subscription may join a claim against the defendants for corporate assets wrongfully appropriated by them. *Lewisohn v. Stoddard*, 78 Conn. 575 (1906). A receiver will be appointed and other relief granted, in a suit by a stockholder in a mining company alleging that the directors had practically abandoned the property and refused to sell treasury stock, although it could be sold, and had removed the books from the state, and had refused all information and were destroying the value of the stock. Such a suit is not multifarious. *Glover v. Manila, etc. Co.*, 19 S. Dak. 559 (1905). A suit by stockholders to hold directors and other parties personally liable for fraudulent trans-

fers of corporate property, and also to set aside fraudulent judgments, by which such transfers are made, is not multifarious. *Northwestern Land Assoc. v. Grady*, 137 Ala. 219 (1903). In a suit to hold stockholders liable on watered stock they may also be held liable for corporate assets illegally transferred to them. *Montgomery, etc. Works v. Capital City Ins. Co.*, 137 Ala. 134 (1903). A stockholder may maintain a suit to adjudge illegal a plan of issuing bonds and stock in exchange for debentures on the basis of about two for one, and the complaint is not multifarious, even though the transaction is attacked as *ultra vires* and also because the directors were personally interested, nor because different defendants will be affected differently, nor because the plaintiff asks more relief than he is entitled to. It is not necessary to join as parties defendant persons who have already made the exchange, inasmuch as the defendant directors may be liable as to them. The depository of the bonds and the registrar of the stock are not necessary parties defendant. *Pollitz v. Wabash R. R.*, 142 N. Y. App. Div. 755 (1911); *s. c.*, 150 Id. 715 and 207 N. Y. 113. A stockholder's suit to compel his railroad company to take back certain stocks, bonds, mines, etc., in which the railroad had no power to invest and which the railroad had transferred to other companies, and asking that such property when taken back shall be sold and the assets distributed among the stockholders, is not multifarious, and on its face makes out a case, it being charged that part of the property had been put into a trusteeship and trust certificates therefor issued to stockholders of the railroad company, even though the transaction is eight years old. *Venner v. Great Northern Ry.*, 117 Minn. 447 (1912). A suit by a person as a stock-



it is the duty and proper function of the corporation to institute any action that may be brought to remedy the injury to the corporation.

holder and policy holder in an insurance company against the directors for losses due to negligence does not make two causes of action. *Young v. Equitable, etc. Soc.*, 112 N. Y. App. Div. 760 (1906). A stockholder's suit against all the directors for moneys illegally received by some of them is not multifarious, it being alleged that they misappropriated the money either for their own benefit or for the benefit of others. *Young v. Equitable, etc. Soc.*, 112 N. Y. App. Div. 760 (1906). Even though the plaintiff sues both as a stockholder and creditor, the complaint may be sustained in his capacity as stockholder and the remainder of the complaint may be treated as immaterial. *Ward v. Smith*, 95 N. Y. App. Div. 432 (1904). A stockholder cannot join a suit to hold the president liable for converting corporate funds to his own use, with a suit to compel another corporation to pay to his corporation money then due on a contract. *Case v. New York, etc. Ass'n*, 88 N. Y. App. Div. 538 (1903). A suit in behalf of the stockholders cannot also include a claim for damages in behalf of the stockholder who brings the suit. *Brown v. Utopia Land Co.*, 118 N. Y. App. Div. 364 (1907). A suit to determine what stock is watered stock (alleged to be overissued stock) and also to set aside transactions by which the corporate property has been misapplied is multifarious. *Church v. Citizens' Street Ry.*, 78 Fed. Rep. 526 (1897). A judgment creditor's bill is multifarious where it asks to hold the defendant liable on a subscription for stock, and as an officer for causing the corporation to buy its own stock, and as an outsider for obtaining real estate of the company without consideration, and as an outsider misrepresenting the condition of the company. *First Nat. Bank v. Peavey*, 75 Fed. Rep. 154 (1896). Where the directors for the sum of \$15,000 resign and put in other directors, and the new directors mismanage the company and cause its insolvency, the receiver of the com-

pany cannot join a suit for the \$15,000 with a suit to hold the resigning directors liable for breach of trust. The complaint is multifarious. *McClure v. Wilson*, 13 N. Y. App. Div. 274 (1897). Stockholders and corporate creditors cannot join in the same bill, the former to rescind their subscriptions and to bring the officers to an account, and the latter to bring the officers to an accounting, even though the officers have been guilty of all the frauds in the category. *Brown v. Bedford City, etc. Co.*, 91 Va. 31 (1895). As to not being multifarious, see *Stevens v. South, etc. Co.*, 14 Utah, 232 (1896). A suit by a stockholder against a promoter in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock, and also to enjoin a proposed sale of plaintiff's stock, in order to pay an assessment, is multifarious. *Pietsch v. Krause*, 116 Wis. 344 (1903). A bill in equity is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See *v. Heppenheimer*, 55 N. J. Eq. 240 (1897); *aff'd*, 56 N. J. Eq. 453. This same transaction was involved in the case *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900), and the court there held that the mortgage was legal and could be



As already explained, however, a stockholder may bring the action if the corporation improperly refuses or neglects to institute such suit. Before the stockholder brings suit he must make a formal request to the corporate officers that suit be instituted by the corporation. Upon its refusal or neglect to comply with that request, he may then bring suit himself. It is well settled, however, that he must allege in his bill in equity that such a request has been made and has not been complied with.<sup>1</sup> There has been considerable discussion as to whether the stock-

enforced, yet the court intimated that the promoters could be held personally liable.

Where an investment company in a receiver's hands has paid all its debts, but by fraud its remaining assets have been transferred to various parties, a suit lies at the instance of a stockholder to set aside the transfer; but the complaint is multifarious where it joins parties not having a common interest and unites distinct and disconnected causes of action. *Fry v. Rush*, 63 Kan. 429 (1901). A stockholder in an irrigation company may in the same suit complain that the directors are managing the corporation in the interest of a rival company and also that they are depriving him personally of his proportionate part of the water. *Henshaw v. Salt River Co.*, 6 Ariz. 151 (1898). The court exercises a large discretion in passing on the questions of multifariousness. *Metropolitan Trust Co., etc. v. Columbus, etc. R. R.*, 93 Fed. Rep. 689 (1899). A stockholder's bill is not necessarily multifarious because it joins several grounds of complaint and has several prayers for relief. *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940 (1898). A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus*. *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940 (1898). But where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for non-joinder of the guilty parties. *Edwards v. Bay State Gas Co.*, 91

Fed. Rep. 942 (1898); *Morse v. Bay State Gas Co.*, 91 Fed. Rep. 944 (1898). Subscribers to stock may rescind the same on the ground that the promoters who sold property to the company had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only \$150,000 of cash for \$450,000 of stock. *Barcus v. Gates*, 89 Fed. Rep. 783 (1898).

<sup>1</sup> Quoted and approved in *Dillon v. Lee*, 110 Iowa, 156, 162 (1899); *Saunders v. Bank of Mecklenburg*, 75 S. E. Rep. 94 (Va. 1912). Stockholders cannot maintain a suit to enjoin a deed of the corporate property after a sale on execution on the ground that the judgment was invalid, unless they show a request to the board of directors and also show that they are a minority, and hence do not control the company. *Brandt v. McIntosh*, 130 Pac. Rep. 413 (Mont. 1913); *Fry v. Rush*, 63 Kan. 429, 440 (1901), and *Starr v. Heald*, 28 Okla. 792 (1911). *Holton v. New Castle, etc. Ry.*, 138 Pa. St. 111 (1890); *Byers v. Rollins*, 13 Colo. 22 (1889); *Flynn v. Brooklyn City R. R.*, 158 N. Y. 493 (1899); *Law v. Fuller*, 217 Pa. St. 439 (1907); *Ross v. American Banana Co.*, 150 Ala. 268 (1907); *Tevis v. Hammersmith*, 170 Ind. 286 (1907). A demand must be made or facts alleged showing it would have been unavailable. *Wright v. Floyd*, 43 Ind. App. 546 (1909). Even though the secretary and treasurer takes away and secretes all the books and papers of the



holder, in addition to his request to the corporate officers to institute the suit, should not also be required to attempt to induce the stockholders

company, yet the president cannot have a receiver appointed in order to carry on the business and collect accounts, no charge of fraud being made and no request to the board of directors being shown. *Fallon v. United States, etc. Co.*, 86 N. Y. App. Div. 29 (1903). Failure to request the corporation to bring suit is fatal. *Weidenfeld v. Allegheny, etc. R. R.*, 47 Fed. Rep. 11 (1891). Three directors cannot sue as stockholders where, for all that appears, they are a majority of the board and could cause the corporation to sue. *Hodgson v. Duluth, etc. R. R.*, 46 Minn. 454 (1891). A stockholder's action to restrain a levy of execution by a judgment creditor on the property of the corporation fails where he does not allege a request and show his interest in the corporation. *Southwest Nat. Gas Co. v. Fayette Fuel Gas Co.*, 145 Pa. St. 13 (1892). The remedy of minority stockholders to open a judgment fraudulently obtained against the corporation is by motion or petition and not by a complaint in intervention, and a request should first be made to the board of directors. *Seattle, etc. Ry. v. Bowman*, 53 Wash. 416 (1909). A stockholder before suing to set aside an issue of stock for property must make a request to the directors to institute the suit. *Elliott v. Puget Sound, etc. Co.*, 52 Wash. 637 (1909). A request made to a railroad corporation to prevent a competing railroad from voting its stock is sufficient to authorize a stockholder's suit. *Memphis, etc. R. R. v. Woods*, 88 Ala. 630 (1889). See also *Cogswell v. Bull*, 39 Cal. 320 (1870); *Hazard v. Durant*, 11 R. I. 195 (1875), the court saying that the allegations of request "will be sustained by proof of a request to the stockholders in corporate meeting, or to the directors in office when the suit began, or in any other mode so that it be in legal effect a request to the corporation"; *Talbot v. Scripps*, 31 Mich. 268 (1875); *Ware v. Bazemore*, 58 Ga. 316 (1877); *Merchants', etc. Line v. Waganer*, 71 Ala.

581 (1882); *Hersey v. Veazie*, 24 Me. 9 (1844); *Memphis v. Dean*, 8 Wall. 64 (1868); *House v. Cooper*, 30 Barb. 157 (1858); *Wilkie v. Rochester, etc. Ry.*, 12 Hun, 242 (1877); *O'Brien v. O'Connell*, 7 Hun, 228 (1876); *Abbott v. Merriam*, 62 Mass. 588 (1851); *Stevens v. Rutland, etc. R. R.*, 29 Vt. 545 (1851). Demurrer lies on the ground that no request to the directors has been made. *Ulmer v. Maine, etc. Co.*, 93 Me. 324 (1899). Where the directors do not act on a request to bring suit a stockholder may bring it. *Morgan v. King*, 27 Colo. 539 (1900). A stockholder cannot bring suit against an assignee for the benefit of creditors to hold him liable for maladministration, inasmuch as any surplus, after paying the debts, would belong to the corporation. A request to the directors to bring suit is first necessary. *State v. Mitchell*, 104 Tenn. 336 (1899). A request to bring the suit in a federal court is insufficient. See *Newby v. Oregon Cent. Ry.*, 1 Sawyer, 63 (1870); s. c., 18 Fed. Cas. 42. The leading case *Foss v. Harbottle*, 2 Hare, 461 (1843), failed by reason of a failure to make this effort to induce the corporation to act. See also the important case *Greaves v. Gouge*, 69 N. Y. 154 (1877); *Cogswell v. Bull*, 39 Cal. 320 (1870); *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262 (1893); *Putnam v. Ruch*, 56 Fed. Rep. 416 (1893); *Atchison, etc. R. R. v. Sumner County*, 51 Kan. 617 (1893); *New, etc. Co. v. Blevins*, 12 Tex. Civ. App. 410 (1896); *Palmer v. Hawes*, 73 Wis. 46 (1888); *Fitchett v. Murphy*, 46 N. Y. App. Div. 181 (1899). The defendant cannot raise this point in the appellate court for the first time. See *Bulkley v. Big Muddy Iron Co.*, 77 Mo. 105 (1882). The request to the directors must be made in good faith, and the actual wrong set forth, and the directors must not be charged in the request as being guilty unless they really are so. *Bacon v. Irvine*, 70 Cal. 221 (1886). A simple allegation that the corporation neglected is insufficient.



in meeting assembled to take action by directing the directors to bring suit, or by refusing to re-elect them at the next election. The fact, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit; that the remedy of refusing to re-elect them involves delay, and involves the assumption that a minority of the stockholders can by the election control such a suit; that irreparable injury or the vesting of great financial interests may occur in the meantime; and that laches may arise as a bar to the stockholder's suit — has settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholders' meeting.<sup>1</sup> The law on this subject

Refusal must be alleged. *Leslie v. Lorillard*, 31 Hun, 305 (1883). It need not be alleged specifically that the present board of directors have refused to act. *Brown v. Buffalo, etc. R. R.*, 27 Hun, 342 (1882). A stockholder suing in behalf of his corporation, which has been dissolved many years, must nevertheless show that he sought to have the directors bring suit. *Taylor v. Holmes*, 127 U. S. 489 (1888). Where the corporation is dissolved, but by statute suits may be brought during the three succeeding years, a stockholder must request the directors to sue before he sues to compel a creditor to restore property illegally taken. *General Electric Co. v. West Asheville Imp. Co.*, 73 Fed. Rep. 386 (1896). Where a stockholder brings suit for an injunction and receiver on the ground that the president is using the assets to construct an insolvent road organized by himself, and is misappropriating the corporate funds and controls a majority of the directors and also of the stock, the allegations are insufficient where it appears that no member of the board excepting the president is interested in the railroad company, and no effort has been made to induce the directors to bring the suit. *Roman v. Woolfolk*, 98 Ala. 219 (1893).

<sup>1</sup> Quoted and approved in *Continental Securities Co. v. Belmont*, 206 N. Y. 7 (1912). *Mason v. Harris*, L. R. 11 Ch. D. 97 (1879), holding also that the court has no power to order such a meeting. See a discussion of this question in *Brewer v. Boston Theater*, 104 Mass. 378 (1870). See

also *Gregory v. Patchett*, 33 Beav. 595 (1864). In the case *Shaw v. Staight*, 107 Minn. 152 (1909), the court said that the cases requiring that an application be also made to the stockholders are cases where the cause of action was entirely in the corporation, and not a cause of action in which a stockholder had a right to bring suit on the refusal of the directors to bring it, and the court held that a request may be made to the managing officers and need not be made to other stockholders to commence a suit. No request to the stockholders is necessary. *Reed v. Hollingsworth*, 135 N. W. Rep. 37 (Iowa, 1912). In *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13, 22 (1875), the difficulty herein probably arose from cases where a stockholder sought to enjoin acts which the directors could not do, but which the majority of stockholders could do. If the stockholders have the power to remove the directors, a request to the stockholders to act must be made before suit is brought by a stockholder. *Rathbone v. Parkersburg Gas Co.*, 31 W. Va. 798 (1888). In West Virginia a request must be made also to a majority of the stockholders, and it must be shown that they were guilty of misconduct and wilful and wrongful refusal to act. *Ward v. Hotel Randolph Co.*, 65 W. Va. 721 (1909). A stockholder must apply to the stockholders as well as the board of directors before commencing suit. *Smiley v. New River Co.*, 77 S. E. Rep. 976 (W. Va. 1913). In *Miller v. Murray*, 17 Colo. 408 (1892), the court refused to sustain an action by the minority stock-



seems to be as follows: First, as to acts *ultra vires* of both the directors and majority of stockholders, the directors or majority of stockholders cannot ratify the same, and hence no request to the stockholders to vote on the subject is necessary,<sup>1</sup> and it has been held, with much reason, that not even a request to the directors is necessary;<sup>2</sup> second, as to acts *ultra vires* of the directors, but *intra vires* of the stockholders, a single stockholder cannot sue if the majority of the stockholders confirm such acts of the directors, and hence a vote of the stockholders is necessary;<sup>3</sup> third, as to frauds perpetrated on the corporation by outside parties, such causes of action are like other causes of action which the corporation may have, and the discretion of the directors as to the advisability of suing, not suing, compromising, or settling such claims is final;<sup>4</sup> fourth, as to acts of the directors themselves which are fraudulent in

holders to set aside an alleged fraudulent sale of the corporate property at foreclosure sale, the property having been subsequently purchased by one of the officers, inasmuch as the complaining stockholders had votes enough to elect a board of directors, and thus have the suit brought in the corporate name. In *Latimer v. Richmond, etc. R. R.*, 39 S. C. 44 (1893), the court seemed to follow the federal rule that an effort must be made to induce the stockholders to act as well as the directors. In Alabama it is held that application must be made to the stockholders as a body also to cause the suit to be brought, unless it is shown that a majority of them are interested in preventing the suit or are the wrongdoers, or that the application cannot be made in time to be of avail. *Montgomery, etc. Co. v. Lahey*, 121 Ala. 131. In the case *Louisville, etc. R. R. v. Neal*, 128 Ala. 149 (1900), the court intimated that the stockholders should apply to the stockholders as a body for redress as well as to the board of directors. In *McCloskey v. Snowden*, 212 Pa. St. 249 (1905), the court held that where suit was brought by a resident stockholder against a foreign corporation for fraud in the purchase of property at a fraudulent price, the directors not being charged with the fraud, a mere allegation that they had been requested to commence suit and had declined is insufficient. A member of a religious corporation cannot main-

tain a bill to enjoin the pastor from assuming his duties, unless the complaint shows that efforts have been made to have the corporation itself act. *Horst v. Traudt*, 43 Colo. 445 (1908).

<sup>1</sup> A stockholder may file a bill to enjoin or set aside an *ultra vires* act, even though every other stockholder is opposed to him. *Hoole v. Great Western Ry.*, L. R. 3 Ch. App. 262 (1867); *Beman v. Rufford*, 1 Sim. 550 (1851); s. c., 6 Eng. L. & Eq. 106, where a majority of the stockholders have even voted to ratify the illegal act; *Bagshaw v. Eastern Union Ry.*, 19 L. J. (Ch.) 410 (1850), aff'g 7 Hare, 114; *Hare v. London & N. W. Ry.*, 30 L. J. (Ch.) 817, 829 (1861); s. c., 2 Johns. & H. 80; *Winch v. Birkenhead, etc. Ry.*, 5 De G. & Sm. 562 (1852). See also § 730, *supra*.

<sup>2</sup> No request is necessary to the board of directors before a stockholder brings suit to cancel an illegal subscription to stock by a municipality, inasmuch as said subscription is *ultra vires*. *Stebbins v. Perry County*, 167 Ill. 567 (1897). A request must be made to the board of directors, even though the act complained of is an *ultra vires* act. *Hutton v. Bancroft, etc. Co.*, 83 Fed. Rep. 17 (1897); contra *Westerland v. Black Bear Min. Co.*, 203 Fed. Rep. 599 (1913). No request to the directors is necessary if the act is *ultra vires*. *Botts v. Simpsonville, etc. Turnp. Co.*, 88 Ky. 54 (1888).

<sup>3</sup> See § 684, *supra*.

<sup>4</sup> See § 750, *infra*.



the eye of the law, but which the majority of the stockholders might have authorized, there is reason for requiring a stockholders' vote thereon before a single stockholder sues to remedy the wrong;<sup>1</sup> and fifth, as to acts of the directors which are fraudulent, and which not even the majority of the stockholders could have authorized, no stockholders' vote would be of any avail, and hence such a vote is unnecessary.<sup>2</sup>

The request may be made to the president,<sup>3</sup> although this is denied in Tennessee.<sup>4</sup> If a receiver is in charge the request is to be made to him,<sup>5</sup> especially as a receiver may by order of the court compromise a claim against directors.<sup>6</sup> A request to the executive committee is

<sup>1</sup> See ch. XXXIX, *supra*, for illustrations, especially § 662.

<sup>2</sup> See ch. XXXIX, *supra*, for illustrations, and § 733.

<sup>3</sup> A request to and refusal by the president, who is also the manager, suffices, even though he is the party guilty of the acts complained of. *Chicago v. Cameron*, 120 Ill. 447 (1887). Service of the demand may be in the same manner as authorized by statute for service of other papers. *The Telegraph v. Lee*, 125 Iowa, 17 (1904). A request made to the president is good, though he replies that he had resigned two years previously, it appearing that his resignation had not been accepted and no meetings held since the resignation. *Averill v. Barber*, 6 N. Y. Supp. 255 (1889). A request by one of the stockholders to the officers and president is sufficient. *Becker v. Gulf City, etc. Co.*, 80 Tex. 475 (1891).

<sup>4</sup> In a stockholder's suit to hold the directors liable for negligence the request must be to the board of directors. A request to the president is insufficient. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891).

<sup>5</sup> *Nelson v. Burrows*, 9 Abb. N. Cas. 280 (1881); *Fisher v. Andrews*, 37 Hun, 176 (1885); *Kelsey v. Sargent*, 40 Hun, 150 (1886); *Coble v. Beall*, 130 N. C. 533 (1902). That it is the duty of a receiver to bring suit, see § 735, *supra*. The request of the stockholders should be to the receiver, and upon his refusal to bring the suit the stockholder may bring it. *Streight v. Junk*, 59 Fed. Rep. 321 (1893). Redress must first be sought through the

board of directors, or through the receiver who is in charge of the property. *Holton v. Wallace*, 77 Fed. Rep. 61 (1896). A request must first be made to the receiver. *Finance Co. v. New Jersey, etc. R. Co.*, 183 Fed. Rep. 830 (1911). It is insufficient to allege that the receiver declines to sue. A demand on him to sue should be shown. *Saunders v. Bank of Mecklenburg*, 75 S. E. Rep. 94 (Va. 1912). It is not enough that the receiver has refused to sue. The stockholder must apply to the court to order the receiver to sue. *Swope v. Villard*, 61 Fed. Rep. 417 (1894). The statute authorizing suit against receivers without previous request does not apply to a stockholder's suit to remedy wrongs committed before the receiver was appointed. *Swope v. Villard*, 61 Fed. Rep. 417 (1894). Where a receiver was himself one of the directors charged with fraud, a stockholder will be allowed to bring suit making the receiver a party defendant, and it is no defense that the receivership has been running for two years. *Weslosky v. Quarterman*, 123 Ga. 312 (1905). It has been held that where a receiver is appointed receiver he may sue himself as a director. *Murphy v. Penniman*, 105 Md. 452 (1907). The depositors of a bank may sue the directors for deceit in causing the former to make deposits when the bank was insolvent, and they need not first make a request to the receiver to bring such suit. *Blumer v. Ulmer*, 44 S. Rep. 161 (Miss. 1907).

<sup>6</sup> See § 701, *supra*.



sufficient.<sup>1</sup> A request by a stockholder to the trustee in insolvency of a corporation is sufficient to enable the former to bring suit to hold the directors liable for negligence if the trustee refuses to sue.<sup>2</sup>

The request must clearly demand that suit be brought.<sup>3</sup> A request is insufficient where it does not state the facts on which the suit may be maintained.<sup>4</sup> A request to bring suit should specify the parties against whom suit is to be brought and should not be a mere notice to bring suit.<sup>5</sup> Failure of a suit on account of no request having been made is no bar to a subsequent suit after request has been made.<sup>6</sup>

In the federal courts the necessity of an allegation that the corporation has been requested to sue and has refused is fixed by a rule of the court.<sup>7</sup>

<sup>1</sup> Hazard v. Durant, 41 R. I. 196 (1875).

<sup>2</sup> Wallace v. Lincoln Sav. Bank, 89 Tenn. 630 (1891).

<sup>3</sup> A request is first necessary, and such request is not proved, where a fraudulent lease has been made, by the stockholder demanding his share of the surplus profits over and above the rental agreed upon, nor is it proved by his notice that the lease was unlawful. Flynn v. Brooklyn, etc. R. R., 158 N. Y. 493 (1899).

<sup>4</sup> Doherty v. Mercantile T. Co., 184 Mass. 590 (1904). In a stockholder's suit to enjoin his railroad corporation from reducing rates, in accordance with the state statute, he must, in addition to alleging that he made a demand on the board of directors, show the manner or reason for their refusal, since their refusal may have been proper. Poor v. Iowa, etc. Ry., 155 Fed. Rep. 226 (1907). Where a stockholder in a railroad company requests the directors or managing officers not to reduce rates as required by the statute, and they reduce the rate on account of the dangers of severe penalties, this is a sufficient demand preliminary to a suit by him to have the rates declared illegal. Perkins v. Northern, etc. Ry., 155 Fed. Rep. 445 (1907). The general allegation that the stockholder tried unsuccessfully to have the corporation secure relief and protection against the wrongs complained of is insufficient. Vogeler v. Punch, 205 Mo. 558 (1907). A general allegation that a demand had been made on the company to

bring suit, but that the company had omitted and failed to do so, does not state sufficient detailed facts. Kavanaugh v. Commonwealth, etc. Co., 103 N. Y. App. Div. 95 (1905).

<sup>5</sup> Pellio v. Bulls Head Coal Co., 231 Pa. St. 157 (1911).

<sup>6</sup> The Telegraph v. Lee, 125 Iowa, 17 (1904).

<sup>7</sup> Rule 94 (104 U. S. ix): "It [the bill] must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees; and, if necessary, of the shareholders, and the causes of his failure to obtain such action." McHenry v. New York, etc. R. R., 22 Fed. Rep. 130 (1884); s. c., 25 Fed. Rep. 65, 114. See Leo v. Union Pac. Ry., 19 Fed. Rep. 283 (1884); s. c., 17 Fed. Rep. 273; Converse v. Dimock, 22 Fed. Rep. 573 (1884); Bill v. Western Union Tel. Co., 16 Fed. Rep. 14 (1883); Quincy v. Steel, 120 U. S. 241 (1887). A request in Alaska to the general manager in Alaska of a Minnesota corporation, the entire business of which is in Alaska, is insufficient where the board of directors is in Minnesota and no irreparable injury is shown. Corbus v. Alaska, etc. Co., 187 U. S. 455 (1903), the court saying: "It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs." The suit in this case was instituted to enjoin the corporation from paying a license tax imposed by the United States government. The



This rule it will be noticed requires a request to be made to the stockholders as well as to the board of directors. There are occasions, how-

bill must set forth with particularity the efforts made to induce the officers and stockholders to institute a suit. *Worth, etc. Co. v. Bingham*, 116 Fed. Rep. 785 (1902); *Savings & T. Co. v. Bear Valley, etc. Co.*, 112 Fed. Rep. 693 (1902); *Clarke v. Eastern, etc. Assoc.*, 89 Fed. Rep. 779 (1898); *Foot v. Cunard Min. Co.*, 17 Fed. Rep. 46 (1883), holding that an allegation that the corporation would probably refuse relief is insufficient. The provision of rule 94 in the federal court that a stockholder's suit must be verified by oath does not apply to a suit instituted by him in the state court and removed to the federal court. *Maeder v. Buffalo, etc. Co.*, 132 Fed. Rep. 280 (1904). A stockholder's suit to compel the declaration of a dividend does not lie where the stockholder has not applied to the directors therefor and does not allege that the directors would refuse to give such application proper consideration. *Maeder v. Buffalo, etc. Co.*, 132 Fed. Rep. 280 (1904). A dissenting stockholder must apply to the stockholders to take action as well as to the directors. *Macon, etc. R. R. v. Shailer*, 141 Fed. Rep. 585 (1905). In the case *Kesler v. Ensley*, 123 Fed. Rep. 546 (1903), where a stockholder charged that a majority of the directors were interested in judgments under which the property was sold out, the court held that the directors having ceased to be such, and the majority of the stockholders in meeting assembled having ratified the transaction, the court would not interfere, no fraud on the part of the stockholders being alleged, and the court held that the corporation being estopped from maintaining the suit the stockholders were estopped. A letter to the directors, explaining the desired suit and requesting that suit be brought, is sufficient to satisfy rule 94, where there is also an allegation that the company declined to comply with the request. *Ball v. Rutland R. R.*, 93 Fed. Rep. 513 (1899). A stockholder bringing suit in the

federal court to cancel an alleged illegal issue of stock must allege a demand to the corporation or its receiver and a refusal to sue, and that he was a stockholder at the time of the transaction complained of, or that the stock has come to him since that time by operation of law. *Bimber v. Calivada, etc. Co.*, 110 Fed. Rep. 58 (1901). Bondholders may enjoin employees, who have struck, from intimidating other employees, and no request to the trustee or corporation to bring such suit is necessary, if it is shown that unless relief is granted neither the principal nor interest will be paid. The company is not a necessary party defendant. *Carter v. Fortney*, 170 Fed. Rep. 463 (1909). A stockholder commencing suit to dissolve the corporation under a statute need not first request the directors to take action. *Stevens v. Empire, etc. Co.*, 180 Fed. Rep. 283 (1910). The compliance of a stockholder with rule 94 requiring him to first make a request of the board of directors must not only be alleged, but must be proved in evidence. Where the stockholder delays for eighteen months, and in the meantime a new board of directors has been elected consisting of the most part of new parties, and a stockholders' meeting is held, it is insufficient for him to allege that the directors who did the *ultra vires* act control a majority of the stock. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902). In this case the court said that while a stockholder might have the right to bring suit for an injunction against an *ultra vires* act of the corporation without first requesting the directors to bring suit, yet that a suit to set aside an *ultra vires* act after it had been completed could not be brought without first requesting the board of directors to bring it, as required by rule 94.

Rule 94 of the federal courts is not satisfied by an allegation that a request has been made to the board of directors and has been refused and that the suit is not collusive. Something more



ever, where no such request need be made to any one. For instance, rule 94 does not apply where there is an antagonism between the directory and the corporate interests, in that the suit if successful would be detrimental to all the directors in other capacities, as, for instance, where the suit is to claim for stockholders in a lessor railroad company a saving by reduction of interest on its bonds, such reduction of interest having been absorbed by the lessor corporation in which the directors of the lessor corporation are interested as stockholders. Moreover, in such a case, no application need be made to a stockholders' meeting.<sup>1</sup>

than this is necessary; and hence if the corporation defendant is of the same state as the other defendants the federal court has no jurisdiction, the corporation defendant being looked upon as the real complainant. *Elkins v. City of Chicago*, 119 Fed. Rep. 957 (1902), the court stating that it did not pass on whether such jurisdiction would exist if the corporation really was hostile to the complainant, and rule 94 had been complied with. The request cannot be omitted merely because the guilty party owns a majority of the stock. *Allen v. Wilson*, 28 Fed. Rep. 677 (1886), holding also that the fact that the guilty party elected the existing board of directors does not excuse request. A suit by a stockholder to remedy frauds on the part of the president does not come within the ninety-fourth rule, and, even if it does, an allegation that the guilty parties control the board of directors excuses any request to them to sue. *Ranger v. Champion, etc. Co.*, 52 Fed. Rep. 611 (1892). Concerning the United States rule as to the request to the company, see also *Whitney v. Fairbanks*, 54 Fed. Rep. 985 (1893). Under rule 94, in the federal courts (104 U. S. ix), it is not enough to allege that the guilty parties are in control of the corporation. This is not enough to dispense with a request to the directors to bring suit. *Squair v. Lookout Mountain Co.*, 42 Fed. Rep. 729 (1890). In the federal courts the stockholder must set out in his pleading when or how the request to sue was made, upon what showing of facts, and that the directors so requested are still in office. *Swope v. Villard*, 61 Fed. Rep. 417 (1894). Where the guilty parties con-

trol the board of directors, the ninety-fourth rule does not require the complainant stockholder to set forth with particularity his efforts to have the directors act. *De Neufville v. New York & Northern Ry.*, 81 Fed. Rep. 10 (1897). No attempt to get the officers to bring suit need be made under rule 94, where the officers themselves are the guilty parties complained of. *Excelsior, etc. Co. v. Brown*, 74 Fed. Rep. 321 (1896). Under the ninety-fourth equity rule, if the board of directors is controlled by the guilty parties, "it is still required that an effort should be made to induce action by the body of the corporation, — by the stockholders, — and that if action cannot be obtained either from the board of directors or from the body of the stockholders, the bill shall show the character and extent of the efforts, and shall particularly show the reasons why the party who brings his suit failed to obtain remedial action within the body of the corporation." *Church v. Citizens' Street Ry.*, 78 Fed. Rep. 526 (1897). Equity rule number 94 does not apply to suits removed into the federal court from state courts. *Earle v. Seattle, etc. Ry.*, 56 Fed. Rep. 909 (1893); *Evans v. Union Pac. Ry.*, 58 Fed. Rep. 497 (1893). A request to the directors is first necessary, and is not excused by vague and general averments as to complicity on the part of the directors in the wrongs complained of. *Ziegler v. Lake Street Elev. R. R.*, 76 Fed. Rep. 662 (1896).

<sup>1</sup> *Delaware & Hudson Co. v. Albany, etc. R. R.*, 213 U. S. 435 (1909). Rule 94 is complied with if it is shown that the defendants constitute a majority



A stockholder and bondholder in a New York corporation may maintain a bill in equity in the United States court to enjoin the attorney-general of New York from enforcing an alleged unconstitutional statute affecting the property of the corporation, and he need not first comply with rule 94, inasmuch as jurisdiction depends on a constitutional question irrespective of citizenship.<sup>1</sup> In a suit by depositors of a bank to hold the directors liable for negligence the depositors need not under the ninety-fourth rule first request the corporation to institute the suit.<sup>2</sup> This rule in the federal courts requiring a stockholder to endeavor to have the corporation bring the suit and to allege what

of the directors who hold five sixths of the capital stock and will not allow the corporation to sue. *Price v. Union Land Co.*, 187 Fed. Rep. 886 (1911). Subscribers to stock may rescind the same on the ground that promoters who sold property to the company had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators, and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only \$150,000 of cash for \$450,000 of stock. Rule 94 of the federal courts does not apply to such a case. *Barcus v. Gates*, 89 Fed. Rep. 783 (1898). Rule 94 does not apply to a case where it appears from the allegations in the bill that there is collusion and that a demand would have been useless. *Eldred v. American, etc. Co.*, 99 Fed. Rep. 168 (1900). No request need be made to the board of directors under rule 94, when they are guilty of the act complained of. *Harrison v. Thomas*, 112 Fed. Rep. 22 (1901). Rule 94 does not require a stockholder to set forth his efforts to induce the corporation to bring suit where he alleges that the corporation is controlled by the defendants. *Berwind v. Canadian, etc. Ry.*, 98 Fed. Rep. 158 (1899); *Universal, etc. Co. v. Stoneburner*, 113 Fed. Rep. 251 (1902). Where one railroad owns a majority of the stock and controls the board of directors of another railroad, and causes the latter to lease its road to the former, a stockholder of the for-

mer may file a bill in equity to set aside such lease on the ground that its terms were so inequitable as to constitute fraud. In such case no demand need be made to the board of directors to bring the suit, if the facts alleged in the bill show that the board of directors is controlled by the guilty party. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). In *Barnes v. Kornegay*, 62 Fed. Rep. 671 (1894), the court very properly held that no request need be made where the state owned most of the stock and controlled the directors and was about to destroy an exemption from taxation. In general see *Westerlund v. Black Bear Min. Co.*, 203 Fed. Rep. 599 (1913).

<sup>1</sup> *Lindsley v. Natural, etc. Co.*, 162 Fed. Rep. 954 (1908). Rule 94 does not prevent a stockholder in a water-works company from filing a bill to enjoin a city from reducing the water rates so low as to deprive the stock of its earning ability, in violation of the fourteenth amendment of the United States constitution, it appearing that the court had jurisdiction of the case irrespective of citizenship, even though it is shown that the company is in sympathy with the stockholder and that the company has already instituted a suit in the state court. *Kimball v. City of Cedar Rapids*, 99 Fed. Rep. 130 (1900), the court saying that the object of the rule was to prevent suits being brought in the federal court, and also to prevent minority stockholders from interfering with the discretion of the directors.

<sup>2</sup> *Foster v. Bank, etc.*, 88 Fed. Rep. 604 (1898).



steps he has taken in that direction does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain the suit. It may be raised by demurrer. A failure, however, to allege such facts does not prevent jurisdiction attaching.<sup>1</sup>

§ 741. *When such an allegation may be omitted.*— There are occasions when the allegation that the stockholder has requested the directors to bring suit and they have refused may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves.<sup>2</sup> Where an illegal dividend was

<sup>1</sup> Illinois, etc. R. R. v. Adams, 180 U. S. 28 (1901). A demurrer may raise the point that no request has been made to the directors. O'Connor v. Virginia, etc. Co., 184 N. Y. 46 (1906). A non-resident stockholder in an Illinois gas corporation may maintain a bill in equity in the federal court to enjoin a city in Illinois from illegally reducing gas rates, the gas company being made also a party defendant, and the question of whether a request by the stockholder to the gas company to bring suit was collusive will not be determined on demurrer. Mills v. City of Chicago, 127 Fed. Rep. 731 (1904).

<sup>2</sup> Quoted and approved in Loomis v. Missouri, etc. Ry., 165 Mo. 469, 488 (1901), and State v. Grant University, 90 S. W. Rep. 294 (Tenn. 1905); Jacobson v. Brooklyn, etc. Co., 184 N. Y. 152 (1906); Polhemus v. Polhemus, 114 N. Y. App. Div. 781 (1906); Barry v. Moeller, 68 N. J. Eq. 483 (1904); Appleton v. American Malting Co., 65 N. J. Eq. 375 (1903); McConnell v. Combination, etc. Co., 30 Mont. 239 (1904); Hingston v. Montgomery, 121 Mo. App. 451 (1906); Columbia, etc. Co. v. Washed, etc. Co., 136 Fed. Rep. 710 (1905). Montgomery Traction Co. v. Harmon, 140 Ala. 505 (1904). No request is necessary if the guilty directors control a majority of the stock. Von Arnim v. American Tubeworks, 188 Mass. 515 (1905). No application to the stockholders or directors is necessary where it would be useless. North

v. Union Savings, etc. Ass'n, 59 Oreg. 483 (1911). A demand is not excused by the fact that the directors who voted for the contract, are still in power. McCoy v. Gas, etc. Co., 135 N. Y. App. Div. 771 (1909). The majority stockholders may maintain a bill in equity to enjoin the board of directors, who represent a minority of the stock, from issuing unissued capital stock to one of themselves, thereby enabling them to control, such being the purpose of the issue. No request to the directors to bring a suit need be made and as to stock already issued no tender of the price need be made; neither need it be alleged that the suit is in behalf of all the stockholders or for the corporation. Trask v. Chase, 107 Me. 137 (1910). Under the Louisiana statute no request need be made if the officers and directors are mismanaging the company. Van Vleet v. Evangeline Oil Co., 127 La. 919 (1911). No meeting of the stockholders need be called to pass upon a stockholder's request to bring suit where a majority of the stock is owned by the parties whose acts are complained of. Virginia, etc. Co. v. Fisher, 104 Va. 121 (1905). A stockholder need not make a request where there is no board of directors. Frederick Milling Co. v. Frederick, etc. Co., 20 S. Dak. 335 (1906). Even though the Michigan statutes authorize one mining company to purchase the stock of other mining companies, yet where this results in establishing a practical monopoly in a certain kind of copper, a



declared by a vote of five of the eleven directors, a stockholder wishing to sue to make them pay it back, under the New Jersey statute, must

minority stockholder may enjoin the voting of such stock so held by the purchasing company, and no formal demand need first be made by him upon the directors to institute the suit. *Bigelow v. Calumet, etc. Co.*, 155 Fed. Rep. 869 (1907). On final hearing, however, the bill in this case was dismissed. See 167 Fed. Rep. 704; aff'd, 167 Fed. Rep. 721. Where a purchaser at tax sale is about to remove the corporate property and the officers do not act, the stockholders may maintain a bill in equity to enjoin the removal of the property and no request to the directors is necessary. *Starr v. Shepard*, 145 Mich. 302 (1906). In a suit by a stockholder for winding up, in accordance with a statute, the insolvent corporation, no previous request need be made to the board of directors. *Briggs v. Traders' Co.*, 145 Fed. Rep. 254 (1906). Where the corporation files a cross-complaint and obtains judgment in its behalf, this excuses the failure to demand of the directors that they bring suit. *Dundon v. McDonald*, 146 Cal. 585 (1905). A stockholder may file a bill to set aside a sale of the entire assets of the company, which is solvent, and a going concern, to another company, and no request to the directors need be made where they authorized the transaction and a majority of the stockholders had ratified it. *Tillis v. Brown*, 47 S. Rep. 589 (Ala. 1908). If it is shown that an application to the officers would be futile, such application need not be made. *Burrows v. Interborough, etc. Co.*, 156 Fed. Rep. 389 (1907). Where the officers know the facts and are not faithfully discharging their duties no request is necessary. *Williams v. Erie Mountain, etc. Co.*, 91 Pac. Rep. 1091 (Wash. 1907); *Wayne Pike Co. v. Hammons*, 129 Ind. 368 (1891); *Donnelly v. Sampson*, 115 N. W. Rep. 1089 (Wis. 1908); *Hannerty v. Standard Theater Co.*, 109 Mo. 297 (1891); *Wickersham v. Crittenden*, 93 Cal. 17 (1892); *Ashton v. Dashaway Assoc.*, 84 Cal. 61 (1890); *Barr v. Pittsburgh, etc. Co.*, 40 Fed. Rep. 412 (1889); *Smith v. Dorn*, 96 Cal. 73 (1892); *Eschweiler v. Stowell*, 78 Wis. 316 (1890); *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (1898); *Anderton v. Wolf*, 41 Hun, 571 (1886); *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483 (1892); *Brinkerhoff v. Bostwick*, 88 N. Y. 52 (1882); s. c., 105 N. Y. 567; *Rogers v. La Fayette, etc. Works*, 52 Ind. 296 (1875); *Tazewell County v. Farmers', etc. Co.*, 12 Fed. Rep. 752 (1882); *Davis v. Gemmell*, 70 Md. 356 (1889); see *Davis v. Gemmell*, 73 Md. 530; *Tippecanoe County v. La Fayette, etc. R. R.*, 50 Ind. 85 (1875); *Wilcox v. Bickel*, 11 Neb. 154 (1881), where the officers had absconded. No demand is necessary if the guilty parties constitute a majority of the board. *Tevis v. Hammersmith*, 66 N. E. Rep. 79 (Ind. 1903); *Whitehead v. Sweet*, 126 Cal. 67 (1899); *Pencille v. State, etc. Co.*, 74 Minn. 67 (1898); *Northern T. Co. v. Snyder*, 113 Wis. 516 (1902); *Hodges' Adm'x v. South Fork, etc. Co.*, 50 S. W. Rep. 969 (Ky. 1899); *Stahn v. Catawaba Mills*, 53 S. C. 519 (1898); *Joy v. Ft. Worth, etc. Co.*, 24 Tex. Civ. App. 94 (1900); *Currier v. New York, etc. R. R.*, 35 Hun, 355 (1885); *Ramsey v. Gould*, 57 Barb. 398 (1870); *Kelsey v. Sargent*, 40 Hun, 150 (1886); *Moyle v. Landers*, 21 Pac. Rep. 1133 (Cal. 1889); s. c., 83 Cal. 579 (1890); *Parrott v. Byers*, 40 Cal. 614 (1871); *Fisher v. Andrews*, 37 Hun, 176 (1885); *Young v. Drake*, 8 Hun, 61 (1876); *Higgins v. Lansingh*, 154 Ill. 301 (1895); *Young v. Alhambra Min. Co.*, 71 Fed. Rep. 810 (1895); *Sage v. Culver*, 147 N. Y. 241 (1895); *Green v. Hedenberg*, 159 Ill. 489 (1896); *Gerry v. Bismarck Bank*, 19 Mont. 191 (1897); *George v. Central R. R., etc. Co.*, 101 Ala. 607 (1894); *Bell v. Montgomery Light Co.*, 103 Ala. 275 (1894); *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894); *Pondir v. New York, Lake Erie, etc. R. R.*, 72 Hun, 384 (1893); *Mount v. Radford Trust Co.*, 93 Va. 427 (1896); *Cowles v. Glass*, 30 S. W. Rep.



first request the corporation to bring suit, but if the corporation in its answer traverses the illegality, this shows that a request would be

293 (Tex. 1895); *Loftus v. Farmers', etc. Assoc.*, 8 S. Dak. 201 (1896); *Heath v. Erie Ry.*, 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976, the court saying: "It would be a mockery to require or permit a suit against them to be brought and prosecuted under their management to obtain relief sought by this bill"; *Mussina v. Goldthwaite*, 34 Tex. 125 (1870); *Doud v. Wisconsin, etc. Ry.*, 65 Wis. 108 (1886); *Pond v. Vermont Valley R. R.*, 12 Blatchf. 280 (1874); s. c., 19 Fed. Cas. 976. But an allegation that the management is under the control of persons appointed by the guilty parties is insufficient. See *McMurray v. Northern Ry.*, 22 Grant (U. C.), 476 (1875). And an allegation that the directors are "nearly if not entirely" in league with the guilty parties is insufficient. *Cogswell v. Bull*, 39 Cal. 320 (1870). See 156 S. W. Rep. 889.

Where one of three directors, who is also president and manager, dies, and the three owned all the stock and the company owed the decedent \$45,000 and other parties \$15,000, and had no money, and the works of the company were idle, and the two remaining directors could not agree, and the treasurer was managing the business illegally, the court will appoint a receiver *pendente lite*, the suit being to preserve the assets for the benefit of the creditors. In such a case no request need first be made to the directors to bring the suit. *Sheridan, etc. Works v. Marion T. Co.*, 157 Ind. 292 (1901). No request to the board of directors or to a stockholders' meeting that suit be brought need be made where a majority of the directors will be defendants, and no meeting of the stockholders can be called except by them. *Schoening v. Schwenk*, 112 Iowa, 733 (1901). In a stockholders' suit to hold directors in a national bank liable for negligence, a request to the receiver to bring the suit is unnecessary where the receiver was one of the directors. *Flynn v. Third Nat. Bank*, 122 Mich. 642 (1900). A request is necessary,

even though it is alleged that a majority of the directors are involved in the fraud complained of, where it appears that such directors were not qualified to act as directors by reason of not being stockholders, and never had acted as such. *Loomis v. Missouri, etc. Ry.*, 165 Mo. 469 (1901). Where the board of directors of a prosperous mining corporation have sold all its assets to another corporation in exchange for the stock of the latter, and a stockholders' meeting has been called for the purpose of ratifying the same under a statute, a minority stockholder may enjoin such ratification, if it is *ultra vires*, without requesting the board of directors to bring suit, inasmuch as they have already committed themselves as to their position. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). Where the majority of the directors control also a majority of the stock no request is necessary. *Alexander v. Automatic, etc. Co.*, [1900] 2 Ch. 56, rev'g [1899] 2 Ch. 302. In a suit by a stockholder to restrain the directors from transferring all the property to another corporation without consideration, no request is necessary. *Boaz v. Sterlingworth, etc. Co.*, 68 N. Y. App. Div. 1 (1902). Where the stockholders of a bank have legally ordered the winding up of its business, and for three years thereafter the officers still continue to do business at a great loss, apparently without any effort to wind up its affairs, a stockholder may file a bill for an accounting and the appointment of a receiver, and no request to the corporation to bring the suit need be made. *Mathews v. Bank of Allendale*, 60 S. C. 183 (1901). A request to the board of directors is necessary, even though the corporation has been enjoined from commencing suit, and even though there is involved the validity of a mortgage given on the corporate property for the benefit of the president. *Smith v. Bulkley*, 18 Colo. App. 227 (1902). If the directors are the guilty parties, a stockholder suing



futile.<sup>1</sup> Nevertheless as a rule the complainant must allege facts which excuse such a demand or request to the directors, and these facts must be stated with particularity and definiteness.<sup>2</sup> In a suit by a stock-

to prevent their running the corporation for the benefit of a partnership need not allege a request to them to sue. *Rothwell v. Robinson*, 39 Minn. 1 (1888); s. c., 44 Minn. 538. If the fraud has been by the majority of the stockholders on the minority, no request to the directors to sue need be made. *Nathan v. Tompkins*, 82 Ala. 437 (1887). No request is necessary to the directors to undo an illegal lease when they cannot undo it except with the consent of another company. *Tippecanoe County v. Lafayette, etc. R. R.*, 50 Ind. 85 (1875). A request to the directors is not excused by the fact that the guilty party — the corporate treasurer — owns a majority of the stock. *Dunphy v. Traveller Newsp. Assoc.*, 146 Mass. 495 (1888). In North Carolina it would seem that a demand on the guilty officers is necessary in any case. *Moore v. Silver, etc. Co.*, 104 N. C. 534 (1889). In a stockholder's suit to enjoin a rival company from voting stock in the stockholder's company, a request to the directors to sue is unnecessary where the directors are controlled by such rival company. *Maack v. De Bardeleben, etc. Co.*, 90 Ala. 396 (1890). A stockholder may be permitted to bring suit against the receiver of the corporation to set aside a fraudulent assessment by him on stock, and a request need not be made to the receiver to bring the suit, he being guilty of the fraud. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522 (1896). A request is unnecessary in a suit to recover back an illegal salary where the guilty parties are in control. *Eaton v. Robinson*, 18 R. I. 396 (1893); s. c., 19 R. I. 146 (1895). A stockholder may bring suit in behalf of the corporation to compel the president to pay his subscription where the president is in control of the company and refuses to pay such subscription. No request to the directors is necessary in such a case. *Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891). A request is not ex-

cused by the fact that a majority of the stockholders sustain the acts complained of. *Decatur, etc. v. Palm*, 113 Ala. 531 (1896). No request is necessary where the owners of a majority of the stock cause the directors to sell the property to a person who buys for them. *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320 (1892). See also § 740, *supra*.

<sup>1</sup> *Herriek v. Dempster*, 73 N. J. Eq. 145 (1907).

<sup>2</sup> Quoted and approved in *Kern v. Arbeiter, etc. Verein*, 139 Mich. 233 (1905). See also cases in preceding note. The plaintiff must allege that the officers have committed a breach of trust, and though requested the corporation refuses to act or is controlled by the wrongdoers, and that he has been diligent in prosecuting his remedy. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). An allegation that a majority stockholder controlled the directors and also controlled directors in other corporations and that thereby acts of spoliation were committed does not excuse the failure to request the directors to bring suit. *Virginia, etc. v. Fisher*, 104 Va. 121 (1905). A letter to the directors requesting them to call a meeting and to take steps to redeem property that had been fraudulently sold under foreclosure is insufficient. *Johns v. McLester*, 137 Ala. 283 (1903). Where a majority of the board of directors are usurpers the request should be made to the proper board, and hence a failure to make such request is fatal. *Ide v. Bascomb*, 18 Colo. App. 415 (1903). The general allegation that the guilty parties control the corporation and refuse to permit the suit to be brought is insufficient. *Deveny v. Hart Coal Co.*, 63 W. Va. 650 (1908). An allegation that frequent protests had been made is not a sufficient allegation of a request to sue. *Boyd v. Simms*, 87 Tenn. 771 (1889), holding also that it is insufficient to show



holder in a lessor railroad to compel the lessee to account, a request to the directors of the lessor to bring the suit is not excused by the fact that the lessee owned a majority of the stock of the lessor and elected its directors.<sup>1</sup> Where a receiver is in charge and he is one of the guilty parties no request need be made to him.<sup>2</sup> The stockholder may bring his suit although the corporation has been dissolved.<sup>3</sup>

In the federal courts the 94th rule is dispensed with where a request to the directors would be out of place.<sup>4</sup>

that a majority of the directors are large stockholders in a competing company, although the charge is that such directors are fraudulently favoring the latter company. It is not sufficient to allege that a majority of the directors "are acting in the interest of, and are under the control of," the guilty directors. It must be alleged that they are wilfully disregardful of the interests of the corporation, or would be if informed of the injurious effect of their actions, or would yield to the influence or control of the guilty directors if aware of the purposes and uses for which that influence is exercised. *Brewer v. Boston Theatre*, 104 Mass. 378 (1870). A request is not excused by an allegation that the complainant had offered to assume the expense and conduct of the litigation. *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97 (1896). A request is necessary, and it is insufficient that the plaintiff had demanded his part of what he would have received if the illegal act had not been committed. *Flynn v. Brooklyn City R. R.*, 9 N. Y. App. Div. 269 (1896); *aff'd*, 158 N. Y. 493 (1899). No request is necessary where, in case the directors brought suit, the suit would be subject to the control of persons opposed to its success, and where the directors themselves are the wrongdoers or the partisans thereof. The allegation of these facts must be statements of fact and not conclusions of law. The manner in which the directors are interested must be pointed out. *Steiner v. Parsons*, 103 Ala. 215 (1893). In alleging the reason why a request has not been made to the board of directors a plaintiff must set forth the facts explicitly and definitely. *Louis-*

*ville, etc. R. R. v. Neal*, 128 Ala. 149 (1900). The mere fact of relationship between stockholders does not excuse failure to apply to the stockholders to redress a corporate wrong. *Hagood v. Smith*, 162 Ala. 512 (1909). General allegations of fraud and collusion are not sufficient to excuse the failure to request the board of directors to act. *Continental, etc. Bank v. Allis-Chalmers Co.*, 200 Fed. Rep. 600 (1912).

<sup>1</sup> *Wolf v. Pennsylvania R. R.*, 195 Pa. St. 91 (1900). A request by a stockholder to the corporation to bring suit against the directors for declaring dividends in violation of a statute is not excused by the fact that five out of the twelve directors were directors when such dividends were declared, even though one of the others was a brother of one of the five and another was an employee of one of the five. *Siegman v. Maloney*, 65 N. J. Eq. 372 (1903). Even though the guilty director has elected, through his control of the stock of the corporation, the board of directors, yet that fact does not excuse failure to make a request to them to bring suit. *Bowne v. Smith*, 44 N. Y. Misc. Rep. 575 (1904).

<sup>2</sup> *Sigwald v. City Bank*, 82 S. C. 382 (1909).

<sup>3</sup> *Lafayette Co. v. Neely*, 21 Fed. Rep. 738 (1884); *Taylor v. Holmes*, 127 U. S. 489 (1888); *General Electric Co. v. West Asheville Imp. Co.*, 73 Fed. Rep. 386 (1896). Even after a dissolution a stockholder may file a bill to recover assets that have been wrongfully diverted. *Boyd v. Hankinson*, 92 Fed. Rep. 49 (1899). Even though the corporation is dissolved a stockholder must show a demand before he himself commences suit. *Elmergreen v. Weimer*, 138 Wis. 112 (1909).

<sup>4</sup> See § 740, *supra*.



§ 742. *Miscellaneous allegations of the complainant.* — The allegations which set forth the complaining stockholder's cause of action will of course depend largely on the particular facts of each case. It is necessary, however, to determine first whether the allegations are to make out a case of fraud, or of an *ultra vires* act, or of a negligent act. If an *ultra vires* act is complained of, the gist of the action is not fraud, and fraud need not be and should not be alleged.<sup>1</sup> But in a stockholder's suit attacking a corporate contract for fraud and breach of contract, the fraud may be unsustained and yet judgment given for breach of the contract.<sup>2</sup> But where the action is to remedy a fraud, the allegations must clearly charge to that effect. The word "corrupt" has been held insufficient herein.<sup>3</sup> Fraud need not be alleged if there has been a breach of the fiduciary relation.<sup>4</sup> A general allegation that the president has appropriated large amounts of money of the corporation to his own use, the details of which the complainant is unable to state, is insufficient. Such an allegation is merely a fishing allegation.<sup>5</sup> A suit by a minority stockholder against the majority alleging a conspiracy to defraud the company will not lie where it is not alleged that the directors were parties to the conspiracy.<sup>6</sup> If the action is to

<sup>1</sup> *Clinch v. Financial Corp.*, L. R. 5 Eq. 450, 482 (1868). If the pleadings charge fraud as the basis of the suit, fraud must be proved; otherwise the suit fails, even though the evidence shows a right to relief on the ground of account, discovery, or some other ground of equitable jurisdiction. *Spies v. Chicago, etc. R. R.*, 40 Fed. Rep. 34 (1889). Where a stockholder of a railroad which has been foreclosed and reorganized attacks the foreclosure on the ground of fraud he cannot on appeal change his complaint and claim that inasmuch as the plan of reorganization allowed the majority stockholders to come in on a more favorable basis than the minority, he was entitled to come in on the same terms as the majority. *MacArdell v. Olcott*, 189 N. Y. 368 (1907). The dissenting opinion to the effect that on the merits the majority stockholders should have allowed the minority stockholders to come in on the same basis as the former came into the reorganization has much force.

<sup>2</sup> *Callanan v. K., A. C. etc. R. R.*, 199 N. Y. 268 (1910).

<sup>3</sup> *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474 (1875). The

mere allegation of fraud without specifying the facts is insufficient. *Schell v. Alston Mfg. Co.*, 149 Fed. Rep. 439 (1906).

<sup>4</sup> *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97 (1896). Where stockholders desire to attack a deed of the corporation on the ground of fraud, they must do so affirmatively, and not by simply denying its execution. *Morrill v. Little Falls, etc. Co.*, 53 Minn. 371 (1893). In a suit against an officer to recover back moneys, his position as officer may be proved by his signatures as such officer. *Putnam v. Gunning*, 162 Mass. 552 (1895).

<sup>5</sup> *Blair v. Telegram News Co.*, 172 Mass. 201 (1898). In a stockholder's suit to cancel an alleged agreement by which the corporation is to pay to a director royalties on a void and worthless patent, the allegation that such director with his sons constitute a majority of the board and that the sons are without means and are supported by their father, is material and not impertinent. *Burden v. Burden*, 124 Fed. Rep. 250 (1903).

<sup>6</sup> *Brown v. Utopia Land Co.*, 118 N. Y. App. Div. 364 (1907).



set aside an *ultra vires* act, the act itself must be stated with particularity,<sup>1</sup> and the articles of incorporation should be alleged in part at least.<sup>2</sup> The complaint need not allege who the other stockholders are, how numerous, or whether a majority.<sup>3</sup> The stockholder need not allege that he was a stockholder at the time of the act or that his stock has since come to him by operation of law.<sup>4</sup> It is not necessary to allege that the stockholders have been free from acquiescence or laches.<sup>5</sup> In North Carolina it is held that the complaining stockholder must aver that he is a "*bona fide* owner of the stock; that he bought the same in good faith, and not for mere vexatious purposes."<sup>6</sup>

A general allegation that the board of directors were negligent does not render a particular director liable.<sup>7</sup> The essential allegations in a stockholder's suit to hold directors liable for negligence are, first, the same allegations as the corporation would have made if it had brought the suit, and, second, that he is a stockholder and the corporation has refused or unreasonably failed to bring the action. Allegations as to the injury to his stock are not proper.<sup>8</sup> A stockholder may enjoin an illegal corporate act without alleging actual injury, present or future, to himself.<sup>9</sup> A demurrer is not the proper way to raise the question of laches.<sup>10</sup>

A stockholder is not liable for libel and slander by reason of allegations in his bill in equity against directors for fraud.<sup>11</sup> Neither is he liable for malicious prosecution, there having been no arrest of the person or seizure of property.<sup>12</sup> While a stockholder at a meeting of a private corporation may charge fraud against another stockholder or officer

<sup>1</sup> *Leo v. Union Pac. Ry.*, 19 Fed. Rep. 283 (1884); s. c., 17 Fed. Rep. 273. The plaintiff must allege that the corporation is one for profit. *Applegarth v. McQuiddy*, 77 Cal. 408 (1888).

<sup>2</sup> *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901).

<sup>3</sup> *Descombes v. Wood*, 91 Mo. 196 (1886).

<sup>4</sup> *Parsons v. Joseph*, 92 Ala. 403 (1890). See also § 736, *supra*. As to the federal courts, see § 737, *supra*.

<sup>5</sup> *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889). See also § 733, *supra*. A stockholder must allege that neither he nor any prior owner of his stock has acquiesced in the acts complained of, where the amount of the stock owned by him is very small, comparatively. *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901). For the various allegations to be made in a complaint to set aside an illegal

alienation of corporate property, see *Beecher v. Schieffelin*, 4 N. Y. Civ. Proc. 230 (1883).

<sup>6</sup> *Moore v. Silver, etc. Co.*, 104 N. C. 534 (1889).

<sup>7</sup> *Fisher v. Graves*, 80 Fed. Rep. 590 (1897). The stockholder's complaint against directors of the bank for negligence need not allege particular losses nor all of the losses in particular, nor who were on the managing board at the time of each particular loss. *Sigwald v. City Bank*, 74 S. C. 473 (1906).

<sup>8</sup> *Kavanaugh v. Commonwealth T. Co.*, 181 N. Y. 121 (1905).

<sup>9</sup> *Schwab v. Potter*, 194 N. Y. 49 (1909).

<sup>10</sup> See also § 733, *supra*.

<sup>11</sup> *Runge v. Franklin*, 72 Tex. 585 (1889). See § 645, *supra*.

<sup>12</sup> *Cincinnati, etc. Co. v. Bruck*, 61 Ohio St. 489 (1900).



in connection with the corporate affairs, yet a newspaper may have no right to report such charge and may be held liable for libel in doing so.<sup>1</sup> A stockholder in telegraphing to another stockholder, in regard to a contested corporate election, is not liable for libel, even though he reflects on the competency of the former manager. Both parties being interested in the communication, it is privileged, where it is in good faith.<sup>2</sup>

§ 743. *Prayer for relief.* — The relief for which prayer is made in the bill will depend upon the character of the act complained of, and also of the facts in the particular case. Generally it is to compel the director or third parties to turn over to the corporation money or property fraudulently held by the defendants, or to enjoin acts, or to set aside transactions, or for a receiver, or for dissolution, or for more than one of these. It is well settled that the prayer for relief may be in the alternative.<sup>3</sup> The relief granted cannot exceed that which is asked.<sup>4</sup> Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved.<sup>5</sup>

§ 744. *Property received under the act objected to must be returned upon that act being set aside.* — This is a principle of law that applies to all the remedies given by a court of equity in remedying the frauds or *ultra vires* acts of the directors or third persons against the corporation. He who seeks equity must do equity. An *ultra vires* act will not be set aside unless the money or property received by the corporation from third persons thereby is returned to such persons.<sup>6</sup>

<sup>1</sup> Kimball v. Post Pub. Co., 199 Mass. 248 (1908), the court saying: "No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest."

<sup>2</sup> Ashcroft v. Hammond, 197 N. Y. 488 (1910).

<sup>3</sup> Colton v. Ross, 2 Paige, 396 (1831); Thomas v. Hobler, 4 De G., F. & J. 199 (1861).

<sup>4</sup> Latimer v. Eddy, 46 Barb. 61 (1864). Plaintiff may ask for more

than he is entitled to. Pollitz v. Wabash R. R., 142 N. Y. App. Div. 755 (1911); s. c., 207 N. Y. 113.

<sup>5</sup> Polhemus v. Polhemus, 114 N. Y. App. Div. 781 (1906).

<sup>6</sup> Buford v. Keokuk, etc. Co., 69 Mo. 611 (1879); Harpending v. Munson, 91 N. Y. 650 (1883); New Castle, etc. R. R. v. Simpson, 23 Fed. Rep. 214 (1885), allowing to the party outlays, compensation, and interest. Cf. Gray v. New York, etc. Co., 3 Hun, 383; Thomas v. Railroad Co., 101 U. S. 71 (1879); Louisiana v. Wood, 102 U. S. 294 (1880); Chapman v. Douglas County, 107 U. S. 348 (1882); Salt Lake City v. Hollister, 118 U. S. 256, 263 (1885); Green's Brice's Ultra Vires, 717. The benefits received by the corporation must be returned in order to



In a stockholder's suit to have a corporate contract rescinded for fraud in its inception and default in carrying it out, tender of restitution in

sustain an action setting aside a fraudulent contract. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). Even though the purchasers of an equity in land sell it to a corporation which they form, at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. *Fleckenstein v. Waters*, 160 Mo. 649 (1901). Where a mining corporation makes a contract with a person holding a majority of its stock and who has furnished the qualification shares for the directors, by which contract the stock is issued to him for work to be done on the mine, minority stockholders may cause the contract to be set aside, and the decree may provide that the stock shall be delivered back upon the repayment of the money. *Jones v. Green*, 129 Mich. 203 (1901). Even though directors are interested in the construction company which takes the bonds and the property is foreclosed and is bought in by the directors, yet the railroad company cannot set aside the transaction unless it offer to pay to the directors what they have expended or offers to take the property subject to such mortgage bonds. *San Antonio, etc. Ry. v. San Antonio, etc. R. R.*, 25 Tex. Civ. App. 167 (1900). Where promoters pay out less than \$30,000 to secure options on land and then sell the options to a corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in services and not making a full dis-

closure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900). The complaining stockholder need not offer to return any benefits to a director to whom the property of the corporation has been transferred, where the director has given nothing therefor. *Mobile, etc. Co. v. Gass*, 129 Ala. 214 (1901). Stockholders complaining of a reorganization must offer to pay their share of what may be found due if the transaction is set aside. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). Even though an insolvent corporation sells its property, yet if the stockholders do not cause the purchase money to be tendered back they cannot set aside the sale for fraud. *Perchmann v. Mt. Eagle, etc. Co.*, 128 La. 894 (1911). Even though the secretary has sold the corporate property without authority, yet if the money has been used by the corporation, the amount must be tendered back before the transfer can be set aside. *Alaska, etc. Co. v. Solner*, 123 Fed. Rep. 855 (1903). An order authorizing the receiver to sell the assets to another corporation, in which the directors are interested, at a certain price, a condition of the sale being that the directors should be released by the receiver from personal liability on their part for past acts, cannot be set aside as to such release by a suit by a stockholder for that purpose, where the effect would be to deprive the directors of the benefit to them without returning the benefit they confer. *Craig v. James*, 89 N. Y. App. Div. 541 (1904); *aff'd*, 181 N. Y. 538. Where the directors of a railway company enter into a contract with third persons, whereby a new



the complaint is sufficient, and if he obtains a decree it relates back to the commencement of the suit.<sup>1</sup> And in a stockholder's suit to hold directors to account for stock practically given away, the complainant need not offer to return any consideration given for the stock, because the complainant has no control over the assets of the company, and the court can adjust the equities by final decree.<sup>2</sup> A tender prior to the

company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on a suit by the stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. *Hitchcock v. Barrett*, 50 Fed. Rep. 653 (1892). The consideration must be returned. *Pierson v. McCurdy*, 33 Hun, 520 (1884), where a receiver sued a director for funds used to purchase stock; *aff'd* on another point in 100 N. Y. 608. See also *Gould v. Cayuga*, etc. Bank, 86 N. Y. 75 (1881); but see *Allerton v. Allerton*, 50 N. Y. 670 (1872). Where the president of a corporation by fraud causes a purchase of property by the company from himself at an excessive price, he cannot demand that he be put *in statu quo* before relief is granted the company. *Gerry v. Bismarck Bank*, 19 Mont. 191 (1897).

Payment by bondsmen of moneys used by directors in illegal purchases of bonds prevents action by the receiver of the corporation against the directors. *Hun v. Van Dyck*, 26 Hun, 567 (1882); *aff'd*, 92 N. Y. 660. As to the right of the fraudulent possessor to compensation for improvements, see *Jackson v. Ludeling*, 99 U. S. 513 (1878). Where two religious corporations united by one conveying its property to the other and the latter paying the debts of the former, a judgment setting aside such sale will also require the former to restore to the latter the money advanced by it. *Madison Ave. Bapt. Ch. v. Oliver St. Bapt. Ch.*, 73 N. Y. 82 (1878). A stockholder seeking to have corporate bonds canceled must offer to return the consideration.

*Spencer v. Clarke*, 1 N. Y. Supp. 533 (1888). *Colojoins v. Penn-Wyoming*, etc. Co., 203 Fed. Rep. 726 (1912).

<sup>1</sup> *Callanan v. K.*, A. C., etc. R. R., 199 N. Y. 268 (1910). In a suit by a minority stockholder to set aside an illegal sale of the property to a majority stockholder, he need not return the consideration in order to maintain the suit. *Citizens, etc. Trust Co. v. Illinois Cent. R.*, 182 Fed. Rep. 607 (1910). Even though \$15,000 of stock is issued to a director for doubtful assets which afterwards turn out to be of little value, yet if all the stockholders knew of it and assented to it, it is too late for them to ask to have the stock returned and canceled four years afterward, especially where it is impossible to restore the parties to their original positions. *Stephany v. Marsden*, 75 N. J. Eq. 90 (1908).

<sup>2</sup> *Continental Securities Co. v. Belmont*, 206 N. Y. 7 (1912). The majority stockholders may maintain a bill in equity to enjoin the board of directors, who represent a minority of the stock, from issuing unissued capital stock to one of themselves, thereby enabling them to control, such being the purpose of the issue. No request to the directors to bring a suit need be made and as to stock already issued no tender of the price need be made; neither need it be alleged that the suit is in behalf of all the stockholders or for the corporation. *Trask v. Chase*, 107 Me. 137 (1910). Where minority stockholders did not discover that stock had been sold at less than par for cash until four years thereafter, they may then maintain a suit to have the sale set aside and they need not offer to restore to the purchaser the price he paid. *Anderson v. Scandia Min. Syndicate*, 26 S. Dak. 558 (1910). If the complainant never received the consideration and cannot compel others



suit need not be made where the amount to be tendered is an unascertained amount. It is sufficient to offer in the complaint to pay or perform whatever obligations may exist.<sup>1</sup> A stockholder who brings suit to have a municipal subscription canceled on the ground that it is illegal need not first return to the municipality bonds which have been received in payment of the subscription.<sup>2</sup> In a suit by a minority stockholder of a land company to cancel a contract between the company and a railroad corporation whereby the latter advanced large sums of money to the former and practically named its directors and officers, the stockholder charging that there was a fraudulent plan to deprive him of the stock, he need not first tender to the railroad company the sums so advanced.<sup>3</sup> Where at the instance of a stockholder, the court sets aside a transfer of corporate property to a director, the stockholder, however, being obliged to repay the consideration, for which the decree gives him a lien upon the property therefor, the stockholder may foreclose such lien and may have a receiver of the corporation appointed.<sup>4</sup> Where the company purchases at an excessive price real estate in which the directors are personally interested, they may be compelled to repay the excess with interest or take the property at cost; otherwise the property should be sold and they be held liable for the difference between the price and the price originally paid with interest.<sup>5</sup> If a director through his wife sells property to the corporation for an exorbitant price in stock and mortgage bonds, and the hotel built thereon fails,

to return it, it is not necessary for him to offer to return it. See *Lamb v. San Pedro, etc. Co.*, 3 N. M. 632 (1886). Where the majority have fraudulently caused the directors to sell land to them and to buy stock of them, the minority need not offer to restore anything in order to institute suit. *Woodroof v. Howes*, 88 Cal. 184 (1891). A stockholder need not make a tender to a purchaser in bad faith of corporate property fraudulently sold by the directors. The action was to enjoin and set aside the sales. *Gray v. New York, etc. Co.*, 3 Hun, 383 (1875). It is clear that the stockholder himself cannot be expected to repay this consideration. A just rule would allow him to pray in his bill that the corporation repay the consideration. Cf. *Atlantic, etc. Tel. Co. v. Union Pac. Ry.*, 1 Fed. Rep. 745 (1880), holding that though a contract be *ultra vires* a corporation will be restrained from recovering possession of property conveyed by

it, except by due process of law and after return of the consideration. A stockholder suing to set aside need not tender if the party sued knew of the stockholder's dissent at the time when he entered into the act. *Metropolitan Elev. Ry. v. Manhattan Elev. Ry.*, 11 Daly, 373 (1884).

<sup>1</sup> *Zebley v. Farmers' L. & T. Co.*, 139 N. Y. 461 (1893).

<sup>2</sup> *Stebbins v. Perry County*, 167 Ill. 567 (1897). A stockholder need not offer to return property acquired by the corporation under a fraudulent agreement or show any effort to procure its return by the corporation where he alleges that he requested the corporation to bring the suit and it refused. *Edwards v. Mercantile, etc. Co.*, 124 Fed. Rep. 381 (1903).

<sup>3</sup> *Holt v. California, etc. Co.*, 161 Fed. Rep. 3 (1908).

<sup>4</sup> *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (1898).

<sup>5</sup> *Klein v. Independent, etc. Assoc.*, 231 Ill. 594 (1907).



the court may reduce the mortgage by the amount of profit made by the director.<sup>1</sup> The officers of a building association who transferred its assets to a trust company without authority, are liable to the stockholders of the former upon the trust company becoming insolvent and not paying the price, but such officers are entitled to the benefit of any security given by the trust company.<sup>2</sup> A stockholder redeeming the corporate property sold under an execution may recover from the company the amount paid to redeem.<sup>3</sup>

§ 745. *Injunction restraining the corporate officers and others from doing specified acts.* — The ordinary remedy of the stockholder is an injunction by a court of equity restraining the corporate officers from doing the specified fraudulent or *ultra vires* act which the stockholder complains of.<sup>4</sup> A stockholder may enjoin an illegal corporate act without alleging actual injury, present or future, to himself.<sup>5</sup> Where a majority of the stockholders are in favor of certain action which the

<sup>1</sup> Voorhees v. Malott, 73 N. J. Eq. 673 (1908). Where the president pledges \$100,000 of the company's bonds for a corporate debt of \$21,500 and then allows them to be sold for non-payment, and the nominal purchaser purchases secretly for a director, secretary and attorney of the company and for a former president of the company and the company becomes bankrupt, they will be allowed only the amount they paid with interest. Canton, etc. Co. v. Rolling Mill Co., 168 Fed. Rep. 465 (1909).

<sup>2</sup> Brinkerhoff v. Holland T. Co., 171 Fed. Rep. 781 (1909).

<sup>3</sup> Duquesne, etc. Co. v. Glaser, 46 Colo. 186 (1909).

<sup>4</sup> Where a proposed consolidation is attacked by a stockholder, a preliminary injunction granted so as not to render useless the whole suit, in case it is successful, will not be disturbed by the court of appeals. Young v. Rondout, etc. Co., 129 N. Y. 57 (1891); River Dun. Nav. Co. v. North Midland Ry., 1 Ry. Cas. 135, 153 (1838); Blatchford v. Ross, 54 Barb. 42 (1869). In Indiana it is held that no injunction will be granted against the payment of an unfounded claim by the directors, but that the action will proceed and other relief be granted. Rogers v. Lafayette Agric. Works, 52 Ind. 296 (1876). Vague fears are no ground for an injunction. Emerson v. South, etc. Co., 59 Kan.

778 (1898). A stockholder may maintain a suit in the state court to enjoin directors from extending a lease at a reduced rental and from releasing security for such rental, where he charges fraud, even though both the lessor and lessee are in the hands of receivers appointed by the federal court. Moreover the federal court has no authority in such suits to compel the lessor to execute such lease. Guaranty Trust Co. v. North Chicago St. R. Co., 130 Fed. Rep. 801 (1904). Where in a suit by a complaining stockholder the main relief is denied he will not be allowed to amend so as to enjoin particular acts by some of the defendants. Pierce v. Old Dominion, etc. Co., 65 Atl. Rep. 1005 (N. J. 1907). Under the statutes of New York a director of a foreign corporation may maintain in the New York courts a suit to compel the president to account for property misappropriated or wasted by him, but the court will not appoint a general receiver and enjoin the corporation from exercising its powers, although it may enjoin the president from acting and may appoint a receiver of the property in New York state. Acken v. Coughlin, 103 N. Y. App. Div. 1 (1905). As to foreign corporations, see §§ 734, 738, *supra*.

<sup>5</sup> Schwab v. Potter, 194 N. Y. 409 (1909)



minority object to as illegal, the latter need not wait until the action has been voted but may apply for an injunction at once.<sup>1</sup> Where a corporation has brought suit against its president for an accounting for money misappropriated by him, and where the president owns a majority of the stock, the court may enjoin the holding of an elections it being shown that the president has power to elect a board of director, who may defeat the purpose of the suit.<sup>2</sup> In a suit by a stockholder to hold a president liable for an illegal salary paid to him the validity of his election may be contested and an injunction asked against his continuing to act as president.<sup>3</sup>

Generally the injunction runs to the corporation itself; and this is sufficient to make it effective and binding upon all corporate officers to whose notice it comes.<sup>4</sup> Where the officers of a corporation refuse to comply with an order of the court to allow inspection of the corporate property they are liable for contempt, even though they are not parties to the suit.<sup>5</sup> In a stockholders' suit to set aside a consolidation on the ground that it was *ultra vires* and also fraudulent in that one company controlled the other, a preliminary injunction will not be granted if the consolidation has already been completed.<sup>6</sup> A shareholder cannot

<sup>1</sup> *Page v. Whittenton Mfg. Co.*, 211 Mass. 424 (1912).

<sup>2</sup> *Coxe v. Huntsville, etc. Co.*, 129 Ala. 496 (1901). See also § 616, *supra*. Even though a "trust" has purchased stock in a corporation, yet another stockholder cannot maintain a suit in equity to have such stock forfeited to the corporation itself. His remedy is to compel the corporation to abandon any illegal contract or connection. Hence, the mere fact that the Amalgamated Copper Company, a New Jersey corporation, has acquired a majority of the stock of a Montana copper company, as well as of other companies, is not sufficient to enable a minority stockholder in a Montana company to obtain an injunction against the voting of such stock or the paying of dividends thereon, or the directors acting as such. *MacGinniss v. Boston, etc. Co.*, 29 Mont. 428 (1904).

<sup>3</sup> *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903). Cf. § 618, *supra*.

<sup>4</sup> See § 738, *supra*, and § 755, *infra*; also *Hatch v. Chicago, etc. R. R.*, 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799; *Trimmer v. Pennsylvania, etc. R. R.*, 36 N. J. Eq. 411 (1883),

holding, however, that the officers are not liable herein for contempt by reason of the acts of subcontractors. See *People v. Sturtevant*, 9 N. Y. 263 (1853); *People v. Pendleton*, 64 N. Y. 622 (1876). A director may resign after the company and officers have been enjoined from interfering with the corporate assets and may then pursue his remedies as a corporate creditor. *Mexican Ore Co. v. Mexican, etc. Co.*, 47 Fed. Rep. 351 (1891). The corporation must not only be made a party defendant, but must be served or voluntarily appear before an injunction is granted. *Morshead v. Southern Pac. Co.*, 123 Fed. Rep. 350 (1903).

<sup>5</sup> *Heinze v. Butte, etc. Co.*, 129 Fed. Rep. 274 (1904).

<sup>6</sup> *Stevens v. Missouri, etc. Ry.*, 106 Fed. Rep. 771 (1901). A preliminary injunction against an alleged fraudulent lease of a railroad should not be granted where the lease has already been executed and delivery made. *Content v. Metropolitan, etc. R. R.*, 73 N. Y. App. Div. 230 (1902). Where it is conceded that a railroad corporation has no power to consolidate with another the court will not



enjoin an agreement authorized by the directors that their pay be increased, inasmuch as such agreement will be legal if ratified by a majority in interest of the stockholders.<sup>1</sup> In a suit to compel the retirement of stock alleged to have been issued fraudulently to control the company, the officers cannot be enjoined from doing any corporate business pending the suit.<sup>2</sup> But an injunction order against officers acting is not invalid as preventing their filing bankruptcy proceedings in the federal court.<sup>3</sup>

§ 746. *Appointment of a receiver — Removal of directors by the court or corporation.* — The law is well settled that the courts have no power to remove corporate officers.<sup>4</sup> Neither can the stockholders, in meeting assembled, remove the officers.<sup>5</sup> It is also the prevailing and general rule that a court of equity will not practically remove corporate officers by enjoining them from performing any of their customary duties, and by appointing a receiver to manage the corporate affairs.

The appointment of a receiver as a remedy for the frauds or *ultra vires* acts of the directors is a punishment of the innocent and complaining party for the acts of the guilty party. As was well said by an Illinois court, "in principle this is very much like sending the creditor to jail, because his debtor cannot pay him, and is so opposed to that spirit of justice which pervades all the true doctrines of equity jurisprudence that it will not bear discussion."<sup>6</sup> A stockholder in a com-

at the instance of a minority stockholder enjoin a possible consolidation under a statute which the legislature may hereafter pass; neither will the court enjoin the company from selling certain stock, even though such sale will expedite a consolidation. *Ryan v. Williams*, 100 Fed. Rep. 172 (1900). And even after such statute has been passed the court will not grant a preliminary injunction against consolidation under it on the ground that such statute is unconstitutional, where no injury to the dissenting stockholder is shown. *Ryan v. Williams*, 100 Fed. Rep. 177 (1900).

<sup>1</sup> *Normandy v. Ind. etc. Co., Ltd.*, [1908] 1 Ch. 84.

<sup>2</sup> *Moore v. Moore, etc. Co.*, 150 N. Y. App. Div. 792 (1912). See also § 746, *infra*.

<sup>3</sup> *Goss v. Warp, etc. Co.*, 133 N. Y. App. Div. 122 (1909).

<sup>4</sup> *Neall v. Hill*, 16 Cal. 145 (1860), the court saying: "It is well settled that there is no jurisdiction in equity

with regard to the removal of corporate officers of any description." Also *Johnston v. Jones*, 23 N. J. Eq. 216 (1872), and §§ 618, 624, 711, *supra*.

<sup>5</sup> *Imperial Hotel Co. v. Hampson*, L. R. 23 Ch. D. 1 (1882). See § 711, *supra*.

<sup>6</sup> *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132 (1879), where a decree had been made that a receiver be appointed unless the officers paid over money received by them in fraud of corporate rights. The court set aside the decree. Even though the dominating directors have purchased at an excessive price real estate in which they are personally interested, no receiver should be appointed, the company being solvent and a going concern. *Klein v. Independent, etc. Assoc.*, 231 Ill. 594 (1907). The court will not appoint a receiver and wind up a solvent corporation merely because the directors have misbehaved. *Sellman v. German, etc. Co.*, 184 Fed. Rep. 977 (1909). Where an Illinois



pany cannot maintain a bill for a receivership on the ground that the promoters fraudulently issued its stock, there being no other relief

stockholder in a Louisiana corporation has caused a receiver to be appointed in the United States court in Louisiana, he cannot cause an ancillary receiver to be appointed in Pennsylvania to bring a suit under the anti-trust act of congress against a New Jersey corporation, there being no evidence that the corporation has property in Pennsylvania. *Bluefields S. S. Co. v. Steele*, 184 Fed. Rep. 584 (1911). A policy holder in an insurance company which has several hundred thousand policy holders, cannot have a receiver appointed on the ground of mismanagement, where it appears that the corporation is solvent, especially where the policy holders participate only in the surplus and the holders have discretion as to what part of the surplus shall be distributed. A claim that the stockholders of such a company are not entitled to the surplus cannot be litigated unless they are joined as parties defendant. *Equitable, etc. v. Brown*, 213 U. S. 25 (1909). A member of a lodge cannot have a receiver appointed on the ground of misapplication of funds where he has not first applied for redress to a higher body which has control. *Howze v. Harrison*, 165 Ala. 150 (1910). The court will not appoint a receiver on the ground that a contemplated sale may not be the best possible. *Sullivan, etc. Co. v. Black*, 159 Ala. 570 (1909). Mere misappropriation of corporate assets by the officers is not a ground for a receiver if they are responsible. *Smith v. Birmingham, etc. Co.*, 56 S. Rep. 721 (Ala. 1911), holding also that a stockholder cannot have a receiver appointed merely because it does not allow him to examine the corporate books. The court will not at the instance of a minority stockholder in a lumber company appoint a receiver to saw timber already cut where it appears that in the opinion of the general manager and a majority of the directors the sawing would result in loss. *Bartow, etc. Co. v. Enwright*, 131 Ga. 329 (1908). A stockholder cannot have the company

wound up on the ground that it had not fully complied with the statute in its incorporation proceedings. *Troutman v. Council Bluffs, etc. Co.*, 142 Iowa, 140 (1909). A receiver will not be appointed, even though the president obtained the resignation of the manager on the promise of returning his money and has not done so and has appointed his relatives to office, and has caused the corporate property to be mortgaged, even though he may have acted unwisely, there being no fraud. *Howeth v. Coulbourne Bros. Co.*, 115 Md. 107 (1911). A stockholder cannot have a receiver appointed merely because the officers have not paid their subscriptions and made misrepresentations to him when he purchased his stock. *Fuller v. McCormick*, 156 Mich. 518 (1909). Where all charges of fraud and insolvency in a stockholder's suit are denied, a receiver should not be appointed at a preliminary hearing. *Woodmansee v. Ann Arbor Brick Co.*, 164 Mich. 688 (1911). A receiver will not be appointed for trivial acts of mismanagement. *Jacobs v. Jacobs, etc. Co.*, 37 Mont. 321 (1908). Minority stockholders cannot have a receiver appointed merely because the books are in another state, and they are not given a copy of the by-laws, and the company owes a debt to the wife of the president and it was not shown on the corporate statements. *Secord v. Wheeler, etc. Co.*, 53 Wash. 620 (1909). A receiver will not be appointed merely on account of mismanagement or misappropriation of funds by the directors, the stockholders having power to remove them. *Ward v. Hotel Randolph Co.*, 65 W. Va. 721 (1909). A temporary receivership should be denied when all the material allegations are denied. *Katz v. De Wolf*, 138 N. W. Rep. 1013 (Wis. 1912). A receiver will not be appointed merely because a stockholder is dissatisfied with the management. *Hastings v. Tousey*, 121 N. Y. App. Div. 815 (1907). Internal dissensions are no ground for a receiver, where dan-



prayed for, except that the receivers manage the property and bring suits to recover back the stock.<sup>1</sup> Minority stockholders in a bank

gers prior to the next election have been removed. *Stokes v. Knickerbocker Inv. Co.*, 70 N. J. Eq. 518 (1905). A receiver will not be appointed merely because a company has made an *ultra vires* lease of its property. *New Albany Waterworks v. Louisville, etc. Co.*, 122 Fed. Rep. 776 (1903). A receiver will not be appointed on the ground that the directors have illegally paid salaries to themselves. *Alabama, etc. Co. v. Shackelford*, 137 Ala. 224 (1903). A bill to have a receiver appointed and the officers removed on account of certain contracts having been fraudulently canceled and excessive salaries paid is subject to demurrer. *Donald v. Manufacturers', etc. Co.*, 142 Ala. 578 (1905). A pledgee of stock may not have a receiver appointed on the ground that there has been an over-issue of stock. *Virginia, etc. Co. v. Provident, etc. Soc.*, 126 Ga. 50 (1906). A receiver, being merely incidental to a suit, cannot be appointed if the object of the suit is to dissolve the corporation, at the instance of a stockholder, on account of frauds. *People v. District Court*, 33 Colo. 293 (1905). A receiver of the corporate property will not be appointed in a suit concerning the ownership of five sixths of the stock. *Belding v. Washington, etc. Co.*, 36 Wash. 549 (1905). A Texan stockholder in an Indiana corporation, owning land in Texas, cannot have a receiver appointed in Texas on the ground that preferred stock had been fraudulently issued and corporate funds diverted, etc., the purpose of the bill being to wind up the affairs of the company and sell its property and pay its debts. *American, etc. Co. v. Schuler*, 34 Tex. Civ. App. 560 (1904). A receiver will not be appointed at the instance of a stockholder for the purpose of bringing suits which the corporation should bring. *Hallenborg v. Cobre, etc. Co.*, 8 Ariz. 329 (1904). Even though

stock of a plantation company has been issued for property at an over-valuation and sold to the public, and a receiver has been appointed at the instance of stockholders, yet if a great majority of the stockholders wish to reorganize the company and pay in more money and continue the business, it still being solvent, the court will discharge the receiver. *Tolman v. Ubero, etc. Co.*, 142 Fed. Rep. 270 (1905). Where an order appointing a receiver at the instance of a stockholder is reversed on appeal, and a sale of the corporate property by such receiver is set aside, the purchaser holds the property for the benefit of the corporation, but is entitled to a return of the purchase price, even though in the meantime judgment creditors have had additional sales of the property. *Lutey v. Clark*, 31 Mont. 45 (1904). Where a person causes a receiver to be appointed of a growing and solvent corporation, and such appointment is afterwards declared void, he is liable for all damages by reason thereof without proof of malice or probable cause. *Thornton, etc. Co. v. Bretherton*, 32 Mont. 80 (1905). In general, see also *United Elect. Securities Co. v. Louisiana Elect. Light Co.*, 68 Fed. Rep. 673 (1895); *People v. Albany, etc. R. R.*, 55 Barb. 344, 383 (1869); *aff'd*, 57 N. Y. 161; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309 (1884); *Howe v. Deuel*, 43 Barb. 504 (1865); *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157 (1867); *Cicotte v. Anciaux*, 53 Mich. 227 (1884); *La Grange v. State Treasurer*, 24 Mich. 468 (1872). A court will not appoint a receiver merely because some of the stockholders disapprove of the management. *Edison v. Phonograph Co.*, 52 N. J. Eq. 620 (1894). Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder,

<sup>1</sup> *Zuber v. Micmac, etc. Co.*, 180 Fed. Rep. 625 (1910).



cannot have a receiver appointed for misconduct of the officers while the bank is solvent, where a new board of directors or the

and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyances and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756 (1893); *rev'd* on another point in 57 N. J. Eq. 318. A court has no power to appoint a receiver in a stockholder's suit for fraud. *Fischer v. San Francisco Super. Ct.*, 110 Cal. 129 (1895); *Stockton v. Harmon*, 32 Fla. 312 (1893); *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942 (1898). A temporary receiver will not be appointed in a stockholder's suit where all his charges are denied. *Taylor v. Cuban, etc. Co.*, 106 Fed. Rep. 437 (1901). A minority stockholder cannot have a receiver appointed on the ground that the corporation, the property of which consists of land, is about to sell a large tract of land at a low price, such price being satisfactory to the majority and no fraud being alleged. Not even the statute in Louisiana authorizing a receiver for gross mismanagement is sufficient. *North American, etc. Co. v. Watkins*, 109 Fed. Rep. 101 (1901). Although preferred stockholders who were deprived of the right to vote, and whose stock amounted to practically a debt, may be entitled to an injunction and an accounting, if the property is being mismanaged, nevertheless they are not entitled to a receiver unless the company is insolvent as well as being mismanaged. *Texas, etc. Mfg. Assoc. v. Storrow*, 92 Fed. Rep. 5 (1899). A court will not appoint a receiver at the instance of minority stockholders, even though the property of the corporation has been sold under execution and purchased in be-

half of the majority stockholders and notes have been given for illegal salaries. *Taylor v. Decatur, etc. Co.*, 112 Fed. Rep. 449 (1901). Even though a corporation has lost most of its assets and has abandoned its business, yet a minority stockholder cannot have a receiver appointed, except for mismanagement, especially where the object of the receivership is to bring suits against the directors, which the stockholder himself may bring. *Clark v. National, etc. Co.*, 105 Fed. Rep. 787 (1900). A stockholder cannot cause a receiver to be appointed merely on the ground that the liabilities exceed the assets and the company has ceased to do business. *Murray v. Superior Court*, 129 Cal. 628 (1900). In the case *Worth, etc. Co. v. Bingham*, 116 Fed. Rep. 785 (1902), the court reversed the court below in appointing a receiver at the instance of a minority stockholder on charges of fraud and mismanagement and a sale of property by a company in which the directors were interested, to the corporation, such appointment having been made without notice to the corporation. The court held also that where the bill does not specify any act which is illegal, fraudulent, or *ultra vires*, nor show any effort on the part of the minority stockholder to change the management, the court will not appoint a receiver and will not decree dissolution of the corporation; also that a receiver will not be appointed on the ground that the directors were interested in a company selling property to the corporation, where such purchase was made on the unanimous vote of stockholders present and voting at a meeting called to consider such purchase; also that insolvency alone of a corporation is not sufficient to warrant the appointment of a receiver at the instance of a minority stockholder, unless fraud or gross mismanagement on the part of the officers is shown. A receiver will not be appointed at the instance of a stockholder, even though mismanage-



bank commissioner might remedy the matter or an injunction is adequate relief.<sup>1</sup> A court will not appoint a receiver, because some of the

ment is charged, there being no fraud and no danger of insolvency, especially where there is some doubt as to the plaintiff being a stockholder. *Kelly v. Fargo, etc. Co.*, 16 S. Dak. 73 (1902). Mere mismanagement is not sufficient cause for a receiver at the instance of a stockholder who owns a small amount of stock. *Callaway v. Powhatan, etc. Co.*, 95 Md. 177 (1902). The fact that a foreign corporation intends to withdraw its property from the state and take it to the place where it is incorporated is no ground for a receiver at the instance of a stockholder. *Reynolds, etc. Co. v. Martin*, 116 Ga. 495 (1902). Where a Maine corporation does all its business in Massachusetts, and all its officers, except the secretary, reside in Massachusetts, a Massachusetts stockholder may maintain in the courts of Massachusetts a suit to compel the directors to account for property misappropriated and to enjoin *ultra vires* acts, but a receiver will not be appointed unless special circumstances require it. *Richardson v. Clinton, etc. Co.*, 181 Mass. 580 (1902). A receiver was denied in *Downing v. Dunlap Coal, etc. Co.*, 93 Tenn. 221 (1893), where all the allegations of the bill were denied in the answer. A court of equity has no jurisdiction to appoint a receiver of and dissolve a solvent beneficial assessment association on the ground of mismanagement, fraud, and the abuse of corporate powers. *Mason v. Equitable League*, 77 Md. 483 (1893). A stockholder cannot have a receiver appointed on the ground of mismanagement, where it appears that the company is solvent, and that the officer charged with fraud is responsible, and that the usual remedies are sufficient. *Rumney v. Detroit, etc. Co.*, 116 Mich. 640 (1898). A receiver appointed at the instance of minority stockholders without notice is illegally appointed. *State v. Clancy*, 20 Mont. 284 (1897).

The court refused to appoint a receiver in *McGeorge v. Big Stone Gap, etc. Co.*, 57 Fed. Rep. 262 (1893), and discharged a temporary receiver who had been appointed in a stockholders' and bondholders' suit. In *Lowe v. Pioneer Threshing Co.*, 70 Fed. Rep. 646 (1895), the court enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but the court refused to appoint a receiver. It is no ground for a receivership that the business has been largely contracted, no fraud, negligence, or *ultra vires* acts being shown. *Hunt v. American Grocery Co.*, 80 Fed. Rep. 70 (1897). Although there are but two stockholders, and the whole property of the corporation consists of stock in another corporation, and these two stockholders disagree, yet one of them cannot have a receiver appointed. *Wallace v. Pierce, etc. Co.*, 101 Iowa, 313 (1897). The court stated that it would require a very strong case to justify the appointment of a receiver. A receiver will not be appointed although bonds have been issued in excess of the charter limit, and although the directors are not managing for the best interests of the stockholders. *Peatman v. Centerville, etc. Co.*, 100 Iowa, 245 (1896). A minority stockholder is not entitled to a receiver in a suit brought by him for an accounting and winding up the company, even though he is refused an inspection of the books of the company, and especially so where he was denied the right for several years for the reason that he did not pay his subscription, and he finally sold his stock. *Ridpath v. Sans Poil, etc. Co.*, 26 Wash. 427 (1901). A minority stockholder of an alien corporation cannot file a bill in equity to have the company wound up and its assets distributed, even though he complains of the management, and even though the main purpose of the corporation

<sup>1</sup> *Feess v. Mechanics', etc. Bank*, 84 Kan. 828 (1911).



stockholders disapprove of the management.<sup>1</sup> A receiver will not be appointed at the instance of a stockholder, even though mismanagement is charged, there being no fraud, and no danger of insolvency.<sup>2</sup>

is to acquire land in the state, it being shown that the corporation is solvent. *Sidway v. Missouri, etc. Co.*, 101 Fed. Rep. 481 (1900). A receiver was refused in *Griffing v. Griffing Iron Co.*, 96 Fed. Rep. 577 (1899), there being no proof of usurpation, *ultra vires*, fraud, or gross negligence on the part of the directors. A stockholder cannot have a receiver appointed to collect subscriptions, the corporations being entirely solvent. If corporate debts are not paid his remedy is to bring suit in behalf of the corporation to collect such subscriptions. *Bergman, etc. Co. v. Bergman*, 131 Pac. Rep. 485 (Wash. 1913). Mismanagement is not a good cause for the appointment of a receiver with a view to winding up the business and distributing the assets. A court of equity has no such power. *Ulmer v. Maine, etc. Co.*, 93 Me. 324 (1899). No receiver on charge of mismanagement: *Mulqueeney v. Shaw*, 50 La. Ann. 1060 (1898). A receiver will not be appointed at the instance of a stockholder to recover back illegal salaries, inasmuch as such a suit may be carried on by the stockholder himself. Nor can a stockholder have a receiver appointed merely because the directors reserved the profits for a surplus instead of distributing them by way of dividends. *Marcuse v. Gullett, etc. Co.*, 52 La. Ann. 1383 (1900). In a stockholder's suit for a dissolution on the ground that the officers are defrauding the corporation the court has no power to appoint a receiver. *Dudley v. Dakota, etc. Co.*, 11 S. Dak. 559 (1899). Even though the board of directors have leased all the corporate property to a minority of the directors, yet the minority stockholders cannot have a receiver

appointed unless it is shown that the lease was unfair, especially where one of the complaining stockholders has ratified the transaction. *Farwell v. Babcock*, 27 Tex. Civ. Ap. 162 (1901), a case involving a corporation owning three million acres of land and one hundred and twenty thousand head of cattle valued at \$10,000,000. Even though the directors have sold preferred stock held by them to the corporation, and taken its notes therefor, when the corporation was insolvent, yet a receiver should not be appointed at the instance of a stockholder. The remedy is an injunction and accounting. *Empire Hotel Co. v. Main*, 98 Ga. 176 (1896). A general creditor of an insolvent corporation cannot have a receiver appointed and obtain a marshaling of the assets. Neither can a stockholder. *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329 (1896). A receiver will not be appointed. *New, etc. Co. v. Blevins*, 12 Tex. Civ. App. 410 (1896); *Wenzel v. Palmetto, etc. Co.*, 48 S. C. 80 (1896). A receiver will not be appointed for a benevolent society in a suit by a member charging that illegal expulsions have been made, and illegal elections held, even though the illegal officers are running the business; nor will a receiver be appointed although the purpose of the company is impracticable, the member bringing the suit having been a party thereto. Equity will not interfere although the company is wholly illegal and unauthorized. The remedy is at law. *Crombie, v. Order of Solon*, 157 Pa. St. 588 (1893). No receiver will be appointed for the fraud of directors. *People's Inv. Co. v. Crawford*, 45 S.W. Rep. 738 (Tex. 1898). Dissatisfaction by the minority with the manage-

<sup>1</sup> Quoted and approved in *Ashton v. Penfield*, 233 Mo. 391 (1911), and *Black v. Sullivan Timber Co.*, 147 Ala. 327 (1906).

<sup>2</sup> Quoted and approved in *Black v. Sullivan Timber Co.*, 147 Ala. 327

(1906). Even though the court appoints a receiver at the instance of minority stockholders, it should not stop the corporate business of a going concern. *Town v. Duplez, etc. Co.*, 138 N. W. Rep. 338 (Mich. 1912).



There is a limit, however, to this rule. The powers of courts of equity to appoint receivers are very broad. Thus, a court of equity has power to appoint a receiver where there is such fraud or dissension as to make it impossible for the corporation to carry on its business honestly and to the advantage of its stockholders. Such receivership, however, will be granted only in extreme cases and will be limited in time and extent, so far as the circumstances will permit.<sup>1</sup>

There are numerous cases to the effect that the court will appoint a receiver where it is evident that a continuation of the business will be impracticable or inequitable.<sup>2</sup> Thus where a parent company so

ment of the majority is not sufficient for the appointment of a receiver of the corporation. *Fluker v. Emporia City Ry.*, 48 Kan. 577 (1892); *American, etc. Co. v. Toledo, etc. Ry.*, 29 Fed. Rep. 416 (1886). A receiver will not be appointed for mere mismanagement. The proceeding must comply with the statutory provisions for dissolution of the corporation. *Port Huron, etc. Ry. v. St. Clair Circuit Judge*, 31 Mich. 456 (1875). The court will not appoint a receiver of a solvent corporation, even though the president has embezzled some of the funds and is disposing of his property, and is apparently sustained by a majority of the stockholders. *Ranger v. Champion, etc. Co.*, 52 Fed. Rep. 609 (1892). See also *Bayles v. Orne, Freeman. Ch. (Miss.)* 161 (1841); *People v. Conklin*, 5 Hun. 452 (1875); *Hand v. Dexter*, 41 Ga. 454 (1871); *Baker v. Backus*, 32 Ill. 79 (1863); *People v. Albany, etc. R.R.*, 7 Abb. Pr. (N. S.) 290 (1869); *Belmont v. Erie Ry.*, 52 Barb. 637 (1869); *Overton v. Memphis, etc. R.R.*, 10 Fed. Rep. 866 (1882); *Smith v. Wells*, 20 How. Pr. 158 (1860). Even where two rival boards of directors are litigating their respective rights, the court cannot turn the corporate affairs over to a receiver. See *Karnes v. Rochester, etc. R.R.*, 4 Abb. Pr. (N. S.) 107 (1867); *Gravenstine's Appeal*, 49 Pa. St. 310 (1865), holding that the appointment of a receiver is equivalent to enjoining the officers from managing the corporate business. See *Cincinnati, etc. R. R. v. Duckworth*, 2 Ry. & Corp. L. J. 560 (1887), refusing a receiver at the instance of

a stockholder and discussing the question. Mere disagreement of the parties as to the management of the property is no ground for a receivership. *American, etc. Co. v. Toledo, etc. Ry.*, 29 Fed. Rep. 416 (1886). The case *State v. Jacksonville, etc. R.R.*, 15 Fla. 201 (1875), seems to have been one for a decree that certain consolidated railroads were subject to the mortgage (pp. 279, 280). Mismanagement and default in interest were charged. The court (p. 386) held that a receiver should not have been appointed. The stockholders of a corporation cannot obtain a receiver of its property on the ground that the lessee of its property is not paying the rent which is due. *Rochester v. Bronson*, 41 How. Pr. 78 (1871). The lessee in this case alleged that it did not know which of two contesting boards of directors of the lessor was the right board to pay rent to. The court will not enjoin the officers from acting. *Foss v. Harbottle*, 2 Hare, 461 (1843); *Mozley v. Alston*, 16 L. J. (Ch.) 217 (1847); 1 Phil. Ch. 790; *Hattersley v. Shelburne*, 31 L. J. (Ch.) 873 (1862). So also *Manneek, etc. Co. v. Manneek*, 23 Alb. L. J. 216 (1881). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. *Stanley v. Luse*, 36 Oreg. 25 (1899).

<sup>1</sup> Quoted and approved in *Ashton v. Penfield*, 233 Mo. 391 (1911), and *Boothe v. Summit, etc. Co.*, 55 Wash. 167 (1909).

<sup>2</sup> Quoted and approved in *Boothe v. Summit, etc. Co.*, 55 Wash. 167 (1909).



dominates the subsidiary company that the latter will not properly enforce a claim which it has against the parent company, a minority

The appointment of a receiver at the instance of minority stockholders on account of mismanagement, is not an act of bankruptcy, it not appearing that the company was insolvent. *Re Boston, etc. Co.*, 181 Fed. Rep. 422 (1909). A court of equity has power to appoint a receiver in a stockholder's suit, but will do so only in extreme cases. *Carson v. Allegheny, etc. Co.*, 189 Fed. Rep. 791 (1911). A court of equity has no power to dissolve or appoint a receiver of a solvent foreign corporation, even though there is dissension among the stockholders. *Pearce v. Sutherland*, 164 Fed. Rep. 609 (1908). Where a majority of the directors are in jail, and they have been guilty of fraud, and their stock was fraudulently issued, a stockholder may have a receiver appointed and may have the directors removed by the court and the corporation wound up. *California, etc. Ass'n v. Superior Court*, 8 Cal. App. 711 (1908). Where two persons receive part of the stock of a corporation for property which has no substantial value and later induce a third person to subscribe for other stock and pay for it in cash, and the business is unprofitable and the parties disagree, the third stockholder may file a bill in equity to have the other stock canceled and a receiver appointed, even though he knew the facts when he subscribed for his stock. *Ellis v. Penn Beef Co.*, 80 Atl. Rep. 666 (Del. 1911). Where some of the members of an unincorporated library incorporate it and claim the property, the court may appoint a receiver without expense pending the litigation. *Ladies', etc. Ass'n, Unincorporated, v. Ladies', etc. Ass'n, Incorporated*, 155 Mich. 663 (1909). A minority stockholder may have a receiver appointed where the majority are grossly mismanaging the company and refusing to give her access to the corporate books and are keeping false books and are threatening not to pay dividends and allowing the expenses to be increased unreasonably, but she is not entitled to dissolution and distribution. *Ashton v. Penfield*, 233 Mo. 391 (1911). Where the shareholders are evenly divided and the faction in power misappropriates the funds and is wasteful, and refuses to allow the other faction to look at the books or know what is being done, the court may appoint a receiver and have the property sold. *Graham v. McAdoo*, 135 Ky. 677 (1909). The court may appoint a receiver. *Exchange Bank v. Bailey*, 29 Okla. 246 (1911). Minority stockholders may have the corporation wound up where the majority stockholders have been guilty of mismanagement and nothing can be reasonably expected from them. *Chisolm v. Carolina Agency Co.*, 88 S. C. 438 (1911). Where a majority stockholder who also controls the board of directors has diverted the funds the court may appoint a receiver to recover back the same and pay a dividend therefrom. *Ritchie v. People's Tel. Co.*, 22 S. Dak. 598 (1909). The court will appoint a receiver at the instance of a minority stockholder where the officers have formed competing concerns and are destroying the business. *Falfurrias, etc. Co. v. Spielhagen*, 129 S. W. Rep. 164 (Tex. 1910). Judgment creditors may have a receiver appointed where bad faith on the part of the president is shown. *Kelso v. American, etc. Co.*, 50 Wash. 381 (1908). Where a minority stockholder sues for fraudulent management of the corporation, all the stockholders being parties to the suit, the court may appoint a receiver to settle the affairs of the company unless a fair and reasonable adjustment is offered to the minority stockholder. *Hampton v. Buchanan*, 51 Wash. 155 (1908). Where a promoter so manipulates a sale of a person's property to the corporation for stock that he fraudulently acquires a large majority of the stock without paying anything for it and practically controls the property of the individual, a receiver may be appointed. *Kennedy Drug Co. v. Keyes*, 60 Wash. 337 (1910). Where



stockholder of the latter may have a receiver appointed to institute such suit and the receiver may have an ancillary receiver appointed in an-

the majority stockholders have appropriated the corporate assets a minority stockholder may have a receiver appointed and the court may direct payment to such minority stockholder of the amount which he would ultimately be entitled to. *Pride v. Pride Lumber Co.*, 84 Atl. Rep. 989 (Me. 1912). In the case *Brock v. Automobile, etc. Co.*, 130 La. 404 (1912), a receiver was appointed where the owner of one half of the stock excluded the owner of the other half, who was president, from any participation in the company and was mismanaging it. The court may appoint a receiver. *Brent v. Brister, etc. Co.*, 60 S. Rep. 1018 (Miss. 1913). Where an electric-light company purchases a majority of the stock of a competing electric-light company in the same city, and elects the board of directors, and fraudulently uses its power to make the latter subservient to and as a feeder to the former, and intends to destroy the latter, the court, at the instance of a minority stockholder of the latter, will appoint a receiver of the company; but the proof of such intent must be clear. The fact that the directors so elected are stockholders in the controlling company is not sufficient. *Davis v. U. S. Electric, etc. Co.*, 77 Md. 35 (1893). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal and void. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97 (1892).

Where one of three directors, who is also president and manager, dies, and the three owned all the stock, and

the company owed the decedent \$45,000 and other parties \$15,000, and had no money, and the works of the company were idle, and the two remaining directors could not agree, and the treasurer was managing the business illegally, the court will appoint a receiver *pendente lite*, the suit being to preserve the assets for the benefit of the creditors. In such a case no request need first be made to the directors to bring the suit. *Sheridan, etc. Works v. Marion T. Co.*, 157 Ind. 292 (1901). A receiver may be appointed, at the instance of a stockholder, in a suit against directors who control a majority of the stock and are diverting all the profits to themselves. *Columbia, etc. Co. v. Washed, etc. Co.*, 136 Fed. Rep. 710 (1905). A suit for the appointment of a receiver and an accounting and the liquidation of the affairs of a corporation lies at the instance of a stockholder where it appears that the board of directors and a majority of the stockholders are guilty of mismanagement and gross negligence. *Klugh v. Coronaca, etc. Co.*, 66 S. C. 100 (1903). A receiver will be appointed and other relief granted in a suit by a stockholder in a mining company alleging that the directors had practically abandoned the property and refused to sell treasury stock, although it could be sold, and had removed the books from the state, and had refused all information and were destroying the value of the stock. Such a suit is not multifarious. *Glover v. Manila, etc. Co.*, 19 S. Dak. 559 (1905). Where a lessee railroad is insolvent and in the hands of a receiver, and the rent is not paid and it controls the board of directors of the lessor railroad, a stockholder of the latter may have a receiver appointed of such of the lessor's property as is not already in the hands of a receiver, and such second receiver may be authorized to sue for the rent due, and the court may also authorize him to issue receiver's certificates to pay the expense of prosecuting such suit.



other district to prosecute such claim.<sup>1</sup> The supreme court of Missouri has said: "That solvent corporations are wrecked for purely selfish

*Town of Vandalia v. St. Louis, etc. R. R.*, 209 Ill. 73 (1904). A court may appoint a receiver of a corporation where the stock is evenly divided and no election can be held and there is danger of the assets being wasted. *Gibbs v. Morgan*, 9 Idaho, 100 (1903). A stockholder may have a receiver appointed where the directors are fraudulently paying out profits in salaries and are grossly mismanaging the business, which will result in insolvency. *Hall v. Nieukirk*, 12 Idaho, 33 (1906). Where the officers practically abandon the corporation and taxes are not paid and suits are pending against the company, and there is an evident intent on the part of the officers to acquire the property at a small figure, the stockholders may maintain a bill in equity for a receiver and an accounting and for an injunction against mortgaging, foreclosing, or selling under execution the property. *Torrey v. Toledo, etc. Co.*, 150 Mich. 86 (1907). A court may appoint a receiver of the corporate assets during litigation at the instance of a stockholder who complains that the corporation has transferred all its property illegally to another corporation for stock of the latter. *State v. Boston, etc. Co.*, 22 Mont. 220 (1899). Especially where it is charged that there is danger of property being removed beyond the jurisdiction of the court. *State v. Boston, etc. Co.*, 22 Mont. 241 (1899). But where the majority represents  $\frac{1}{3}$  of the stock and the corporation is solvent and has \$1,000,000 in the treasury, and its property is worth \$40,000,000, and there are no debts, and the corporation offers to cancel the transfer and indemnify the minority stockholders, and shows that the receiver will not manage the property as well as the corporation would manage it, the receiver will be discharged. *Forrester v. Boston, etc. Co.*, 22 Mont. 430 (1899). A receiver appointed at

the instance of minority stockholders by reason of an illegal transfer of all the corporate property should be discharged upon the property being returned. *Forrester v. Boston, etc. Co.*, 24 Mont. 148 (1900). Where the corporate property is being wasted by reason of a contest between two rival boards of directors, one board having been declared illegal by the court and the other refusing to act, the court will, at the instance of a minority stockholder, appoint a receiver to protect the property until a recognized board is elected, and the stockholder need not request the directors to bring suit before he himself brings suit. *Jasper, etc. Co. v. Wallis*, 123 Ala. 652 (1899). In the case *Sternberg v. Wolff*, 56 N. J. Eq. 555 (1898), the court stated that it had power, where there were dissensions among the stockholders of a corporation, to appoint a receiver to preserve the property until a certain object could be attained; but that this power, while recognized by the New Jersey courts, had never yet been acted upon. To same effect, see s. c., 56 N. J. Eq. 389 (1898). A receiver at the instance of stockholders and creditors was appointed in *Hodges' Adm'x v. South Fork, etc. Co.*, 50 S. W. Rep. 969 (Ky. 1899). In Louisiana, by statute, a receiver may be appointed at the instance of stockholders when the directors are grossly mismanaging the business or committing *ultra vires* acts. *Sincer v. Alverson*, 51 La. Ann. 955 (1899). A stockholder may have a receiver appointed if the property is being mismanaged and is in danger of being lost by the absorption thereof by the directors for salaries and expenses. *Cameron v. Groveland Co.*, 20 Wash. 169 (1898). In the case *McGilliard v. Donaldsonville, etc. Works*, 104 La. 544 (1900), where the business of a corporation was going to ruin by reason of bad management, and the corporation was insolvent,

<sup>1</sup> *Bluefields S. S. Co. v. Steele*, 192 Fed. Rep. 23 (1911).



and illegal purposes, that minority interests are 'frozen out,' that

the court appointed a receiver at the instance of two stockholders. Where an English corporation owning land in the United States sells a portion of such land in Louisiana at one seventh of its value, thereby causing a loss to the corporation of over \$2,000,000, and the board of directors refuse to take any action, a stockholder may bring suit in Louisiana to set aside the sale and may have a receiver appointed of the assets in that state. *Watkins v. North American, etc. Co.*, 107 La. 107 (1902). A receiver was appointed at the instance of minority stockholders, under the Louisiana statutes, in the case *Davies v. Monroe, etc. Co.*, 107 La. 145 (1901), where the majority were about to sell out an electric-light and water-works plant to a foreign corporation controlled by the president, at a price less than the debts, and the president, in addition to his salary, had been charging for traveling expenses. Where the stockholders of a bank have legally ordered the winding up of its business, and for three years thereafter the officers still continue to do business at a great loss, apparently without any effort to wind up its affairs, a stockholder may file a bill for an accounting and the appointment of a receiver, and no request to the corporation to bring the suit need be made. *Mathews v. Bank of Allendale*, 60 S. C. 183 (1901). Where one building association absorbs another and takes all its assets, and tries to force the minority stockholders to transfer or surrender their stock, and causes the absorbed association to become insolvent, a receiver will be appointed at the instance of minority stockholders, even though the absorbed association is a failing one. *Continental, etc. Assoc. v. Miller*, 44 Fla. 757 (1902). Where an insurance company has reinsured all its risks and is doing no business, but the officers are drawing large salaries, a stockholder may have a receiver appointed. *Treat v. Pennsylvania, etc. Co.*, 203 Pa. St. 21 (1902).

Where a stockholder in a street

railway starts suit to set aside an illegal consolidation with another company, fraudulently brought about by the officers, the latter company being insolvent and the former liable to become so, a cause of action is stated and a receiver may be appointed. *Becker v. Gulf City, etc. Co.*, 80 Tex. 475 (1891). In a stockholder's suit to cause an alleged fraudulent transaction to be set aside, the court appointed a receiver, not to take the property, but to carry on the suit. The upper court held that such an appointment was illegal. *Burns v. Atchison*, 48 Kan. 507 (1892). A few cases have held that the court, under extreme circumstances, may appoint a receiver to take charge of the corporate business, even though the corporation is solvent, and no dissolution is intended, and no corporate creditors' interests are involved. See *Stevens v. Davison*, 18 Gratt. (Va.) 819 (1868), where a railroad was turned over to a receiver to protect stockholders' rights. "Courts of equity have the ultimate power of administering the assets of insolvent corporations." A stockholder of a building and loan corporation which is insolvent and is being mismanaged may have a receiver appointed. The federal court will take jurisdiction where the assets are scattered through many states, even though it is charged that the bill is collusive. *Towle v. American Bldg. etc. Soc.*, 60 Fed. Rep. 131 (1894). A minority of the mortgage bondholders may have a receiver appointed, where the mortgage trustees have resigned, the corporation is without officers, executions are being levied, and forfeiture of charter is imminent. *Ralph v. Shiawassee Circuit Judge*, 100 Mich. 164 (1894). Where a receiver has been appointed at the instance of a minority stockholder on the ground of fraud in the management, the court will not remove the receiver and appoint another at the instance of the controlling stockholders who are charged with fraud, where the receiver's management has been



business immorality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis.”<sup>1</sup>

able and impartial. *Street v. Maryland Central Ry.*, 58 Rep. 47 (1893). A receiver was appointed in a stockholders' suit in *Aiken v. Colorado River Irr. Co.*, 72 Fed. Rep. 591 (1896), where it was charged that the control had been obtained by spurious stock and the funds had been diverted. Where an improvement company and a development company have practically the same officers, and the business is conducted largely as one concern, and the real estate involved is being sold for taxes and judgments obtained, and the accounts are not properly kept and the funds misapplied, a stockholder of the latter company may have a receiver appointed, it being shown that the officers are so implicated in the confusion that they will not properly conduct the business. *Bridgeport Development Co. v. Tritsch*, 110 Ala. 274 (1895). Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. *Du Puy v. Transportation, etc. Co.*, 82 Md. 408 (1896). A policy-holder in a mutual benefit association may have a receiver appointed where it is alleged that the officers have converted three quarters of the assets to their own use, and that the officers refused to call meetings of the directors, and refused to publish the proceedings as required. *Order of Iron Hall v. Baker*, 134 Ind. 293 (1893). Where, at the instance

of a stockholder, the court sets aside a transfer of corporate property to a director, the stockholder, however, being obliged to repay the consideration, for which the decree gives him a lien upon the property therefor, the stockholder may foreclose such lien and may have a receiver of the corporation appointed. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (1898). A stockholder may have a receiver appointed of a foreign corporation which is insolvent and is in the hands of a receiver in the state creating it. *Phoenix, etc. Co. v. North River, etc. Co.*, 33 Hun, 156 (1884). A receiver will be appointed if the corporation is practically defunct and there has been a breach of trust. *Hall v. Astoria, etc. Co.*, 5 Ry. & Corp. L. J. 412 (Louisville Ct., 1889). See also, in general, *Frostburg Bldg. Assoc. v. Stark*, 47 Md. 338 (1877). In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639 (1885), the corporation was insolvent. In *Lawrence v. Greenwich F. Ins. Co.*, 1 Paige, 587 (1829), the court appointed a receiver to preserve the corporate property, there having been no officers elected by the stockholders. In *Forbes v. Memphis, etc. R. R.*, 2 Woods, 323 (1872); s. c., 9 Fed. Cas. 408, a receiver was appointed upon the default of the defendants to answer, the bill being filed by a stockholder, a bondholder, and the trustee for the bondholders on behalf of themselves and all other stockholders and bondholders to prevent the directors of the insolvent company from fraudulently disposing of the property. Where there are but two stockholders and one dies, and his administrator takes possession of the corporate property as though it belonged to the estate, the other stockholder may have a receiver

<sup>1</sup> *Cantwell v. Columbia, etc. Co.*, 199 Mo. 1 (1906). In this case it was held that where a majority of the stockholders and a majority of the

directors have combined to wreck a company for the benefit of a competing company in which they are interested, the court may appoint a receiver.



Where a receiver has been appointed at the instance of a minority stockholder on account of the company having sold all its property to another corporation, but the transaction has been undone and canceled, the court should discharge the receiver.<sup>1</sup>

Sometimes the power to restrain or remove corporate officers, and to appoint a receiver of the corporation, is given to the court by a statutory enactment. Such statutes exist in New York, Indiana, Kansas, Missouri, Louisiana, and Washington.<sup>2</sup>

appointed. *Re Belton*, 47 La. Ann. 1614 (1895). The court refused to appoint a receiver under the Louisiana statute, at the instance of stockholders, in *Posner v. Southern, etc. Co.*, 109 La. 658 (1902). A statute authorizing the appointment of a receiver in case of mismanagement by the officers will be strictly construed. *Bartlett v. Fourton*, 115 La. 26 (1905). The court may appoint a receiver to prevent waste and destruction. *Houston, etc. Co. v. Drew*, 13 Tex. Civ. App. 536 (1896); *Stevens v. South, etc. Co.*, 14 Utah, 232 (1896). Where the stockholder alleges that the president is fraudulently contracting a debt to himself, and is about to sell out the whole property illegally, a receiver will be appointed. *Stewart v. Belt*, 19 S. Rep. 957 (Miss. 1896). Where the majority take all the profits, keep false books, buy a worthless franchise, and mortgage the corporate property in order to wreck the corporation, a receiver will be appointed pending suit to cancel the mortgage. *State v. District Court*, 15 Mont. 324 (1895). A receivership in one state in a suit between claimants for office does not prevent a receivership in another state in behalf of the bondholders to take charge of the property in such latter state. *Schmidt v. Mitchell*, 98 Ky. 218 (1895). The appellate court, in *Florida Constr. Co. v. Young*, 59 Fed. Rep. 721 (1892), refused to reverse an order in an action brought by stockholders in a construction company for an accounting between the company and a railroad company, and a distribution of the assets of the former, although the order appointed a receiver of the former and granted an injunction. *Cf.* § 684, *supra*. As to the appointment of a receiver for

the purpose of distributing the assets, see § 629, *supra*.

<sup>1</sup> *Forrester v. Boston, etc. Co.*, 22 Mont. 430 (1899).

<sup>2</sup> In New York, by statute, the court may appoint a receiver in a stockholder's action. *Osgood v. Maguire*, 61 N. Y. 524 (1875); *Piza v. Butler*, 90 Hun, 254 (1895). The appointment of a receiver at the instance of a stockholder may be voidable. It is not void. *Attorney-General v. Continental L. Ins. Co.*, 28 Hun, 360 (1882); *aff'd*, 93 N. Y. 630. A receivership may be the proper remedy. *Hallenborg v. Greene*, 66 N. Y. App. Div. 590, 596 (1901). A receiver may be appointed under the New York statutes in a stockholder's action for fraud on the part of the directors. *Halpin v. Mutual Brewing Co.*, 91 Hun, 220 (1895). In *Duncan v. Treadwell Co.*, 82 Hun, 376 (1894), the court upheld a discharge of a receiver appointed by reason of directors' wrong-doing, new directors having been elected since the appointment. Even though three out of five directors have been ousted by the court, yet if one of the remaining two is vice-president and has been given all the powers of the president, a receiver will not be appointed under the New York statute. *Ehret v. Ringler Co.*, 144 N. Y. App. Div. 480 (1911). A receiver will be appointed only on a strong case. *Welcke v. Trageser*, 131 N. Y. App. Div. 731 (1909). Mere misconduct of the officers will not justify the appointment of the receiver unless it is necessary to preserve the property or the rights of creditors or stockholders. *Fenn v. Ostrander, Inc.*, 132 N. Y. App. Div. 311 (1909).

In New York an injunction order suspending "the general and ordi-



§ 747. *Miscellaneous remedies.*—It has been held and clearly established that a stockholder cannot bring about the dissolution of the

nary business" of a foreign or domestic corporation in New York can be obtained only after notice to the corporation. Code Civ. Proc., § 1809. Cf. § 1787 of the same Code. Hence an *ex parte* injunction against the removal of the treasurer is void. *Wilkie v. Rochester, etc. Ry.*, 12 Hun, 242 (1877). An injunction against an officer doing any corporate business during the pendency of a suit against him for maladministration, etc., will not always be set aside, even under the rule that, where the defendant specifically denies under oath all charges, the injunction must be dissolved. *Hayt v. Malone*, 9 N. Y. Supp. 877 (1890). In New York a stockholder's action under the statute to place the corporate property in a receiver's hands and for an accounting by its officer will be compelled to give precedence to another action instituted by the attorney-general under the statute to remove the officers, etc. *Keller v. Brooklyn Elev. R.R.*, 9 Abb. N. Cas. 166 (1880). In New York the misconduct of a trustee authorizes a court to appoint a receiver. *Jenkins v. Jenkins*, 1 Paige, 243 (1828). See also *Conro v. Gray*, 4 How. Pr. 166 (1849); *Kelly v. Mariposa, etc. Co.*, 4 Hun, 632 (1875). See also *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84 (1831). Under the statutes of New York a director of a foreign corporation may maintain in the New York courts a suit to compel the president to account for property misappropriated or wasted by him, but the court will not appoint a general receiver and enjoin the corporation from exercising its powers, although it may enjoin the president from acting and may appoint a receiver of the property in New York state. *Acken v. Coughlin*, 103 N. Y. App. Div. 1 (1905). A New York court has power to appoint a receiver of corporate assets within the state, of a New Jersey corporation, in a suit by a stockholder, who alleges that the directors have turned over the business to one of their number who

is winding up the business in violation of law and dissipating all the assets. *Reusens v. Manufacturing, etc. Co.*, 99 N. Y. App. Div. 214 (1904). A receiver will not be appointed on allegations made on information and belief. *Weber v. Wallerstein*, 111 N. Y. App. Div. 700 (1906). Even though a corporation is in debt to its directors, yet if its income is sufficient to pay the interest, the directors cannot legally sell their holdings of stock to a competing concern, together with such debt, whereby the competing concern obtains a majority of the stock, even though the minority are offered the same price, such action being followed practically by the new corporation taking a lease of the assets of the old corporation and doing all the business. The minority stockholders may hold the directors personally liable, and may have a receiver appointed, and may have the mortgage securing the directors' debts canceled, and the business itself continued by the receiver. The former directors who resigned, as well as new directors who took their place, are proper party defendants. *Jacobus v. Diamond, etc. Co.*, 94 N. Y. App. Div. 366 (1904). A receiver of a foreign corporation will not be appointed at the instance of a resident stockholder on allegations that it had sold treasury stock on fraudulent representations and that the directors had been guilty of fraud and mismanagement of the company; and that the assets had been conveyed to other corporations, parties defendant, and where the plaintiff did not allege that he purchased his stock by reason of the misrepresentations, he cannot maintain a suit to recover for the benefit of the corporation the moneys paid for stock. *Phillips v. Sonora Copper Co.*, 90 N. Y. App. Div. 140 (1904). Even though the secretary and treasurer takes away and secretes all the books and papers of the company, yet the president cannot have a receiver appointed in order to carry on the business and collect accounts, no charge of fraud



corporation merely because the officers have been guilty of a breach of trust.<sup>1</sup> Nor can he defeat an action for his subscription by alleging

being made and no request to the board of directors being shown. *Fallon v. United States, etc. Co.*, 86 N. Y. App. Div. 29 (1903). In certain cases an "officer" is construed to mean merely an agent and not a director. So held in regard to appointing a receiver of a foreign corporation. *Moran v. Alvas, etc. Co.*, N. Y. L. J., Dec. 5, 1891. As to resignations of officers to obtain a receiver, see *Zeltner v. Zeltner, etc. Co.*, 174 N. Y. 247 (1903).

Where under a statute a stockholder files a bill for a receiver on the ground of insolvency and the directors consent to the appointment, other stockholders may be allowed to intervene and show fraud, even though they have delayed for three and one half months. *Thayer v. Kinder*, 45 Ind. App. 111 (1909). Under the statutes of Indiana the court may appoint a receiver in a stockholder's suit where there has been a diversion of funds to pay salaries and a failure to repair. *Wayne Pike Co. v. Hammons*, 129 Ind. 368 (1891).

Under the Kansas statutes the court may appoint a receiver in a stockholder's suit where the business is being run in the interest of a rival company, and the company is insolvent, and its assets being absorbed by the officers. *Re Lewis*, 52 Kan. 660 (1894).

Under the Missouri statute minority stockholders on proving that the managing officer had been fraudulently selling the products of the company, and hence as a result had been

denied the use of the United States mail, and had wasted the assets and converted some of them to his own use, may have a receiver appointed to take charge and to recover back such sums of money. *State v. Foster*, 225 Mo. 171 (1909).

A statute in Louisiana authorizes the appointment of a receiver where the officers and directors are mismanaging the company. *Van Vleet v. Evangeline Oil Co.*, 127 La. 919 (1911). A stockholder may have a receiver appointed, under the Louisiana statute, where no meetings are held and dividends although declared are not paid, and the officers are winding up the affairs in an illegal way and keep the books out of the state. *Varnado v. Banner, etc. Co.*, 126 La. 590 (1910). A receiver will not be appointed at the instance of a stockholder merely for mistakes of judgment on the part of the directors. *Trahan v. Broussard, etc. Co., Ltd.*, 125 La. 785 (1910). A stockholder cannot have a receiver appointed, there being no proof of mismanagement or misuse of the corporate property. *Hero v. Consumers', etc. Co.*, 123 La. 359 (1909). Where the assets are distributed by way of a dividend a dissenting stockholder may have a receiver appointed under the Louisiana statute. *Van Vleet v. Evangeline Oil Co.*, 129 La. 406 (1911). Even though a deed is made by authority of a meeting of the directors, where the vote was evenly divided, yet if it is subsequently ratified this is no ground for a receivership. *Simple*

<sup>1</sup> See § 629, *supra*. A stockholder's prayer for relief that the corporation be dissolved and the assets distributed because a director has sold property to it at an overvaluation will be denied. *Tutwiler v. Tuskaloosa, etc. Co.*, 89 Ala. 391 (1889). Where a corporation has abandoned its authorized business and engaged in another, it will be wound up. This is different from a case where the directors have merely and incidentally committed *ultra vires* acts. *Re*

*Crown Bank*, L. R. 44 Ch. D. 634 (1890). A court of equity has no power to wind up a solvent corporation and distribute its assets simply on the ground of dissensions among the stockholders. *Sternberg v. Wolff*, 56 N. J. Eq. 555 (1898). A court of equity has no power to dissolve a corporation in a stockholder's suit complaining of frauds. *People v. District Court*, 33 Colo. 293 (1905).



such a defense.<sup>1</sup> The remedy of a stockholder who wishes to examine the corporate books in order to bring suit against the directors for fraud is by *mandamus*, not by an order for inspection.<sup>2</sup> The court may refuse to set aside a foreclosure if the parties offer to make full reparation.<sup>3</sup> Corporate funds used by the president without authority and invested in real estate in his own name enables the receiver to claim the real estate.<sup>4</sup> An *ultra vires* act cannot be set aside by a stockholder unless it works a substantial injury, where it cannot be set aside by the corporation itself.<sup>5</sup> In a stockholder's suit attacking a corporate contract for fraud and breach of contract, the fraud may be unsustainable and yet judgment given for breach of the contract.<sup>6</sup> Questions relative to the personal liability of officers for signing instruments purporting to be what they are not or for signing instruments without authority are considered elsewhere.<sup>7</sup> The court in a decree in equity may grant separate decrees, adjusting the liability as against each of the defendants, the same as though they had been sued in separate actions.<sup>8</sup> Interest is

*v. Frisco Land Co.*, 124 La. 663 (1909).

Under the Washington statute where two persons each own one half of the capital stock, and one has control of the board of directors and officers, and at the annual meeting there is a deadlock and the old directors and officers hold over, and such controlling stockholder votes to increase salaries to them in violation of his agreement with the other stockholder, and there is no chance of reconciliation, the court may appoint a receiver, even though the company is entirely solvent. *Boothe v. Summit, etc. Co.*, 55 Wash. 167 (1909).

<sup>1</sup> See § 187, *supra*; also *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220 (1877); *South Georgia, etc. R. R. v. Ayres*, 56 Ga. 230 (1876). Nor can the stockholder enjoin a call. *Ex parte Booker*, 18 Ark. 338 (1857). If an illegal consolidation is set aside, the stockholders of the new company may recover back the amount paid in by them. *Re Bank of Hindustan*, L. R. 16 Eq. 417 (1873).

<sup>2</sup> *Walsh v. Press Co.*, 48 N. Y. App. Div. 333 (1900). On this point, see § 519, *supra*.

<sup>3</sup> In the case *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899) where the owner of ten out of two thousand shares of stock attacked a

foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

<sup>4</sup> *Shearer v. Barnes*, 118 Minn. 179 (1912).

<sup>5</sup> *Wisconsin Lumber Co. v. Greene, etc. Co.*, 127 Iowa 350 (1904). See also § 848*k*, *infra*. In the case *Home, etc. Co. v. Barber*, 67 Neb. 644 (1903), where the purchaser of stock sued to hold former stockholders liable for corporate assets appropriated by them, the court found that such use of assets had been taken into consideration in fixing the price at which the stock had been sold, and hence refused to hold the parties liable.

<sup>6</sup> *Callanan v. K., A. C., etc. R. R.*, 199 N. Y. 268 (1910).

<sup>7</sup> See § 682, *supra*.

<sup>8</sup> *Von Arnim v. American Tube-works*, 188 Mass. 515 (1905).



not allowed on the recovery where the defendant invested capital and the proofs do not show what dividends could have been paid.<sup>1</sup> Minority stockholders in a corporation engaged in manufacturing telephone supplies, a business impressed with a public character, may cause to be set aside a sale of a majority of the stock to a competing telephone supply company where the purchase is for the purpose of establishing a monopoly.<sup>2</sup> A stockholder cannot maintain a suit against the directors for damages resulting from a conspiracy to wreck the corporation, inasmuch as a request to the corporation to bring such suit is first necessary and the damages, if recovered, belong to the corporation.<sup>3</sup>

But an indictment for conspiracy to obtain money by false pretenses lies against persons who organize a bank and constitute its board of directors and borrow enough money from it to pay for their small subscriptions to the stock, the purpose being to defraud the public and other stockholders.<sup>4</sup>

In New York it has been held that a stockholder may have a corporate officer arrested for his frauds on the corporation.<sup>5</sup> Officers of a corporation who obtain money in its name, representing that it would be used in speculation and profits divided by way of dividends, but use the money to pay pretended dividends and keep the balance for their own use, may be convicted of embezzlement and larceny at common law.<sup>6</sup> A director is not guilty of grand larceny, even though he donates corporate funds for a political purpose.<sup>7</sup> The vice-president and general counsel of an insurance company cannot be convicted of larceny for using the corporate funds to settle a claim against the corporation and its president, there being no proof that the company was not liable thereon.<sup>8</sup> A fraudulent sale of mining stock by means of the United States mails, the fraud consisting of misrepresentations known to be such by the party so using the mails, is a criminal offense under the revised statutes of the United States.<sup>9</sup> In England there is a statute,

<sup>1</sup> *McCourt v. Biggers-Singer*, 145 Fed. Rep. 103 (1906).

<sup>2</sup> Even though the purchaser is a foreign corporation with a charter giving it express power to purchase stock, yet it cannot exercise that power in Illinois where no corporation can purchase stock unless it is necessary to carry into effect the objects of the corporation. The decree will not merely enjoin the purchaser from voting the stock and receiving dividends, but may order the stock to be returned to the vendors and the money repaid. The monopoly may be proved by proving that the purchaser owned the stock of a competing

manufacturing company. *Dunbar v. American Tel., etc. Co.*, 238 Ill. 456 (1909).

<sup>3</sup> *Niles v. N. Y., etc. R. R.*, 176 N. Y. 119 (1903).

<sup>4</sup> *People v. Smith*, 239 Ill. 91 (1909).

<sup>5</sup> *Crook v. Jewett*, 12 How. Pr. 19 (1854).

<sup>6</sup> *People v. Kellogg*, 105 N. Y. App. Div. 505 (1905).

<sup>7</sup> *People v. Moss*, 187 N. Y. 410 (1907).

<sup>8</sup> *People v. Burnham*, 119 N. Y. App. Div. 302 (1907); s. c., 120 N. Y. App. Div. 388.

<sup>9</sup> *Horn v. United States*, 182 Fed. Rep. 721 (1910).



under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.<sup>1</sup>

In order to avoid circuity of action reimbursement may be made to the individual stockholders, instead of to the corporation, if the exigencies of the case require it.<sup>2</sup> The question of whether a small dissenting stockholder may be decreed to take the equitable value of his stock, instead of a corporate transaction being set aside at his instance, is considered elsewhere.<sup>3</sup> In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors, it is not necessary for the court to order an accounting, but the court may hear the entire case and decide it.<sup>4</sup> Where an officer has been obliged to pay a corporate loss due to his negligence he is entitled to any securities held by the corporation in connection therewith.<sup>5</sup>

A suit by a stockholder against the corporation for an injunction and a receiver on the ground that the corporation is insolvent does not render the stockholder liable to a suit for malicious prosecution, even if his suit failed, there having been no arrest of the person or seizure of property.<sup>6</sup> There are various other remedies and rules which govern this subject.<sup>7</sup> A stockholder is not liable for libel and slander by reason

<sup>1</sup> *Re London, etc. Corp. Ltd.*, [1903] 1 Ch. 728.

<sup>2</sup> *Von Arnim v. American Tube-works*, 188 Mass. 515 (1905). See § 734, *supra*. In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906).

<sup>3</sup> See § 735, *supra*. Even though a New York mining company dissolves and sells its property to a West Virginia company in order to avoid New York taxes, a share of stock and some bonds in the new company being given for each share of stock in the old company, and even though a dissenting stockholder is entitled to have a public

sale of the property, yet if when the time for depositing the stock was about to expire he sells most of his stock to a business associate who makes the exchange, he cannot then insist on a public sale, especially where such sale would destroy a profitable concern, but the court will order that he be allowed to participate, notwithstanding that the time has expired, or that he be paid the value of his stock. *Treadwell v. United, etc. Co.*, 134 N. Y. App. Div. 394 (1909).

<sup>4</sup> *Davis v. Hofer*, 38 Oreg. 150 (1900).

<sup>5</sup> *Brinekerhoff v. Holland T. Co.*, 159 Fed. Rep. 191 (1908).

<sup>6</sup> *Cincinnati, etc. Co. v. Bruck*, 61 Ohio St. 489 (1900).

<sup>7</sup> Where money is recovered and is to be distributed among the stockholders, see *Pacific Ry. of Mo. v. Cutting*, 27 Fed. Rep. 638 (1886). The corporation may appeal from the judgment. *Sheridan v. Sheridan Electric L. Co.*, 38 Hun. 396 (1886). Even though the plaintiff proves fraud, yet



of allegations in his bill in equity against directors for fraud.<sup>1</sup> But where in a suit against a corporation to foreclose a mortgage, the president swears to an answer, charging outside parties with dishonestly trying to deprive some of the stockholders of their interest in the property, such outside parties may maintain a suit for libel against the president, if such answer is irrelevant, malicious, and not privileged.<sup>2</sup> While a stockholder at a meeting of a private corporation may charge fraud against another stockholder or officer in connection with the corporate affairs, yet a newspaper may have no right to report such charge and may be held liable for libel in doing so.<sup>3</sup>

§ 748. *The complaining stockholder controls the conduct of the suit — Right of other stockholders to come into the suit — Compromise and discontinuance — Costs and disbursements — Similar suits elsewhere in federal or state courts.* — It is a principle of equity practice, when a person brings a suit in behalf of himself and such others as may wish to come in who are similarly situated, that the complaining stockholder controls the case and may continue, compromise, abandon, or discontinue it at his pleasure until a creditor similarly situated has procured an order to be made a party to the action, or until interlocu-

if the findings are not full enough to sustain the judgment, the higher court will reverse a judgment in the plaintiff's favor. *Beach v. Cooper*, 72 Cal. 99 (1887). Before an accounting is ordered the fact of misapplication must be proved. *Stokes v. Stokes*, 91 Hun, 605 (1895). Pledgees of a majority of the corporate stock who, by voting their stock, cause men of their choice to be elected directors, are not liable for the misconduct of such directors. *Higgins v. Lansingh*, 154 Ill. 301 (1895). Where promoters represent to capitalists that it will cost \$1,900,000 to purchase a company to be reorganized, when in fact it costs them but \$1,400,000, and the capitalists advance the former sum, and the promoters organize a company and carry out the reorganization and give to the capitalists a part of the stock with bonds, the latter as stockholders may compel the promoters to pay the extra \$500,000 to the company, even though the promoters controlled all the stock at the time the property was taken over, the essence of the transaction being that the capitalists were the stockholders in the new company from the beginning, and it is no

defense that for each dollar advanced by the capitalists they were to receive a dollar in bonds and a dollar in stock. *Arnold v. Searing*, 73 N. J. Eq. 262 (1907). Where the majority, who are in control of the corporation, cause it to give illegal rebates to themselves and others, and another corporation then recovers judgment for a similar rebate, the minority may compel the majority to make good to the corporation the amount. *Dodd v. Pittsburg, etc. R. R.*, 127 Ky. 762 (1908).

<sup>1</sup> *Runge v. Franklin*, 72 Tex. 585 (1889).

<sup>2</sup> *Potter v. Troy*, 175 Fed. Rep. 128 (1909).

<sup>3</sup> *Kimball v. Post Pub. Co.*, 199 Mass. 248 (1908), the court saying: "No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest."



tory judgment is entered.<sup>1</sup> Where a stockholder sues in behalf of himself and others, another stockholder may file a petition in the case without

<sup>1</sup> Quoted and approved in *Hirshfeld v. Fitzgerald*, 157 N. Y. 166 (1898). "The plaintiff, as he acts upon his own mere motion and at his own expense, retains (as in other cases) the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure. After decree, however, he cannot, by his conduct, deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it." 1 *Daniells*, Ch. Pl. (6th Am. ed.) 244; *Brinekerhoff v. Bostwick*, 99 N. Y. 185, 194 (1885); *Allen v. New Jersey*, etc. R. R., 49 How. Pr. 14 (1875); *Tremain v. Guardian*, etc. Ins. Co., 11 Hun, 286 (1877), allowing discontinuance, and reviewing cases. See also the valuable briefs in this case. But see *Seaton v. Grant*, L. R. 2 Ch. 459 (1867); and see *Salisbury v. Binghamton Pub. Co.*, 85 Hun, 99 (1895), refusing to allow a creditor to discontinue. Where the plaintiff stockholder delays unreasonably in trying the case, the court may allow another stockholder, who has intervened and been made a party, to proceed with the trial, upon his giving a bond to the original plaintiff to secure payment to him of a ratable part of the entire expense of the suit, whenever that should be determined. *Manning v. Mercantile T. Co.*, 37 N. Y. Misc. Rep. 215 (1902). In a suit by a bondholder in behalf of himself and other bondholders against a reorganization committee to hold them liable for breach of their duty and to restrain them from carrying out a plan of reorganization, another bondholder who has not come into the suit has no standing in court, especially where he did not deposit his bonds under the agreement. *Browne v. Bache*, 66 N. Y. App. Div. 367 (1901). Where a stockholder has commenced suit to set aside an illegal assignment by the corporation for the benefit of creditors, a settlement between the corporation and the assignee does not put an end to the case, especially where a receiver has been appointed. *Standard*, etc. Co. v. *Jones*, 64 Ohio St. 147 (1901).

As to the right of a creditor to assign his claim in a suit in behalf of himself and others to enforce the statutory liability, see *Hirshfeld v. Bopp*, 157 N. Y. 166 (1898), rev'g 27 N. Y. App. Div. 180 (1898). Even though a creditor brings suit in behalf of himself and other creditors to enforce the statutory liability of directors, yet he may settle the case and the other creditors are not entitled to any part of the settlement, they not having come into the litigation. *Dauids v. Bauer*, 155 N. Y. App. Div. 97 (1913). Even though two persons own all the stock of a company and one of them converts its funds, yet a settlement by which he pays a certain amount to the other stockholder, is not enforceable. *Reinecke v. Bailey*, 112 S. W. Rep. 569 (Ky. 1908). In Wisconsin it is held that a taxpayer who has brought suit in behalf of himself and others to enjoin the construction of a street railway cannot discontinue the suit at his pleasure, but the court may allow other taxpayers to be substituted as plaintiffs in his place. *State v. Ludwig*, 106 Wis. 226 (1900). In *Belmont v. Erie Ry.*, 52 Barb. 637 (1869), the court held that the other stockholders could intervene in the management of the case. If the guilty directors settle with the complaining stockholder by paying him out of the corporate treasury, the corporation may subsequently recover back the money so paid. *Erie Ry. v. Vanderbilt*, 5 Hun, 123 (1875). See also *Derby v. Yale*, 13 Hun, 273 (1878). The stockholder who sues may discontinue or go on. *Mattison v. Demarest*, 1 Rob. (N. Y.) 717 (1863). Cf. *Thouron v. East Tennessee*, etc. Ry., 38 Fed. Rep. 673 (1889); *Innes v. Lansing*, 7 Paige, 583 (1839). The suit stops if the complaining stockholder is paid. *Searth v. Chadwick*, 14 Jur. 300 (1850). A debenture holder who brings suit in behalf of himself and other debenture holders for a receiver may discontinue at his pleasure, even after a decree and the appointment of a receiver, no other debenture holder



a formal order authorizing him to do so.<sup>1</sup> Where *bona fide* stockholders intervene it is immaterial that the original complaining stockholder would not have been granted relief.<sup>2</sup> But where a stockholder's suit to set aside an alleged illegal foreclosure sale has been pending for ten years, another stockholder will not be allowed to come into the suit unless he explains the delay or shows that it is necessary in order to protect his interest.<sup>3</sup> After a receiver of an insolvent corporation has been appointed at the instance of a creditor, and under an order of the court other creditors have proved their claims in such suit, the court has power to refuse to discontinue the suit at the instance of the complainant of record.<sup>4</sup> After other creditors have come in as parties plaintiff, the original plaintiff cannot dismiss the suit except with their consent.<sup>5</sup>

In case the suit is successful and property or money is recovered back by the corporation, the complaining stockholder is entitled to have his costs and attorney's fees paid by the corporation.<sup>6</sup> A stockholder

having come into the case, such decree being different from an administration decree which directs inquiries as to debts and also directs that the assets be applied "in a due course of administration." *Re Alpha Co. Ltd.*, [1903] 1 Ch. 203. See § 222, *supra*.

<sup>1</sup> *Coltrane v. Templeton*, 106 Fed. Rep. 370 (1901). In a stockholders' suit to cancel stock which had been issued for a nominal consideration, stockholders who were induced by fraud to cancel their stock and accept bonds in exchange may join as parties complainant in order that the exchange may be canceled. *Price v. Union Land Co.*, 187 Fed. Rep. 886 (1911).

<sup>2</sup> *Carver v. Southern, etc. Co.*, 78 N. J. Eq. 81 (1910).

<sup>3</sup> *MacArdell v. Olcott*, 62 N. Y. App. Div. 127 (1901). Stockholders who delay for two months in applying to intervene in a stockholders' suit, will be denied in their application. *Appeal of Streuber*, 229 Pa. St. 184 (1910). Where under a statute a stockholder files a bill for a receiver on the ground of insolvency and the directors consent to the appointment, other stockholders may be allowed to intervene and show fraud, even though they have delayed for three and one half months. *Thayer v. Kinder*, 45 Ind. App. 111 (1909).

<sup>4</sup> *Johnson v. Miller*, 96 Fed. Rep. 271 (1899). A corporate creditor

who has brought suit in behalf of himself and other creditors against the corporation and its stockholders to collect his debt cannot discontinue on his own motion if other creditors have filed their claims. *Deane v. Perkins*, 155 Mich. 644 (1909).

<sup>5</sup> *Belmont, etc. Co. v. Columbia, etc. Co.*, 46 Fed. Rep. 336 (1891). A stockholder in bringing suit for a receiver cannot discontinue after creditors have intervened and proven their claims and a final decree rendered and the property sold. *Culver, etc. Co. v. Culver*, 81 Ark. 102 (1906). Where other stockholders have come into the suit as parties complainant, a settlement made with the stockholders who filed a bill is not binding on the other stockholders who have come in, and they may proceed with the suit on indemnifying the original plaintiffs against further costs and paying their *pro rata* share of the expenses already incurred. *McAlpin v. Universal, etc. Co.*, 57 Atl. Rep. 418 (N. J. 1904). A settlement with the complaining stockholder and his agreement to discontinue may not amount to a discontinuance if another stockholder intervenes before actual discontinuance. *Snyder v. De Forest, etc. Co.*, 154 Fed. Rep. 142 (1907).

<sup>6</sup> See § 879, *infra*. A corporation may pay the expense of defending a suit brought by a stockholder



who recovers a fund for the company will be allowed his reasonable attorney's fees and expenses, but stockholders and officers who resisted the recovery are not given such an allowance, although defending in the name of the company.<sup>1</sup>

In case the directors, on the demand of a stockholder, institute a suit for an accounting, the stockholder cannot then institute another suit in the courts of the same state for the same purpose, even though he alleges that the first suit will not be properly conducted.<sup>2</sup> Where a Pennsylvania stockholder in an Illinois corporation brings suit against it and another Illinois corporation in the federal court, the suit being a stockholder's suit, and the cause of action being really between the two defendants, the court will dismiss the suit if the same matter is already in litigation in the state court and it is evident that this suit in the federal court was commenced by connivance between the plaintiff and his corporation.<sup>3</sup> But the federal court may grant relief if it deems best, notwithstanding a state court decision.<sup>4</sup> Judgment ren-

against the company and its officers, charging the latter with fraud, where such suit is held to be ungrounded. *Figge v. Bergenthal*, 130 Wis. 594 (1906).

<sup>1</sup> *McCourt v. Singers-Bigger*, 145 Fed. Rep. 103 (1906); s. c., 150 Fed. Rep. 102.

<sup>2</sup> *Gray v. South, etc. R. R.*, 151 Ala. 215 (1907).

<sup>3</sup> *National, etc. Co. v. Chicago Ry. Co.*, 168 Fed. Rep. 666 (1909). Where a California corporation files a bill of injunction in the state court and fails to obtain a temporary injunction except for a limited time, and then incorporates a company in Nevada and files a similar bill in the United States court, the latter bill will be dismissed as a fraud on the jurisdiction of the court. *Moss & Co. v. M'Carthy*, 191 Fed. Rep. 202 (1911). A stockholder's suit in a state court does not prevent a similar suit in the federal court. *Snyder v. De Forest, etc. Co.*, 154 Fed. Rep. 142 (1907). A stockholder may maintain a suit in the federal court to enjoin an *ultra vires* act, even though two similar suits are pending in the state courts, all of the suits being *in personam*, and there being no conflict over property *in custodia legis*. *Consumers', etc. Co. v. Quinby*, 137 Fed. Rep. 882 (1905). Where the corporation is suing in the state court a non-resident

stockholder cannot begin suit on the same cause of action in the federal court. *Kemmerer v. Haggerty*, 139 Fed. Rep. 693 (1905). Where a stockholder's suit is instituted in the federal court after the same party has commenced a similar suit in the state court, the federal court will await the decision in the state court before proceeding. *Hennessy v. Tacoma, etc. Co.*, 129 Fed. Rep. 40 (1904). See also § 759, *infra*. A stockholder's suit in the state court for a receiver for mismanagement resulting in a receivership takes precedence over a subsequent suit by trustees in the federal court for the same purpose. *Stirling v. Seattle, etc. Ry.*, 198 Fed. Rep. 913 (1912).

<sup>4</sup> A federal court will not follow a decision of the state court that a town may revoke its permission to a telephone company at any time, where the telephone company has invested \$90,000, on the faith of such permission. The decision of the state court is not binding on the federal court as *res judicata*. *East Tennessee Tel. Co. v. Board of Councilmen*, 190 Fed. Rep. 346 (1911). Where a waterworks grant from a city has expired and the city has enjoined in the state court the company from discontinuing operation of the plant, pending the construction by the city of its own



dered in one stockholder's suit is a bar to a similar suit by another stockholder, even though the latter commenced his suit before judgment was rendered in the former.<sup>1</sup> A stockholder may institute a suit although there is already one pending in another court at the instance of another stockholder, bearing on the same question, but after judgment in one case the other cases may be stopped.<sup>2</sup> It is no defense to one

plant, the company may deed to its mortgagee its equity of redemption, and the mortgagee may then enjoin the city from preventing its discontinuing operation and dismantling and taking away the plant. *Laighton v. City of Carthage*, 175 Fed. Rep. 145 (1909). Even though a suit in a state court filed by a stockholder to enjoin a sale of the assets fails, this does not prevent a subsequent suit in the United States court for the same relief, where the first suit was not in behalf of all stockholders, especially as a federal court considers such cases from a different standpoint. *Jackson Co. v. Gardiner Inv. Co.*, 200 Fed. Rep. 113 (1912). Although a judgment against a corporation is conclusive as against a stockholder, this does not apply to joint tort feorsors. *Bigelow v. Old Dominion, etc. Co.* 225 U. S. 111 (1912).

<sup>1</sup> *Willoughby v. Chicago, etc. Co.*, 50 N. J. Eq. 656 (1892). After one stockholder's suit has passed into a judgment, another stockholder cannot institute a similar suit. *Goodbody v. Delaney*, 83 Atl. Rep. 988 (N. J. 1912). A judgment in one suit instituted by stockholders is a bar to another suit by other stockholders on the same cause of action based on the same facts. *Hearst v. Putnam Mining Co.*, 28 Utah, 184 (1904). Where two suits for the same purpose, one by a stockholder and one by the corporation itself, are pending in different states, the first decision will be followed in the other state, although the suit in the latter state was commenced first, unless there is collusion. *Memphis, etc. R. R. v. Grayson*, 88 Ala. 572 (1889). The judgment in a stockholders' suit constitutes *res judicata* and prevents another suit on the same cause of action by the corporation, the corporation having

been a party defendant in the first suit and having replied and adopted the allegations of the plaintiff. *Montezuma, etc. Co. v. Dake*, 16 Colo. App. 139 (1901). If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the allegations in the first suit. *Old Dominion, etc. Co. v. Lewisohn*, 202 Fed. Rep. 178 (1913). Where a receiver is appointed in 1892 and the property is foreclosed and the sale confirmed in 1894, and a creditor and stockholder in 1895 petitions a court in another state to direct the receiver to begin suit to set aside the foreclosure, which motion is denied, and the stockholder then commences such suit himself in 1896, and the court decides against him in 1902 in another state, the receiver in the original state will not be directed or allowed to contest the matter again. *Denver, etc. Co. v. American Waterworks Co.*, 85 Atl. Rep. 826 (N. J. 1913). See also §§ 826, 830, 839.

<sup>2</sup> *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 194 (1885). Where a suit by a minority director is pending, a subsequent suit for the same relief and in the same court by a stockholder should be stayed until the former is tried. *Loewenstein v. Diamond, etc. Co.*, 94 N. Y. App. Div. 383 (1904). A similar suit in another state is no bar to a stockholder's suit against the directors for fraud. *Reed v. Hollingsworth*, 135 N. W. Rep. 37 (Iowa, 1912). If the company has instituted a suit a stockholder cannot. *Memphis v. Dean*, 8 Wall. 64 (1868); *Black v. Huggins*, 2 Tenn. Ch. 780 (1877). See also, as to who may be a complainant herein, *Green's Brice's Ultra Vires* (2d ed.), 649. In *Dannmeyer v. Coleman*, 11 Fed. Rep. 97 (1882), the court queries whether each stockholder may insti-



promoter that a similar suit against his co-promoter has been defeated.<sup>1</sup> A suit by a stockholder in an interstate consolidated railroad to prevent the issue of preferred stock where one of the states in which it is incorporated forbids such issue except upon unanimous consent, is not defeated by the defense that he changed the grounds of his objection from the grounds in a previous suit.<sup>2</sup> A suit by a bank to recover from its cashier securities purchased by bank funds is a bar to a suit against the parties selling such securities to the cashier, even though the latter knew that the cashier was using bank funds, but a suit against the directors for negligence is not such a bar.<sup>3</sup>

After judgment is entered the parties for whose benefit it was brought may come in and prove their claims and share in the recovery, but

tute a separate suit herein. Where a stockholder or those acting with him institute practically the same suit in different circuit courts of the United States for the same purpose, namely, the enjoining of a consolidation, the court where the bill was first filed will conduct the litigation, and in the other circuits the courts will stay the proceedings. *Dady v. Georgia, etc. Ry.*, 112 Fed. Rep. 838 (1900). Although a stockholder may bring similar suits in courts of different jurisdictions, yet the defendant may apply in all the suits instituted after the first suit, and ask the court to stay proceedings or refuse to permit final judgment until the first suit has been determined. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). Where in a stockholder's suit in the federal court to set aside a sale of all the assets of the company to another company an injunction has been denied on the giving of a bond, an injunction will not be granted in a similar suit by the same parties in the state court, especially where the purchaser is outside of the jurisdiction of the court, and the advantage to the complainant will be small as compared with the injury to the defendant. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). The party with whom the alleged illegal contract was made cannot sustain a bill in equity to prevent a multiplicity of stockholders' suits. *Manhattan Ry. v. New York Elev. R. R.*, 29 Hun, 309 (1883). Although a creditor has brought suit in behalf

of himself and others, yet another creditor may institute another similar suit. After judgment in one, the other ceases. *Innes v. Lansing*, 7 Paige, 583 (1839). As to demurrer on the ground that another suit is pending for the same relief, see *Zebbley v. Farmers' L. & T. Co.*, 139 N. Y. 461 (1893). A corporate creditor's suit in equity in behalf of himself and all others to enforce the stockholders' statutory liability does not, even though it goes to a decree, prevent other creditors filing a subsequent bill for the same purpose. *Palmer v. Woods*, 149 Ill. 146 (1894). A suit pending in the United States court brought by the purchaser of municipal bonds from a railroad to compel the state treasurer to deliver them, the corporation being made a party defendant, does not prevent the state court issuing a *mandamus* at the instance of the municipality to have such bonds delivered up by the state treasurer for cancellation. *People v. State Treasurer*, 24 Mich. 468 (1872). A suit brought by a bondholder in behalf of himself and other bondholders who may choose to join with him does not make the judgment binding on those who do not join. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908).

<sup>1</sup> *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909).

<sup>2</sup> *Pollitz v. Wabash R. R.*, 150 N. Y. App. Div. 709 (1912); s. c., 207 N. Y. 113.

<sup>3</sup> *Davenport v. Walker*, 132 N. Y. App. Div. 96 (1909).



if they fail to do so they are barred from participation.<sup>1</sup> Where a creditor brings suit in behalf of himself and such others "as would join with him" to hold directors of an insolvent bank liable for misappropriation of assets and compromises the suit, a creditor who did not take part nor make himself known prior to the compromise is not entitled to any part of the money so received.<sup>2</sup>

Where the company itself has already brought suit on a cause of action and has been defeated, a stockholder cannot bring suit on the same cause of action on behalf of the corporation, even though the former case was decided in another state.<sup>3</sup> Even after trial, however, the court in its decree may dismiss a bill without prejudice.<sup>4</sup> In a creditor's suit attacking a mortgage, the suit being for himself and other creditors, there being no fund to pay the expense of litigation, the court may require parties coming in to contribute towards such expense or else be excluded from the suit.<sup>5</sup> Where the court authorizes the receiver to sue promoters for secret profits, the proceeds of the suit to belong to the creditors who agree to pay the expenses, costs, etc., a creditor who delays taking part until it is evident that a large sum will be recovered, will not be allowed to come into such suit.<sup>6</sup> A stockholder, who intervenes and becomes also a party plaintiff, is entitled to the same rights as the original plaintiff, but if they disagree as to bringing in an additional party defendant, the court may require the one wishing to bring in such additional party to give security for costs as regards such additional party.<sup>7</sup> Where the board of directors has been changed and the new board proposes to dismiss a pending suit, the court may allow minority stockholders, who originally caused the directors to com-

<sup>1</sup> *Hirshfeld v. Fitzgerald*, 157 N. Y. 166 (1898).

<sup>2</sup> *Niccolls v. Rice*, 147 Cal. 633 (1905). A corporate creditor who brings suit in behalf of himself and other creditors against directors of a bank to enforce their personal liability for the corporate debts may compromise and other creditors cannot claim a part of the compromise if they did not come into the action and agree to share a part of the expense. *Dauids v. Bauer*, 155 N. Y. App. Div. 97 (1913).

<sup>3</sup> Quoted and approved in *Smith v. Bulkley*, 18 Colo. App. 227 (1902); *Alexander v. Donohoe*, 68 Hun, 131 (1893); *aff'd*, 143 N. Y. 203 (1894). A stockholder cannot maintain a suit in a matter which has been adjudicated against the corporation itself. *Buck v. Massie*, 109 La. 776 (1901).

<sup>4</sup> *Ebner v. Zimmerly*, 118 Fed. Rep. 818 (1902).

<sup>5</sup> *Chick v. Northwestern, etc. Co.*, 118 Fed. Rep. 933 (1895). Where the receiver is authorized to commence suit for the benefit of such creditors as come in and give security for the cost and expenses of such suit, the suit being against the stockholders, the defendants cannot defend on the ground that some of the creditors purchased their claims for the sole purpose of coming in under such order of the court. *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902).

<sup>6</sup> *McEwan v. Harriman, etc. Co.*, 138 Fed. Rep. 797 (1905).

<sup>7</sup> *Weed v. First Nat. Bank*, 117 N. Y. App. Div. 340 (1907).



mence the suit, to file a supplemental bill setting forth all the facts and to continue the suit at their own expense.<sup>1</sup>

§ 749. *No contribution among the directors — Joint and several liability.* — No contribution can be enforced among directors guilty of a breach of trust for which a part are held liable.<sup>2</sup> Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they hav-

<sup>1</sup> *Eagle Iron Co. v. Colyar*, 156 Fed. Rep. 954 (1907).

<sup>2</sup> *Wilkinson v. Dodd*, 40 N. J. Eq. 123 (1885); *Ervin v. Oregon*, etc. Nav. Co., 20 Fed. Rep. 577 (1884); *Peck v. Ellis*, 2 Johns. Ch. 131 (1816). See *Power v. O'Conner*, 19 W. R. 923 (1871). Where the owners of property give to one of their number an option on the property for \$27,500 and he offers the property through a broker at \$33,000, of which \$3,000 was to go to the broker and \$2,500 to the party holding the option, and the broker and others then cause a land company to be organized, which buys the property for \$39,000, the party holding the option and the broker and those taking part in the sale are liable to the land company for their profits, each for the whole, and no contribution will be enforced, the profit having been a secret profit and misrepresentations having been made as to the cost of the property, and there being parties in the land company who were not aware of the facts. *Lomita*, etc. Co. v. *Robinson*, 154 Cal. 36 (1908). A promoter, who is being sued in Massachusetts by a New Jersey corporation for alleged illegal profits, cannot by a suit in equity in New Jersey enjoin the corporation from prosecuting such suit in Massachusetts, even though he has been held liable by the Massachusetts court and he alleges that the decision is erroneous, and even though the New Jersey courts might not have held him liable originally, and even though the United States court in the same transaction held that the parties were not liable, especially where he has delayed five years before he has commenced suit in New Jersey. Where a promoter has been held liable for illegal profits the court will not compel another promoter equally guilty

to pay a part of the judgment, even though the judgment is for more than the profit received by the defendant promoter. The liability of a promoter is to be determined by the law of the state where the transaction occurred or where the action is tried, rather than of the state where the corporation was organized. *Bigelow v. Old Dominion*, etc. Co., 74 N. J. Eq. 457 (1908). Where two directors in a failing bank cause it to purchase their stock, and the receiver compels one of them to pay back the amount, the other being a non-resident, and in liquidation all debts are paid and there is a fund for distribution among the stockholders, the director who had to pay the amount cannot compel the other director to contribute his share in connection with the distribution of the assets but he is entitled to the benefit of the stock sold to the bank itself. *Avery v. Central Bank*, 221 Mo. 71 (1909). See also *Brinckerhoff v. Holland T. Co.*, 159 Fed. Rep. 191 (1908). In *Lingard v. Bromley*, 1 Ves. & B. 114 (1812), contribution was enforced between assignees in bankruptcy, one of whom had improperly paid a loss with the concurrence of the others. In *Ramskill v. Edwards*, L. R. 31 Ch. D. 100 (1885), contribution was enforced against a director who subsequently ratified an unauthorized loan which another director made and was held responsible for. An executor of a deceased director was also held liable. A director who objects and protests is not liable. In the case *Gaither v. Bauernschmidt*, 108 Md. 1 (1908), the court held that contribution between the directors in a receiver's suit to hold them liable for illegal dividends and illegal loans and other wrongful acts might be enforced in the same suit in equity.



ing no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. The courts will not enforce contribution among joint tort-feasors.<sup>1</sup> A director cannot claim a set-off,<sup>2</sup> or bankruptcy, where he has been guilty of fraud.<sup>3</sup>

As a rule directors are liable jointly and severally for frauds in which they participate.<sup>4</sup>

#### B. SUITS BY OR AGAINST THE CORPORATION IN GENERAL — SERVICE AND JURISDICTION.

§ 750. *The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with — Intervention by stockholders.* — It frequently happens that the corporation has a cause of action against a third party which the directors think best not to press, or that the corporation is sued and the directors think best not to defend, or, where an action is pending, the directors decide to compromise the matter. The judgment of the directors may, in the opinion of a stockholder, be erroneous, and yet it cannot be controlled or changed by the stockholders except by refusing to re-elect the directors to office. The stockholder cannot go into court and attempt to change the policy of the directors in the management of the suit.<sup>5</sup> A stockholder cannot control the

<sup>1</sup> *Gilbert v. Finch*, 173 N. Y. 455 (1903). Where a treasurer, who is also a director, has divided among the stockholders, in violation of the statute, the corporate funds of an insolvent corporation, and is afterwards held liable to creditors, he cannot have contribution from the other directors, even though they took part in the division. *Sharp v. Call*, 69 Neb. 72 (1903). As to contribution among directors under the English statute, see *Shepherd v. Bray*, 95 L. T. Rep. 414 (1906), reversed by consent in 97 L. T. Rep. 729 (1907).

<sup>2</sup> *Re Anglo-French Co-op. Soc.*, L. R. 21 Ch. D. 492 (1882).

<sup>3</sup> *Emma Min. Co. v. Grant*, L. R. 17 Ch. D. 122 (1880).

<sup>4</sup> Each person is liable jointly and severally for the whole damage. *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909). A corporation may compel its directors to turn in the profit they secretly have made on a contract which one of them obtained in his own name and then transferred to

the corporation for a higher price, and they are liable jointly and severally. *Asphalt, etc. Co. v. Bouker*, 150 N. Y. App. Div. 691 (1912). Where a copartnership is the general manager and agent of the company and a member of the copartnership is a director and misappropriates the company's property, the company has recourse against his separate estate as well as against the joint estate of the copartnership. *Re MacFadyen*, [1908] 2 K. B. 817. As to *ultra vires* acts, see § 682, *supra*.

<sup>5</sup> These principles of law follow necessarily from the fact that the management and policy of the corporation are determined and controlled by the directors and not by the stockholders. The only cases wherein the stockholders may interfere are cases where the directors are guilty of fraud, *ultra vires* acts or gross negligence in protecting the corporate interests.

"There may be claims against directors; there may be claims against



discretion of directors as to whether to bring a suit or not.<sup>1</sup> A stockholder cannot bring a suit to recover for goods sold by the corporation. The corporation is the proper party to sue.<sup>2</sup> In general, a corporation represents and binds the stockholders in bringing and defending suits which

officers; there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done." *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13 (1875). See also 15 Fed. Rep. 360, note. A sale by a trustee in bankruptcy to a reorganization committee cannot be attacked in that proceeding by a stockholder, even though the corporate officers are in jail for fraudulent sales of stock to the public. The bankruptcy court has no authority to compel the purchaser to admit the stockholders into the reorganization. *Re Witherbee*, 202 Fed. Rep. 896 (1913). A stockholder cannot maintain a suit on an ordinary cause of action of the corporation unless it refuses or is unable to institute the suit. *Gilman v. German, etc. Co.*, 153 S. W. Rep. 996 (Ky. 1913). Even a majority of the stockholders cannot go into court and have appeals dismissed where the directors order them to be continued. *Railway Co. v. Alling*, 99 U. S. 463 (1878). "Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." *Ellerman v. Chicago Junction, etc. Co.*, 49 N. J. Eq. 217 (1891). The discretion of the directors cannot

be questioned by the stockholders. *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620 (1894). Even though the holders of a majority of the stock are opposed to the board of directors, yet the former cannot obtain an injunction against the board of directors selling treasury stock. *Gillette v. Noyes*, 92 N. Y. App. Div. 313 (1904). A receiver will not be appointed at the instance of a stockholder for the purpose of bringing suits which the corporation should bring. *Hallenborg v. Cobre, etc. Co.*, 8 Ariz. 329 (1904). Creditors cannot object that the corporation has not set up the statute of limitations to other claims, where there is no proof that the creditors will not be paid in full. *Dozier v. Arkadelphia, etc. Mills*, 71 Ark. 407 (1903). See also § 684, *supra*. Where a charter may be amended with the written consent of the corporation, a single stockholder owning a minority of the stock cannot object to a change made by the directors. *Venner v. Chicago City Ry.*, 236 Ill. 349 (1908).

<sup>1</sup> *Dickermann v. Northern T. Co.*, 176 U. S. 181, 188, 193 (1900), citing the above text; *La Grange v. State Treasurer*, 24 Mich. 468 (1872). It is a question whether stockholders have power to compel directors to institute suits to which the latter are opposed. *Delaware & Hudson Co. v. Albany, etc. R. R.*, 213 U. S. 435 (1909).

<sup>2</sup> *Cutshaw v. Fargo*, 8 Ind. App. 691 (1893). Stockholders cannot bring suit in behalf of the company to set aside a deed on the ground that the directors neglect to bring the suit, where the matter in dispute is being litigated in another form. *Bissell v. Taylor*, 7 Wash. 324 (1893). Stockholders cannot maintain a suit to enjoin a deed of the corporate property after a sale on execution on the ground that the judgment was invalid, unless they show a request to the board of directors and also show that they are



involve the rights and obligations of the corporation, and binds them as fully as in the making of contracts.<sup>1</sup>

Thus, it is not for the stockholder to take out an appeal or *certiorari* which the corporation does not take out; <sup>2</sup> nor bring an action against other corporate agents for injury and loss to the corporation.<sup>3</sup> The great case of *Dodge v. Woolsey*,<sup>4</sup> however, was on the very point now under discussion, and it was decided under the facts of that case, where

a minority, and hence do not control the company. *Brandt v. McIntosh*, 130 Pac. Rep. 413 (Mont. 1913).

<sup>1</sup> *Farnum v. Ballard, etc. Shop*, 66 Mass. 507 (1853); *Oglesby v. Attrill*, 105 U. S. 605 (1881); *Came v. Brigham*, 39 Me. 35 (1854); *Lane v. Weymouth School Dist.*, 51 Mass. 462 (1845); *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886), aff'g 14 Fed. Rep. 753 (1883). It has been held that the minority bringing suit against a third person to enforce a right which the corporation ought to enforce must make the corporate officers co-defendants. *Slattery v. St. Louis, etc. Co.*, 91 Mo. 217 (1886). But see § 738, *supra*. A stockholder cannot appeal from a decree against the company. *Ex parte Cutting*, 94 U. S. 14 (1876). Stockholders are not entitled to notice of the suit. *Peirce v. Somersworth*, 10 N. H. 369 (1839). A corporation represents the stockholders in bringing or defending suits. *Gunderson v. Illinois Trust & Savings Bank*, 100 Ill. App. Rep. 461 (1902). Where a stockholder transfers stock to another person for the benefit of the company, he cannot call the latter to account or enforce the agreement, inasmuch as the company has the beneficial interest, although he might maintain a suit in behalf of the company if it declined to sue. *Parmenter v. Homans*, 125 N. Y. App. Div. 399 (1908). Even though there are but three stockholders in a coal mining company which is suing a railroad for damages for discrimination, and they sell their stock under an agreement by which they are to have the results of the suit and are to control it, this is no defense to the suit itself. *Puritan, etc. Co. v. Pennsylvania R. R.*, 85 Atl. Rep. 426 (Pa. 1912).

<sup>2</sup> *Silk Mfg. Co. v. Campbell*, 27

N. J. L. 539 (1859). Under the Louisiana statute a stockholder may appeal from a judgment against the corporation. *Massie v. Louque*, 109 La. 769 (1901). Even though the corporation fails to perfect an appeal by filing a bond, yet a stockholder cannot take such appeal. *White, etc. Co. v. Union, etc. Co.*, 232 Ill. 165 (1907). Under the statute of Ohio a stockholder may sometimes appeal where the corporation does not. *Henry v. Jeanes*, 47 Ohio St. 116 (1890). A stockholder has no right to take an appeal from a decree against the corporation. *Chicago, etc. R. R. v. Northern Trust Co.*, 90 Ill. App. 60 (1899).

<sup>3</sup> *Forbes v. Whitlock*, 3 Edw. Ch. 446 (1841). See also *Quincy v. Steel*, 120 U. S. 241 (1887).

<sup>4</sup> 18 How. 331, 345 (1855), where the court said: "Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency." See also *Memphis, etc. Co. v. Williamson*, 9 Heisk. (Tenn.) 314 (1872), where suit was brought on the bond which the plaintiff in *Memphis v. Dean*, 8 Wall. 64 (1868), gave in obtaining an injunction. Cf. *Corbus v. Alaska, etc. Co.*, 187 U. S. 455 (1903). Where a purchaser at tax sale is about to remove the corporate property and the officers do not act, the stockholders may maintain a bill in equity to enjoin the removal of the property and no request to the directors is necessary. *Starr v. Shepard*, 145 Mich. 302 (1906).



the corporation refused to defend itself against an illegal tax, that a stockholder of the corporation might do that which the corporation should have done.<sup>1</sup> A stockholder cannot maintain an action at law against outside parties for conspiracy to injure and ruin the corporation.<sup>2</sup> Although the corporation may have a right to treble damages on account of a violation of the anti-trust act of congress, yet a stockholder or creditor of the corporation cannot maintain the suit on the ground of injury to his stock or debt.<sup>3</sup>

It is within the power of the directors to compromise a pending lawsuit by or against the corporation, and a stockholder cannot control the directors' decision.<sup>4</sup> After the receiver, in

<sup>1</sup> See also *Park v. Petroleum Co.*, 25 W. Va. 108 (1884); s. c., 26 W. Va. 486 (1885).

<sup>2</sup> *Converse v. United States, etc. Co.*, 185 Mass. 422 (1904). A manager who is forced to resign and sell his stock because the corporation has been defrauded by other parties, cannot hold such other parties liable for the depreciation in the value of the stock or for his proportion of the amount out of which they had defrauded the corporation, nor for damages from his enforced resignation and injury to reputation. *Ninneman v. Fox*, 43 Wash. 43 (1906). Where a promoter causes the stockholders in various electric companies to turn in their stock to a new corporation in exchange for bonds of the latter, and also gives to such stockholders the right to purchase, at \$30 a share, stock in the latter, a stockholder who has done so and then discovers that the promoter has made \$20,000,000 profit in stock of the new company, he may bring suit to compel the promoter to turn over the profit to the corporation and may join the new corporation as a party defendant. It is no defense that the board of directors of the latter thinks it inexpedient that the suit be brought. *Groel v. United States, etc. Co.*, 70 N. J. 616 (1905). The court said (p. 1064): "The authorities hold that it is a matter of discretion in the court whether to permit a suit to be brought by a stockholder on behalf of his corporation, and that the court will exercise its discretion, having in view the circumstances of the parties,

their relationships to each other and to the cause of action, the refusal to sue," etc.

<sup>3</sup> *Loeb v. Eastman Kodak Co.*, 183 Fed. Rep. 704 (1910). See also § 734, *supra*.

<sup>4</sup> "It cannot be contended that the directors of a corporation do not possess authority, acting in good faith and in the exercise of their best judgment, to settle a pending action, or that the settlement is not binding on their stockholders, even though it may subsequently appear that they failed to secure the best terms to which the corporation might have been entitled." *Donohoe v. Mariposa, etc. Co.*, 66 Cal. 317, 319 (1885). See also *Shawhan v. Zinn*, 79 Ky. 300 (1881). The board of directors may compromise claims and lawsuits. *New Albany v. Burke*, 11 Wall. 96 (1870); *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122 (1875), aff'g 39 Md. 600; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322 (1885); *Frankfort Bank v. Johnson*, 24 Me. 490 (1844); *Seeley v. San José, etc. Co.*, 59 Cal. 22 (1881). The sureties of a corporate treasurer are liable for a deficiency existing after the compromise by the corporation of a claim which the treasurer illegally created. *Goodyear, etc. Co. v. Cadue*, 144 Mass. 85 (1887). Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is



accordance with an order of the court, settles with the directors claims against them for breaches of trust, a stockholder cannot maintain a suit for such breaches of trust.<sup>1</sup> Even though a contract is of doubtful validity, the corporation may compromise the claim.<sup>2</sup>

In England it has been held that even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal it is not *ultra vires*, and, as to the illegal act, it is for the corporation to decide whether or not it will sue.<sup>3</sup> A stockholder cannot sue to enjoin a person from slandering the title of property belonging to the corporation.<sup>4</sup> But a stockholder in a railroad company may file a bill to enjoin an unreasonable reduction of the rates made by act of the legislature;<sup>5</sup> and a stockholder may enjoin his company from paying an illegal income tax.<sup>6</sup> A stockholder may enjoin a rival company from appropriating the right of way and property of his own company, where a majority of the directors of the latter are allowing these acts to be done.<sup>7</sup> A stockholder may bring suit in behalf of the corporation to compel the president to pay his

no bar to such suit for the balance. A release by the board of directors is no defense. *Gilbert v. Finch*, 72 N. Y. App. Div. 38 (1902); *aff'd*, 173 N. Y. 455.

<sup>1</sup> *Craig v. James*, 71 N. Y. App. Div. 238 (1902).

<sup>2</sup> *Farmers', etc. Co. v. Meese*, 49 Neb. 861 (1896). Where the board of directors have adjusted a claim against a labor union for treble damages under the anti-trust act of Congress, a minority stockholder cannot maintain a suit in behalf of the corporation to enforce such claim. *Post v. Buck's, etc. Co.*, 200 Fed. Rep. 918 (1912). An adjustment of a claim by the board of directors is binding on the stockholders unless fraud and bad faith are shown. *Chambers v. Chambers, etc. Co.*, 185 Pa. St. 105 (1898). Where the bonds of a lessor railroad become due before the lease expires, and they may be refunded at a low rate of interest, and a *bona fide* controversy arises as to who is entitled to the saving, and a compromise is effected and approved by a majority in interest of the stockholders at a meeting called for that purpose, the fact that a majority of the directors of the lessor are also

directors of the lessee does not invalidate the compromise if there was no actual fraud. *Continental Ins. Co. v. N. Y. etc. R. R.*, 103 N. Y. App. Div. 282 (1905); *aff'd*, 187 N. Y. 225. Where a corporation brought suit against a promoter for fraud and has failed, and a contract is then made by which all the stockholders are given an opportunity to sell their stock to the promoter, and the board of directors ratified the contract and agreed to stop all litigation, a dissenting stockholder cannot have the contract set aside for fraud, even though by the contract the president is paid for his services. *Hallenborg v. Cobre, etc. Co.*, 200 U. S. 239 (1906).

<sup>3</sup> *Anderson v. Midland Ry.*, [1902] 1 Ch. 369.

<sup>4</sup> *Langdon v. Hillside, etc. Co.*, 41 Fed. Rep. 609 (1890).

<sup>5</sup> *Smyth v. Ames*, 169 U. S. 466 (1898).

<sup>6</sup> *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429 (1895); *s. c.*, 158 U. S. 601.

<sup>7</sup> *Weidenfeld v. Sugar Run R. R.*, 48 Fed. Rep. 615 (1892); *Robinson v. New York, etc. Ry.*, 123 N. Y. App. Div. 339 (1908).



subscription, where the president is in control of the company and refuses to pay such subscription.<sup>1</sup>

It has been held that a stockholder may bring suit on behalf of the corporation to remove a cloud from the corporate title to real estate,<sup>2</sup> and that a stockholder may sue for the corporation to compel delinquent stockholders to pay in their unpaid subscription.<sup>3</sup> In one case it has been held that where there is a controversy among the stockholders as to how many directors one of the stockholders — a municipality — is entitled to, a stockholder may file a bill to settle it, since the corporation is not bound to decide or test the matter.<sup>4</sup> "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding,"<sup>5</sup> but may have a void judgment set aside.<sup>6</sup>

By reason of this principle of law and the further fact that a multiplicity of suits should be avoided, the courts will, in some instances, allow a stockholder to intervene in a suit brought by or against the corporation and thus enable him to assist and protect the corporate interest in such suit. This subject, however, is considered elsewhere.<sup>7</sup>

<sup>1</sup> No request to directors is necessary in such a case. *Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891). If a trustee who holds land for the benefit of a corporation commits a breach of trust, any stockholder may cause him to be removed. *Fisk v. Patton*, 7 Utah, 399 (1891). The president may institute a suit to compel a majority of the board of directors to account for fraud, even though they are opposed to the suit. *Recamier Mfg. Co. v. Seymour*, 5 N. Y. Supp. 648 (1889).

<sup>2</sup> *Baldwin v. Canfield*, 26 Minn. 43, 56 (1879).

<sup>3</sup> *Wallworth v. Holt*, 4 Myl. & C. 619 (1840).

<sup>4</sup> *Wheeling v. Baltimore*, 1 Hughes, 90 (1862); s. c., 29 Fed. Cas. 914.

<sup>5</sup> *National Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006 (1895). See also § 209, *supra*. A stockholder may attack the judgment by a direct proceeding. See § 734, *supra*. Pledges of stock are not in any sense creditors of the corporation, and are bound by judgments against the corporation the same as stockholders. *Farmers' Bank, etc. v. Ohio River, etc. Co.*, 108 Ky. 447 (1900). A judgment in a suit between the corporation and the president

which fixes his liability is not binding on stockholders in a suit to adjust equities among the stockholders on winding up. *Gund v. Ballard*, 73 Neb. 547 (1905). Although a judgment against a corporation is conclusive as against a stockholder, this does not apply to joint tort-feasors. *Bigelow v. Old Dominion, etc. Co.*, 225 U. S. 111 (1912). A stockholder cannot maintain a suit against a foreign corporation to impeach a judgment against the corporation in the state where it is incorporated, where the only allegations are general ones of fraud and collusion. *Kelly v. Thomas*, 234 Pa. St. 419 (1912). A stockholder cannot prevent a judgment creditor of a corporation levying on corporate property on the ground that the corporate property was not subject to execution, inasmuch as stockholders are bound by judgments against the corporation. *Verner v. Simpson*, 68 S. C. 459 (1904).

<sup>6</sup> A judgment against a corporation that has been dissolved is void. A stockholder may have it expunged from the record. *Newhall v. Western, etc. Co.*, 128 Pac. Rep. 1040 (Cal. 1912).

<sup>7</sup> See § 848, *infra*.



Where the corporation fraudulently does not defend, the remedy of a stockholder is not to appear and defend in the name of the corporation, but to intervene and defend in his own name.<sup>1</sup> Hence if there is no officer or agent to defend in behalf of the corporation, a stockholder will be allowed to defend.<sup>2</sup> A stockholder will be allowed to intervene and object to a reckless sale of the property of an insolvent corporation by the receiver thereof, where the corporation itself is now protecting the interests of the stockholder.<sup>3</sup> A stockholder will be allowed to intervene and defend a suit pending against the corporation on a note where he alleges that the note is fraudulent, and the directors, by a conspiracy, do not intend to defend.<sup>4</sup> Stockholders will be allowed to intervene and defend in the name of the company where they show that the officers are wrongfully refusing to make a valid defense, which is set forth in the papers.<sup>5</sup> There is no appeal in the federal court from an order denying the petition of a bondholder to intervene.<sup>6</sup>

Where a suit is brought against a corporation for the benefit of the president and a majority of the board of directors, and no answer is

<sup>1</sup> *Cornell v. Sims*, 111 Ga. 828 (1900). In a suit between two corporations, one of which owns a majority of the stock of the other and controls it, a minority stockholder of the latter may intervene and defend, even though the suit was instituted at his request, it appearing that he did not then know all the facts. In such a case, however, his attorney's fees must be paid by himself. *Ex parte Gray*, 157 Ala. 358 (1908). In insolvency proceedings minority stockholders may intervene to contest an alleged *ultra vires* mortgage debt which the officers and majority stockholders are in favor of allowing. *Jones v. Ezell & Co.*, 134 Ga. 553 (1910). Stockholders will be allowed to come in and defend where the officers by collusion are not making any defense. *Feess v. Mechanics', etc. Bank*, 87 Kan. 313 (1912).

<sup>2</sup> *Doak v. Stahlman*, 58 S. W. Rep. 741 (Tenn. 1899). A stockholder may intervene to vacate a foreclosure decree entered on consent of the president without authority, where there is no board of directors to defend. *Frederick Milling Co. v. Frederick, etc. Co.*, 20 S. Dak. 335 (1906).

<sup>3</sup> *State v. Holmes*, 60 Neb. 39 (1900).

<sup>4</sup> *Majors v. Taussig*, 20 Colo. 44 (1894).

<sup>5</sup> *Fitzwater v. National Bank, etc.*

62 Kan. 163 (1900). Even though the corporate property is sold on an execution obtained in a suit against the corporation, yet the stockholders cannot make a motion in such suit to set aside the sale unless it is made to appear that the corporate officers have been wilfully and fraudulently neglectful. *Home, etc. Co. v. McKibben*, 60 Kan. 387 (1899). Stockholders will not be allowed to intervene in a suit brought by a creditor against the corporation itself, even though they wish to set up the statute of limitations, and even though the directors had directed the company's lawyer to admit the allegations of the complainant, and even though the company is insolvent, and the stockholders are liable on the stock, no fraud being shown. *Meyer v. Bristol, etc. Co.*, 163 Mo. 59 (1901). Even though the vice-president and general manager, who is being sued by the corporation for converting its funds, obtains control and intends to dismiss the suit, the minority stockholders cannot intervene unless they allege facts that would sustain a suit brought by them. *Ainsworth v. Evans*, 80 Pac. Rep. 344 (Ariz. 1905).

<sup>6</sup> *Land, etc. Co. v. Tatnall*, 132 Fed. Rep. 305 (1904).



interposed, a stockholder will be allowed to intervene and defend without requesting the officers to make the defense.<sup>1</sup> A receiver cannot have a judgment at law set aside on the ground that it was obtained by collusion. His remedy is in equity.<sup>2</sup>

The rule which ordinarily prevents a stockholder from instituting or defending a suit against third persons herein is clearly to be distinguished from all other classes of actions treated of in the fourth part of this work. The actions now being considered are those which exist for or against the corporation in a multitude of cases, and which are of daily occurrence to all great corporations. They are actions not involving frauds or *ultra vires* acts of the directors, but involve at the most only a neglect of the directors to begin or defend suits.

There is a class of cases which are midway between these two classes.

This third class involves a neglect of the directors to defend a suit against the corporation, and the further fact that the defense is not made on account of the fraud and collusion of the directors with the complainants in the suit. This generally happens in foreclosures of mortgages on the property of the corporation, a subject which is considered elsewhere.<sup>3</sup> A stockholder in a foreign corporation may bring suit in the United States court to set aside a judgment obtained in that district against the corporation fraudulently by its officers and directors, and the latter cannot have the suit dismissed as to them, even though they are non-residents.<sup>4</sup>

§ 751. *Suits by and against corporations must be in corporate name.* — It is stated by Blackstone that one of the distinguishing features of a corporation is that it may sue and be sued in its corporate name. This is an elementary principle of law. Consequently, the stockholders are not to be made parties in suits against the corporation.<sup>5</sup> Moreover, a suit by or against the corporation must be by or against

<sup>1</sup> *Shively v. Eureka, etc. Co.*, 129 Cal. 293 (1900). Stockholders cannot contend that the corporation is not insolvent in a bankruptcy proceeding against it by corporate creditors except where a request to the directors to defend has been made. *Re Eureka, etc. Co.*, 197 Fed. Rep. 216 (1912).

<sup>2</sup> *Woodward v. Arlington, etc. Co.*, 2 Pen. (Del.) 188 (1899).

<sup>3</sup> See § 848, *infra*.

<sup>4</sup> *Schultz v. Diehl*, 217 U. S. 594 (1910). The remedy of minority stockholders to open a judgment fraudulently obtained against the corporation is by motion or petition and not by a complaint in intervention, and a request should first be made to the

board of directors. *Seattle, etc. Ry. v. Bowman*, 53 Wash. 416 (1909).

<sup>5</sup> *Kelley v. Mississippi Cent. R. R.*, 1 Fed. Rep. 564 (1880). In a suit by a corporation to obtain property, in accordance with a contract, a trustee who is holding all the stock for the benefit of the stockholders is not a proper party. *Havana, etc. Ry. v. Ceballos*, 49 N. Y. App. Div. 263 (1900). In Ohio a person litigating with a corporation may have a change of venue when the corporation has more than fifty stockholders at its principal office in the county where the litigation is pending, if the party swears that he does not think he can obtain a fair and impartial trial in that



it in its corporate name, and not in the names of its officers.<sup>1</sup> A judgment against a partnership sued as a corporation cannot be enforced

county, and five credible persons residing in the county sustain his application. *Snell v. Cincinnati, etc. Ry.*, 60 Ohio St. 256 (1899). Even though suit is brought in the name of all the stockholders instead of the corporation, the corporation may be substituted by amendment. *Hackett v. Van Frank*, 119 Mo. App. 648 (1906).

<sup>1</sup> An action against an individual, "president of the," etc., is not a suit against the corporation. The suit must be against the corporation in its corporate name. *Ogdensburg Bank v. Van Rensselaer*, 6 Hill, 240 (1843). Process should run against the corporation and not its officers. *Smith Premier, etc. Co. v. Westcott*, 112 Md. 146 (1910). Where suit has been commenced against the president personally, the court cannot direct that the suit continue as against the corporation, even though thereby the statute of limitations becomes a bar as against the latter. *Licausi v. Ashworth*, 78 N. Y. App. Div. 486 (1903). An action against the stockholders does not bind or affect the corporation unless it is made a party by name and service. *Lillard v. Porter*, 2 Head (Tenn.), 177 (1858). Garnishee process addressed to a person as cashier does not bind the bank. *Bank of Monroe v. Ouachita Valley Bank*, 124 La. 798 (1909). When there is no prayer for process against a corporation by its corporate name, but only against its officers, and the body of the bill does not describe the corporation as a party, the corporation is not before the court, though it is in the title. *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438 (1831). An important exception to this rule arises, of course, where the corporation refuses to sue and a stockholder sues for it. See Part IV of this work generally. Process running to A as president of, etc., runs to A individually, and the company is not thereby made a party, and an amendment without new service cannot cure. *Plemmons v. Southern Imp. Co.*, 108 N. C. 614 (1891). Where the name of a party is stated

in the complaint in such words as to imply a corporation, it will be presumed that it was a corporation. *Ohio Oil Co. v. Detamore*, 165 Ind. 243 (1905). Even though process runs to an officer of the corporation instead of to the corporation itself, yet if it appears and defends it cannot raise that objection. *Shorter University v. Franklin Bros.*, 75 Ark. 571 (1905). Where several lines of railroad use for convenience the name "Kanawha Dispatch" in handling freight, such Kanawha Dispatch cannot maintain a suit. *Kanawha Dispatch v. Fish*, 219 Ill. 236 (1905). See Ch. XXIX, *supra*. A citation directed to an agent of a corporation does not bring the corporation into court. *Mutual, etc. Co. v. Uecker*, 46 Tex. Civ. App. 84 (1907). A corporation may sue in its own name by its attorney without designating the president or any other officer. *Southern Sawmill Co. v. Ducote*, 120 La. 1052 (1908). An attachment or garnishment against "William Milnes, president Shenandoah," etc. Railroad, is not good as against the company. It is against Milnes as an individual. *Fidelity, etc. Co. v. Shenandoah Valley R. R.*, 33 W. Va. 761 (1890). A corporation may appeal from an order for the examination of one of its officers. *Sherman v. Beacon Const. Co.*, 58 Hun, 143 (1890). In a suit to enjoin a corporation from lowering the level of a lake, the president may be joined as a party defendant. *Cedar Lake Hotel Co. v. Cedar Creek, etc. Co.*, 79 Wis. 297 (1891). The question of joining the directors and agents for purposes of discovery is discussed elsewhere. See § 519, *supra*. Process should not run to a person as president of a company. It should run to the company itself. *State v. Montegudo*, 48 La. Ann. 1417 (1896). Process to an individual as president does not bring the corporation into court. *Butler v. Holmes*, 29 Tex. Civ. App. 48 (1902). A *mandamus* to compel the production of the books of the corporation should run to the corpo-



against copartners.<sup>1</sup> A defendant sued as a partnership cannot be held liable if it is a corporation.<sup>2</sup> The mere fact that one company owns all the stock of another does not create such a community of interest as to prevent the latter being made a party to a suit by the former.<sup>3</sup> The president of the company may employ an attorney to bring suit or to appear for the company.<sup>4</sup> Stock is located where the corporation is incorporated, and a non-resident stockholder may file a bill in the United States court in the district where the corporation was organized to set aside an illegal forfeiture of the stock for non-payment of assessments, and in such suit he may bring in non-resident defendants by substituted service.<sup>5</sup> A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account.<sup>6</sup>

A peremptory *mandamus* granted without notice is not the proper remedy to compel the treasurer of the corporation to pay a debt in accordance with the order of the executive committee.<sup>7</sup> A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity.<sup>8</sup>

§ 752. *Service on a domestic corporation — Appearance — Answer — Proofs.* — If the suit is against the corporation, service is made upon it, not by service upon a stockholder,<sup>9</sup> but upon the chief officer of the corporation within the jurisdiction.<sup>10</sup> "At common law service

ration itself and not to the manager. *State v. North American, etc. Co.*, 105 La. 379 (1901); s. c., 31 S. Rep. 172 (1902).

<sup>1</sup> *Pittsburg, etc. Co. v. Beale*, 204 Pa. St. 85 (1902). See also § 243, *supra*.

<sup>2</sup> *Welton v. Genesee, etc. Co.*, 114 La. 842 (1905).

<sup>3</sup> *Federal, etc. Co. v. Bunker Hill, etc. Co.*, 187 Fed. Rep. 474 (1909).

<sup>4</sup> See § 716, *supra*. In a suit against a corporation and its president, both parties are liable for the fees of their attorneys. *Humes v. Decatur Land, etc. Co.*, 98 Ala. 461 (1893).

<sup>5</sup> *Jellenik v. Huron, etc. Co.*, 177 U. S. 1 (1899). See also § 363.

<sup>6</sup> *Consolidated, etc. Works v. Brew*, 112 Wis. 610 (1902). See also § 648, *supra*.

<sup>7</sup> *Horton v. State*, 60 Neb. 701 (1900).

<sup>8</sup> *Hunter v. Robbins*, 117 Fed. Rep. 920 (1902). See also § 648, *supra*.

<sup>9</sup> *Bache v. Nashville, etc. Soc.*, 10

*Lea (Tenn.)*, 436 (1882); *Lillard v. Porter*, 2 Head (Tenn.), 177 (1858); *De Wolf v. Mallett*, 3 Dana (Ky.), 214 (1835). Service in Colorado by statute may be on a stockholder if there is no resident agent. Service cannot be avoided by a transfer of his stock by a stockholder for that purpose only. *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499 (1890). See also § 758, notes, *infra*. Service upon the president and secretary as individuals is not service on the corporation. *Kirkpatrick, etc. Co. v. Central, etc. Co.*, 159 Ind. 639 (1903). Service on the owner of the entire capital stock may stop the running of the statute of limitations. *Linn, etc. Co. v. United States*, 196 Fed. Rep. 593 (1912).

<sup>10</sup> Service of notice of attachment in a garnishment case upon two of the officers and directors of a corporation has been held sufficient notice to the corporation. *Boyd v. Chesapeake, etc. Canal Co.*, 17 Md. 195 (1860). Notice



was made on such head officer of a corporation as secured knowledge

of a motion for a rule to establish the election of directors is sufficient if served on the directors whose election is questioned, and it need not be served on the other directors or on the president. *Ex parte Holmes*, 5 Cow. 426 (1826). Upon affidavit that the corporation had no presiding officer or treasurer, and that the secretary had left the country, the court ordered service to be on the trustee. *Tom v. First Society, etc.*, 19 Wend. 25 (1837). Service on a domestic corporation may be by service on the president, even though he is temporarily in the state in connection with litigation. *Breon v. Miller, etc. Co.*, 83 S. C. 221 (1909). Where a corporation is defunct and service is made upon a former officer he may ask to have the service set aside. *Pennington, etc. v. Douglas, etc. Ry.*, 6 Ga. App. 854 (1909). A foreman acting under a superintendent is not an officer or manager or local agent upon whom service may be made. *Simmons v. Defiance Box Co.*, 148 N. C. 344 (1908). In moving to set aside service on the ground that the party served was not the president, the papers should state who is the president or other officer on whom service may be made, if there is one. *Arnold v. Sentinel, etc. Co.*, 77 Atl. Rep. 966 (Del. 1910). A return made by the sheriff of service on a certain person as agent may be sufficient proof of service on the corporation. *Phillips v. Bond*, 132 Ga. 413 (1909). A person who brings together two parties in a single transaction is not an agent of one of them on whom process may be served. *Good Roads, etc. Co. v. Commonwealth*, 146 Ky. 690 (1912). Where the president and treasurer of a corporation misinform a process-server and induce him to serve process upon another party which was intended to be served upon the president, the service is good as against the corporation. *Wilson v. California Wine Co.*, 95 Mich. 117 (1893). "At common law the process against a corporation could only be served on its head or principal officer within the jurisdiction of the sov-

ereignty where the artificial body existed." *Young v. Dexter*, 18 Fed. Rep. 201, 208 (1883). Service upon one who has ceased to be president, director, or other officer renders the judgment void. *Beardsley v. Johnson*, 121 N. Y. 224 (1890). Even though an officer resigns for the purpose of preventing service upon the company, yet, if the resignation is accepted, service cannot be made upon him. *Sturgis v. Crescent, etc. Co.*, 10 N. Y. Supp. 470 (1890). Service on one as secretary, when he never had been secretary, is not good. *Collier v. Morgan's, etc. R.R.*, 41 La. Ann. 37 (1889). Where the corporation has suspended business, and the chairman of the directors was dead, the court directed service to be made on the deputy chairman and secretary who had last served as such for the corporation. *Gaskell v. Chambers*, 26 Beav. 252 (1858). Service on the chief resident agent has been held sufficient. *Newby v. Von Oppen*, L. R. 7 Q. B. 293 (1872). A notice of a lien served on the secretary is sufficient. *Heltzell v. Chicago, etc. R.R.*, 77 Mo. 315 (1883). Service on the president is sufficient. *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96 (1854). But not on a mere agent. *McCall v. Byram Mfg. Co.*, 6 Conn. 428 (1827). A suit against a supposed corporation is not good against its members, there being merely a copartnership. Service on the general manager does not make him a party defendant. *Leatherman v. Times Co.*, 88 Ky. 291 (1889). See § 758, *infra*. A director cannot avoid service by slamming the door in the face of the officer. *Boggs v. Inter-American, etc. Co.*, 105 Md. 371 (1907). Where a contract is to be performed in another state, suit may be commenced in that state by service on the president while there. *Payne v. East, etc. Co.*, 109 La. 706 (1903). Service on a book-keeper is not good under the Kentucky statute on the mere allegation that the "president and chief officers" were absent, without further specification. *Beattyville, etc. Co. v. Bamberger, etc.*



of the process to the corporation."<sup>1</sup> A decree of foreclosure based upon services accepted by the acting president, who was really the agent of the mortgagee, may be set aside as fraudulent.<sup>2</sup> Where the secretary, who has been served with process, fraudulently concealed the service, the corporation may have a judgment entered by default set aside.<sup>3</sup> The subject of service upon a foreign corporation is considered elsewhere.<sup>4</sup> Generally the statutes of the state specify the corporate officers upon whom service may be made.<sup>5</sup> A statute may

Co., 53 S. W. Rep. 31 (Ky. 1899). Where a domestic corporation has no officers upon whom service can be made, the statute may authorize service by publication. *McKendrick v. Western, etc. Co.*, 130 Pac. Rep. 865 (Cal. 1913). Where an agent authorized to accept service causes appearance to be entered without service, and the corporation for three years does not object, the appearance is good. *Alliance, etc. Co. v. Bartlett*, 9 N. M. 554 (1899). A judgment by default against a corporation must show that service was properly made on an officer of the corporation. *Southern, etc. Assoc. v. Gillespie*, 121 Ala. 295 (1899). Where the attorney for the plaintiff is president also of the defendant corporation, service of process upon him as president is not void. *United States, etc. Co. v. Spencer*, 46 W. Va. 590 (1899). A judgment obtained in another state by service on a person who had ceased to be secretary is not binding. *Thum v. Pyke*, 8 Idaho, 11 (1901). Under the United States statute that a federal receiver shall manage property according to the laws of the state where the property is, service in a suit against the receiver may be made upon a local agent where by the statutes of the state such service could be so made as against the corporation itself. *Wolfe v. Pierce*, 23 Ind. App. 591 (1900). A "managing agent" upon whom process may be served in New York need not be the general manager, but may have had charge of only the matter in which the litigation arose. *Perrine v. Ransom, etc. Co.*, 60 N. Y. App. Div. 32 (1901). For purposes of making service a director and president of a railroad company

is presumed to continue as such, even though elected annually and the year has expired. *Buell v. Baltimore, etc. R. R.*, 39 N. Y. App. Div. 236 (1899).

<sup>1</sup> *Kansas City, etc. R. R. v. Daughtry*, 138 U. S. 298, 305 (1891).

<sup>2</sup> *Fox v. Robbins*, 62 S. W. Rep. 815 (Tex. 1901). Service on an officer who is interested in suppressing the fact of service, is not good. *People v. Feicke*, 252 Ill. 414 (1911). Where the secretary owns a claim against the company and assigns it and the assignee commences suit, service cannot be upon such secretary. *Atwood v. Sault, etc. Power Co.*, 148 Mich. 224 (1907).

<sup>3</sup> *Sprague v. Stratton, etc. Co.*, 125 Pac. Rep. 490 (Colo. 1912).

<sup>4</sup> See §§ 757, 758, *infra*.

<sup>5</sup> A solicitor of insurance in Ohio is not a managing agent upon whom process may be served sufficient to support a judgment to be sued upon in Michigan. *Spiker v. American, etc. Soc.*, 140 Mich. 225 (1905). An agent of a domestic corporation who is temporarily in another county cannot be served there under the Nebraska statute. *Security, etc. Co. v. Ress*, 76 Neb. 141 (1906). A statute requiring corporations to appoint a state auditor as agent to accept service of process and notice is constitutional. *State v. St. Mary's, etc. Co.*, 58 W. Va. 108 (1905). Service upon the vice-president is good under a statute authorizing service on the president or other head. *Comet, etc. Co. v. Frost*, 15 Colo. 310 (1890). Service on an assistant cashier is not sufficient even though the statute authorized service on the cashier. *Karns v. State Bank, etc.*, 31 Nev. 170 (1909). A timekeeper may be such an agent as may be served under a



provide that where no officer of a domestic corporation is in the state process may be served on the state auditor.<sup>1</sup>

The corporation may appear generally, or may appear specially for the purpose of objecting to the service.<sup>2</sup> Where service is made upon an agent who is not an agent within the meaning of a statute authorizing service, the corporation should promptly move to set it aside.<sup>3</sup>

Formerly a corporation made complaint or answer in a suit by attaching the corporate seal to the bill of complaint or answer. But this rule left the pleading unverified, and consequently, by statute now, it is generally prescribed that some officer of the corporation shall verify the pleading for the corporation.<sup>4</sup> Where the answer of a corporation

statute. *Jenkins v. Penn Bridge Co.*, 73 S. C. 526 (1906). Service by publication is sufficient for a personal judgment against a domestic corporation, if the statutes so provide. *Clearwater, etc. Co. v. Roberts, etc. Co.*, 51 Fla. 176 (1906). The master of a ship owned by a corporation may be managing agent upon whom service may be made in accordance with a statute. *Davidson, etc. Co. v. United States*, 142 Fed. Rep. 315 (1905); *aff'd*, 205 U. S. 187. As to the requirements of service and a return thereof by the sheriff, under the Missouri statute, see *Newcomb v. New York, etc. R. R.*, 182 Mo. 687 (1904).

<sup>1</sup> *Wylie, etc. Co. v. Lynch*, 195 Fed. Rep. 386 (1912).

<sup>2</sup> See § 759, *infra*. A corporation, like a natural person, may appear voluntarily by attorney, and such appearance gives jurisdiction to the same extent as if there was actual service of process. *Att'y-Gen. v. Guardian, etc. Ins. Co.*, 77 N. Y. 272 (1879).

<sup>3</sup> *Coast Land Co. v. Oregon, etc. Co.*, 44 Oreg. 483 (1904). Where service is made upon a corporate agent who has been served in prior cases, in which the corporation appeared, it is his duty or the duty of the attorney to return the papers and inform the plaintiff upon whom service can be made if the service was insufficient, otherwise the service will be held good. *Hill v. Morgan*, 9 Idaho, 718 (1904). In a plea in abatement to quash service, the affidavit should not be made by the party on whom service was made and who it is claimed was not a person upon whom service

could be made. *Scott v. Stockholders', etc. Co.*, 129 Fed. Rep. 615 (1904).

<sup>4</sup> In an answer by a corporation, "the answer should be made by the principal officer of the defendant corporation, who should be able to admit or deny the facts charged and interrogated about, or to state want of knowledge clearly and truly as a reason for not doing either." *Hale v. Continental L. Ins. Co.*, 16 Fed. Rep. 718 (1883). When an affidavit is required of the corporation it may be made by any officer or agent. *Old Settlers' Inv. Co. v. White*, 158 Cal. 236 (1910). An injunction against a corporation is not dissolved by an answer verified by the present secretary, who became such after the acts occurred, and who verified that his acts therein referred to were true, and that the acts of others he believed to be true. Some officer cognizant of the facts must verify. *Fulton Bank v. New York, etc. Canal Co.*, 1 Paige, 311 (1829). At common law a corporation answers by attaching its seal. The answer is not evidence, since it is not sworn to. If a sworn answer is desired, some of the officers or members must be made co-defendants. *Baltimore, etc. R. R. v. Wheeling*, 13 Gratt. (Va.) 40 (1855). In legal proceedings answers which, if made by an individual, should be under oath, are made by corporations under their corporate seals. 1 *Daniell, Ch. Pl.* (6th Am. ed.) 146; *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212 (1860); *Bronson v. La Crosse R. R.*, 2 Wall. 283, 302 (1863); *Baltimore & Ohio R. R. v. Gallahue*, 12 Gratt.



is sworn to positively by an officer on his personal knowledge, the corporation is entitled to the benefit of the rule that the complainant must produce two witnesses or one with corroborating circumstances to overcome such answer.<sup>1</sup> Originally a corporation could not file an answer without the corporate seal except by consent.<sup>2</sup> Under the old practice an officer might be joined as a party defendant in order to obtain a sworn answer, especially where interrogatories were attached.<sup>3</sup> A cross-bill for discovery lies against a corporation, even though the officers might be called as witnesses.<sup>4</sup> In suing on a corporate obligation it need not be alleged that the officer signing the obligation had power to do so.<sup>5</sup> Under a denial by a corporation that it executed a contract, it may show that the president was not authorized to sign its name thereto, nor the secretary to attach its seal thereto.<sup>6</sup> The defense of *ultra vires* must be pleaded to be available.<sup>7</sup>

Reports from officers and employees of a corporation to its executive

(Va.) 655 (1855), answer of garnishee. See also *Brumly v. Westchester, etc. Soc.*, 1 Johns. Ch. 366 (1815); *Vermilyea v. Fulton Bank*, 1 Paige, 37 (1828); *Bouldin v. Baltimore*, 15 Md. 18 (1859); *Union Bank v. Geary*, 5 Pet. 99 (1831); *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601 (1826); s. c., 11 Fed. Cas. 156. A statute requiring a corporation to obtain the consent of a judge to interpose a defense to a suit on a promissory note before it can interpose a defense is not applicable where the corporation is an indorser to a note. *Shorer v. Times, etc. Co.*, 119 N. Y. 483 (1890). Where the corporation answers under its seal and by one of its principal officers, his authority to answer cannot be questioned by other parties to the suit. *Central Trust Co. v. Washington, etc. R. R.*, 124 Fed. Rep. 813 (1903). An officer verifying an answer under oath is not thereby given immunity under the acts of Congress. *Simon v. American Tobacco Co.*, 192 Fed. Rep. 662 (1911).

<sup>1</sup> *Kane v. Schuykill, etc. Co.*, 199 Pa. St. 198 (1901).

<sup>2</sup> *Gildersleeve v. Wolfe Island, etc. Canal Co.*, 3 Ch. Chamb. (Can.) 358 (1871). It is necessary to attach the corporate seal to its answer to a bill in equity. *R. Frank Williams Co. v. U. S. etc. Co.*, 86 Md. 475 (1897). A bill in equity by a corporation may be

signed by its counsel and need not be under the seal of the corporation. *Washington, etc. Assoc. v. Buser*, 61 W. Va. 590 (1907).

<sup>3</sup> See § 519, *supra*.

<sup>4</sup> *Indianapolis Gas Co. v. City of Indianapolis*, 90 Fed. Rep. 196 (1898). A corporation sued for a trespass cannot compel the plaintiff to specify what officers committed the trespass. *Commonwealth v. Nunn*, 17 Colo. App. 117 (1902).

<sup>5</sup> *Johnson County v. Chamberlain, etc.*, 74 Neb. 549 (1905). In suing to enforce a corporate contract it is not necessary to allege that the contract was within its powers. *San Antonio, etc. Co. v. Josey*, 91 S. W. Rep. 598 (Tex. 1906).

<sup>6</sup> *Quackenboss v. Globe & Rutgers, etc. Co.*, 106 N. Y. App. Div. 466 (1905). A corporation may by special demurrer require the plaintiff to state what officers conducted the transaction complained of. *Cherokee Mills v. Gate City, etc.*, 122 Ga. 268 (1905). In order to raise the question of *ultra vires* in regard to a foreign corporation, the foreign statute must be pleaded in order to bring up the powers conferred by such statute. *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903).

<sup>7</sup> *Perryman & Co. v. Farmers', etc. Co.*, 169 Ala. 414 (1910). See also § 681, *supra*.



officer in regard to an accident are privileged communications.<sup>1</sup> In a case involving fraud, the letters of officers of a corporation to each other may be put in evidence.<sup>2</sup> An attorney for a corporation, who is also a director, cannot refuse to testify as to corporate affairs on the ground of privilege.<sup>3</sup> The question of whether a party may testify as to a transaction between himself and a deceased director or *vice versa* is considered elsewhere.<sup>4</sup>

A creditor suing the corporation may call the directors as witnesses, but may not be bound by their testimony.<sup>5</sup> As against the officers of the company it may be proved by the books of the company that they had converted to their own use the funds of the company illegally.<sup>6</sup> Corporate books may be used to prove a right against the corporation itself or against one of the stockholders, so far as regularity and legality of the corporate proceedings are concerned. They must, however, be identified and this may be done by having an officer swear that he is the proper custodian and that they are the original books.<sup>7</sup> A copy of a resolution of the board of directors certified to by the secretary and authenticated under the corporate seal is admissible in evidence but not if the seal is not attached.<sup>8</sup> A corporation cannot be compelled to produce its president for examination as a witness.<sup>9</sup>

§ 753. *Allegation and proof of incorporation.*—If the corporation is plaintiff it is customary to allege that it has been and is incorporated.<sup>10</sup> The state in which the defendant is incorporated need not

<sup>1</sup> *Ex parte Schoepf*, 74 Ohio St. 1 (1906). See also § 519, *supra*.

<sup>2</sup> *Weiss v. Haight, etc. Co.*, 148 Fed. Rep. 399 (1906).

<sup>3</sup> *Matter of Robinson*, 140 N. Y. App. Div. 329 (1910).

<sup>4</sup> See § 11, *supra*.

<sup>5</sup> *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900).

<sup>6</sup> *Saranac, etc. R. R. v. Arnold*, 167 N. Y. 368 (1901). On this point see also § 727, *supra*.

<sup>7</sup> *Lowry Nat. Bank v. Fickett*, 122 Ga. 489 (1905). In a suit by the United States government to break up a combination and monopoly of corporations owning bridges and ferries across the Mississippi river at St. Louis, while a court of equity may compel traffic associations to produce their books and papers, even though they are not parties to the suit and it is claimed that the books and papers are immaterial and are private books and papers, yet it must be shown that the evidence is material. *United*

*States v. Terminal, etc.*, 154 Fed. Rep. 268 (1907).

<sup>8</sup> *Interstate, etc. Co. v. Powell Bros. etc. Co.*, 126 La. 22 (1910).

<sup>9</sup> *Central, etc. Co. v. Board, etc.*, 125 Fed. Rep. 463 (1903).

<sup>10</sup> It is unnecessary to allege incorporation where the name implies that plaintiff is a corporation. *Prussian, etc. Co. v. Eisenhardt*, 153 Mich. 198 (1908). A corporation suing in an apparent corporate name need not allege that it is a corporation, and the defendant will not be allowed to deny that it is a corporation where he has dealt with it as such. *Edenfield v. Bank of Millen*, 7 Ga. App. 645 (1910). Where the name indicates that the plaintiff is a corporation, incorporation need not be alleged. *Charles v. Valdosta, etc. Co.*, 4 Ga. App. 733 (1908). A corporation suing an indorser to it of a note need not allege incorporation. *New Bern, etc. Co. v. Duffy*, 156 N. C. 83 (1911). Failure to allege incorporation is cured by



be alleged in the complaint, it being better known to the defendant

judgment where the defendant failed to object. *St. Cecelia's Academy v. Hardin*, 78 Ga. 39 (1887). Incorporation need not be alleged unless the fact of its existence enters into or constitutes a part of the cause of action. *Holden v. Great Western E. Co.*, 69 Minn. 527 (1897). The execution and delivery of an instrument to a corporation raises the presumption that the company was regularly incorporated. *West Side, etc. Co. v. Connecticut, etc. Co.*, 186 Ill. 156 (1900). An allegation that a corporation is "a Pennsylvania corporation" sufficiently alleges that fact. *Roberts v. Pioneer Iron Works*, 125 N. Y. App. Div. 207 (1908). A corporation in bringing suit need not allege that it is a corporation. *Brady v. National, etc. Co.*, 64 Ohio St. 267 (1901). "A corporation under the laws of the state of Virginia" is equivalent to "existing under the laws of Virginia." *Mathieson, etc. Works v. Mathieson*, 150 Fed. Rep. 241 (1906). Where the name of a corporation is set forth in full, it is not necessary to allege that it is a corporation. *Snyder v. Philadelphia Co.*, 54 W. Va. 149 (1903); *Holcombe v. Cable Co.*, 119 Ga. 466 (1904). Where the name of the defendant signifies that it is a corporation it is not necessary to allege that it is a corporation. *Ft. Wayne, etc. Co. v. Nieman*, 33 Ind. App. 178 (1904). The words "a corporation" appearing after the name of the plaintiff in the title of a case is not an allegation of incorporation. *Boyce v. Augusta Camp*, 14 Okla. 642 (1904). In an indictment against a corporation it is not necessary to allege that it is a corporation. *State v. Dry Fork R. R.*, 50 W. Va. 235 (1901). Incorporation need not be alleged. *Loan, etc. Co. v. Stoddard*, 2 Neb. Unof. 486 (1902). Corporate existence need not be proved where the pleadings show that the defendant dealt with the plaintiff as a corporation. *Grand Ronde, etc. Co. v. Cotton*, 12 Colo. App. 375 (1898). A corporation plaintiff need not allege that it is a corporation; it suffices to state in the commencement of the dec-

laration the name of the corporation. *Union Cement Co. v. Noble*, 15 Fed. Rep. 502 (1882); *Smythe v. Scott*, 124 Ind. 183 (1890); *Shearer v. Peale, etc. Co.*, 9 Ind. App. 282 (1894); *Exchange Nat. Bank v. Capps*, 32 Neb. 242 (1891); *Leader, etc. Co. v. Lowry*, 9 Okla. 89 (1899). Cf. 1 Barb. Ch. Pr. 36, n. (foot p. 44, 2d ed.). In a suit against a corporation on a promissory note the incorporation need not be alleged, since the signature estops a denial of incorporation. *Griffin v. Asheville Light Co.*, 111 N. C. 434 (1892). An examination before trial may be had to ascertain whether defendants are proper defendants or whether they are a corporation. *Sweeney v. Sturgis*, 24 Hun, 162 (1881). An allegation of incorporation made once suffices for two causes of action in one suit. *West v. Eureka Imp. Co.*, 40 Minn. 394 (1889). The complaint need not allege whether the defendant is a foreign or domestic corporation. *Rothschild v. Grand Trunk Ry.*, 19 N. Y. Civ. Pro. 53 (1890). The allegation "a corporation under the laws of Iowa" is sufficient. *Saunders v. Sioux City Nursery*, 6 Utah, 431 (1890). Incorporation must be alleged. *Miller v. Pine Min. Co.*, 2 Idaho, 1206 (1892). In *Feghtly v. Village Blacksmith, etc. Co.*, 18 Idaho, 536 (1910), the court left undecided whether it would follow the rule in *Miller v. Pine Mining Co.*, 3 Idaho, 495, as to alleging corporate existence. As to South Dakota see *State v. Chicago, etc. Ry.*, 4 S. Dak. 261 (1893). In California an averment of corporate existence is necessary in every count of a complaint against the corporation. *People v. Central Pac. R. R.*, 83 Cal. 393 (1890). In a libel in admiralty such averment should be made. *Sun Mut. Ins. Co. v. Mississippi, etc. Co.*, 14 Fed. Rep. 699 (1882). In *Perine v. Grand Lodge, etc.*, 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. If the incorporation is denied it must be



than to the plaintiff.<sup>1</sup> An error in describing the corporation as incorporated in one state when it was actually incorporated in another state, may be corrected by amendment on the trial.<sup>2</sup> Where a New York company and also a New Jersey company, having the same name, have

proved. *Davis v. Nebraska Nat. Bank*, 51 Neb. 401 (1897). In Massachusetts proof of incorporation need not be given unless the defendant within a certain time files a demand for proof. *Cabana v. Holyoke Conclave*, 160 Mass. 1 (1893). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial in order to ascertain where they were incorporated. *Clark v. Wileklow*, 75 Hun, 290 (1894). In Colorado the appearance by a corporation as a defendant admits its incorporation. *Gauthier Decorating Co. v. Ham*, 3 Colo. App. 559 (1893). "The bringing of an action in a name purporting to be a corporate name is a sufficient averment of the existence of the plaintiff as a corporation." *Canandaigua Academy v. McKechnie*, 19 Hun, 62 (1879). There has been considerable controversy as to whether, at common law, a corporation plaintiff need allege that it is incorporated. See *Henriques v. Dutch West India Co.*, 2 *Ld. Raym.* 1532 (1727); *Central Mfg. Co. v. Hartshorne*, 3 Conn. 199 (1819); *Ewing v. Robeson*, 15 Ind. 26 (1860); *Zion Church v. St. Peter's Church*, 5 Watts & S. (Pa.) 215 (1843); *Vance v. Farmers', etc. Bank*, 1 Blackf. 80 (1820); *Emery v. Evansville, etc. R. R.*, 13 Ind. 143 (1859); *O'Donald v. Evansville, etc. R. R.*, 14 Ind. 259 (1860); *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326 (1827); *Jackson v. Bank of Marietta*, 9 Leigh (Va.), 240 (1838); *Farmers', etc. Bank v. Troy City Bank*, 1 Doug. (Mich.) 457 (1844); *Lighte v. Everett F. Ins. Co.*, 5 Bosw. 716 (1860); *Lewis v. Bank of Kentucky*, 12 Ohio, 132 (1843); *Mississippi, etc. R. R. v. Gaster*, 20 Ark. 455 (1859); *Bank of Utica v. Smalley*, 2 Cow. 770 (1824); *Jackson v. Plumbe*, 8 Johns. 378 (1811); *Dutchess Cotton Mfy. v. Davis*, 14 Johns. 238 (1817); *Bank of Michigan v. Williams*, 5 Wend. 482 (1830);

*Bank of Waterville v. Beltser*, 13 How. Pr. 270 (1856). Cf. *Chapman v. Barney*, 129 U. S. 677 (1889), to the effect that the allegation is necessary in the federal courts in cases where the jurisdiction depends on it; *Adams Exp. Co. v. Harris*, 120 Ind. 73 (1889); *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491 (1859). The corporation cannot demur on the ground that incorporation is not alleged. *Adams v. Lamson, etc. Co.*, 59 Hun, 127 (1891); *Rothschild v. Grand Trunk Ry.*, 14 N. Y. Supp. 807 (1891). *Contra*, *Schillinger, etc. Co. v. Arnott*, 14 N. Y. Supp. 326 (1891).

<sup>1</sup> *Pearce v. Butte, etc. Ry.*, 41 Mont. 304 (1910). The particular state in which a corporation is organized need not be alleged in the complaint. *Imperial, etc. Co. v. Jacob*, 136 Mich. 72 (1910). In a suit against a foreign corporation it is unnecessary to allege in what state it was incorporated. *Machen v. Western, etc. Tel. Co.*, 63 S. C. 363 (1902). It is not necessary to allege the particular state in which a foreign corporation was organized. *Herman, etc. Co. v. Pacific, etc. Co.*, 2 Cal. App. 167 (1905). It is not necessary to allege in what particular state a defendant corporation was incorporated. *Jones v. Pacific, etc. Co.*, 9 Idaho, 186 (1903).

<sup>2</sup> *Confectioners', etc. Co. v. Racine, etc. Co.*, 163 Fed. Rep. 914 (1908). In a suit for damages against a corporation it is immaterial that it is alleged that it is a domestic corporation, even though it is a foreign corporation. *Ackerman v. Atlantic, etc. R. R.*, 83 S. C. 278 (1909). Where an allegation as to the state in which a plaintiff was incorporated is immaterial, a mistake in the statement will be disregarded. *Brunswick-Balke-Collender Co. v. Kraus*, 132 Mo. App. 328 (1908). On the trial the court may allow an amendment to the complaint as to the state in which a defendant corporation was incorporated. *Stuart*



the same agent in Ohio, and a person brings suit for an injury by the New Jersey company but in his pleading describes the defendant as the New York company, the court may at the trial allow the plaintiff to amend by correctly stating the place of incorporation, it appearing that the injury was by the New Jersey company and the error in the pleading was concealed until the trial.<sup>1</sup> If the defendant pleads the general issue and fails to interpose the plea of *nul tiel corporation* or an equivalent plea or defense under the Code, he admits the incorporation of the plaintiff.<sup>2</sup> The fact of incorporation is proved by putting in evi-

*v. The New York Herald Co.*, 73 N. Y. App. Div. 459 (1902). See also § 15, *supra*. 87 Atl. Rep. 220.

<sup>1</sup> *Hernan v. American Bridge Co.*, 167 Fed. Rep. 930 (1909); *Bainum v. American Bridge Co.*, 141 Fed. Rep. 179 (1905). In a suit for damages for negligence against a railway company where on the trial the proof is that the negligence was due to another company, the court may allow the declaration to be amended so as to allege that it is the same corporation known by two names. *Langhorne v. Richmond, etc. Ry.*, 91 Va. 369 (1895). Where the "Eureka Tempered Copper Company" fails and is sold out and the "Eureka Tempered Copper Works" is organized to continue the business, and the latter causes injury to a person and he brings suit but names the former company instead of the latter, he may on the trial amend as to the name, it appearing that service was made on the manager of the latter and also that a new suit would be barred by the statute of limitations. *Wright v. Eureka Tempered Copper Co.*, 206 Pa. St. 274 (1903). Where a foreign and a domestic corporation have nearly the same name and are connected in business, and by mistake the foreign corporation was named when the domestic one was intended to be, and the latter appeared and defended and did not make known the mistake until the trial, the pleadings may be amended so as to contain the name of the domestic corporation. *McCord, etc. Co. v. Prichard*, 37 Tex. Civ. App. 418 (1904). Where a corporation is incorporated in two states by the same name and with the same officers and incorporators, each state

giving the corporation certain riparian rights on a river, a mortgage given by one of the corporations, without stating which one, when foreclosed, must be foreclosed as against both corporations in order to convey complete title. *Alabama, etc. Co. v. Riverdale, etc. Mills*, 127 Fed. Rep. 497 (1904); *aff'd*, 198 U. S. 188. See also § 15, *supra*.

<sup>2</sup> *Bailey v. Valley Nat. Bank*, 127 Ill. 332 (1889). Incorporation of the defendant need not be proved if it has pleaded to the merits and has not demurred. *Hale v. Crown, etc. Co.*, 56 Wash. 236 (1909). The plea "no such corporation" may be in abatement or in bar. *Whiton v. Balch*, 203 Mass. 576 (1909). The character of the plea *nul tiel corporation* was discussed in *Belvidere Water Co. v. Town of Belvidere*, 82 N. J. L. 601 (1912). But see *Oregonian Ry. v. Oregon, etc. Co.*, 23 Fed. Rep. 232 (1885), *rev'd* on another point in 130 U. S. 1, holding that the defense of no corporate capacity to sue in a particular case is raised by plea in abatement, and the defense of no corporate capacity at all by a plea either in abatement or bar. *Cf. Pullman v. Upton*, 96 U. S. 328 (1878); and see *Bank of Auburn v. Weed*, 19 Johns. 300 (1822), holding that the plea of *nul tiel corporation* is not good, and that the general issue should be pleaded. Denial of corporate existence of plaintiff can be only by plea in abatement. Denial of merit waives this defense. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386 (1828). *Contra*, *U. S. Bank v. Stearns*, 15 Wend. 314 (1836). A plea of *nul tiel corporation* cannot be filed with a plea of the general issue and the defendant should



dence the certificate of incorporation; also the corporate minutes proving an organization by a corporate meeting, and also user of the corporate name in business.<sup>1</sup> An indictment for larceny *from* a corpo-

point out whether it is a partnership, etc. *Keokuk, etc. Co. v. Wetzel*, 228 Ill. 253 (1907).

A general denial does not put in issue the fact of incorporation. *Fletcher v. Co-operative, etc. Co.*, 58 Neb. 511 (1899). *Montgomery v. Seaboard, etc. Ry.*, 73 S. C. 503 (1906). Where a defendant is sued as a corporation and answers generally, it admits incorporation. *Faust v. Southern Ry.*, 74 S. C. 360 (1906). *Herald Shoe Co. v. Oklahoma, etc. Co.*, 15 Okla. 29 (1904). By appearing generally a corporation admits its corporate existence. *Pittsburg, etc. Ry. v. Lighthouse*, 168 Ind. 438 (1906). By pleading the general issue, incorporation is admitted. *Southern Ry. v. Hundley*, 151 Ala. 378 (1907). A denial of an allegation in the complaint "that the plaintiff is a corporation duly organized as a national bank under the act of Congress of June 3, 1864," is a negative pregnant, in that it implies that the bank was incorporated, but was not legally incorporated. *First Nat. Bank v. Gibson*, 60 Neb. 767 (1900). In Illinois where the summons is served on the defendant as a corporation, no proof of incorporation need be given if there is no plea of *nul tiel corporation*. *Chicago & A. R. R. v. Glenny*, 175 Ill. 238 (1898). A defendant sued as a corporation, by appearing, answering, and defending waives proof of its incorporation. *Baldwin, etc. Co. v. Davis*, 15 Colo. App. 371 (1900). A plea of *nul tiel corporation* goes to the merits and is a plea in bar, and may be joined with a plea to the merits. *Law, etc. Soc. v. Hogue*, 37 Ore. 544 (1900). A general demurrer does not raise the point that the complaint does not allege incorporation. *Sly v. Palo, etc. Co.*, 28 Wash. 485 (1902). The question of incorporation should be raised by plea in abatement. *Emerson Co. v. Nimocks*, 88 Fed. Rep. 280 (1898). A denial that the plaintiff is a corporation organized under the laws of the

state of Illinois admits that it is a corporation and merely denies as to the state. *McCormick, etc. Co. v. Hovey*, 36 Ore. 259 (1899). A general denial does not raise an issue as to the incorporation. *Chamberlain, etc. v. Kemper, etc. Co.*, 3 Neb. Unof. 549 (1902). Where a corporation as defendant appears generally and files a demurrer and then answers to the merits in its corporate name, it admits its existence as a corporation, and cannot by a denial in the answer compel the plaintiff to prove the same. *Perris, etc. Dist. v. Thompson*, 116 Fed. Rep. 832 (1902). An answer of *nul tiel corporation* precedes an answer to the merits. *De facto* existence must then be proved. An answer alleging want of parties raises the question of whether the corporation is more than a partnership. *Heaston v. Cincinnati, etc. R. R.*, 16 Ind. 275 (1861). A general denial in a suit in equity puts in issue the corporate character of the plaintiff. *Bank of Jamaica v. Jefferson*, 92 Tenn. 537 (1893). The plea of general issue does not deny the corporate existence. *Rembert v. South Carolina Ry.*, 31 S. C. 309 (1889). A denial upon information and belief that the plaintiff is a corporation puts in issue the incorporation. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293 (1892). The plea that the plaintiff "is not a corporation duly authorized by law to maintain this suit" is a good plea of *nul tiel corporation*. The burden is on the plaintiff to prove corporate existence. *Johnson v. Hanover Nat. Bank*, 88 Ala. 271 (1889). By the New York code, the corporate existence of a foreign corporation plaintiff is not put in issue where the answer does not expressly deny the same, and where the making of the corporate contract in question is admitted. *Commercial Bank v. Pfeiffer*, 108 N. Y. 242 (1888).

<sup>1</sup> Proof of incorporation may be by an exemplified copy of the charter



ration need not allege that the corporation is a corporation.<sup>1</sup> In an indictment *against* a corporation the incorporation must be alleged.<sup>2</sup> A

and evidence of user. A special charter may be proved by the statute book. *U. S. Bank v. Stearns*, 15 Wend. 314 (1836). If *de facto* incorporation is denied, it may be proved by introducing the charter and proof of the exercise of the franchises and powers thereby created. *Marshall v. Keach*, 227 Ill. 35 (1907). In proving title to land deeded by a corporation the incorporation may be proved by the fact that the United States conveyed land to it and the state had donated land to it and the corporation had assumed to make deeds as a corporation. *Altschul v. Casey*, 45 Oreg. 182 (1904). In a suit by a corporation on a bond the incorporation may be proved by the bond itself reciting that it is a corporation. *Campbell, etc. Co. v. American Surety Co.*, 129 Fed. Rep. 491 (1904); *aff'd*, 138 Fed. Rep. 531. Where incorporation is denied and there is no proof given of that fact, the plaintiff cannot recover. *Pike, etc. Co. v. Wathen*, 78 S. W. Rep. 137 (Ky. 1904). A court will take judicial notice of a railroad charter taken out under the general law. *Atlanta, etc. R. R. v. Atlanta, etc. R. R.*, 124 Ga. 125 (1905). The corporate existence may be proved by proof of its *de facto* existence. *State v. Pitam*, 32 Wash. 137 (1903). If the allegation of incorporation is not denied no proof is necessary. *Simon v.*

*Calfee*, 80 Ark. 65 (1906). A person giving a bond to a corporation cannot defend by denying its capacity to sue; hence proof of incorporation is unnecessary. *Thompson v. Commercial, etc. Co.*, 20 Colo. App. 331 (1904). Proof that there is no certificate of incorporation filed in the office of the secretary of state should be by the testimony of that officer. *Cobb v. Bryan*, 37 Tex. Civ. App. 339 (1904). Where the defendant represented in a letter that it was a corporation, its incorporation need not be proved. *Marx v. Raley & Co.*, 6 Cal. App. 479 (1907). In Georgia the defendant has to disprove the incorporation of the plaintiff where its name indicates it is a corporation. *Van Winkle, etc. Works v. Mathers*, 21 Ga. App. 249 (1907). Corporate existence may be proved in condemnation proceedings by a certified copy of the certificate of incorporation and a showing of compliance with the statutory requirements. *Calor, etc. Co. v. Franzell*, 128 Ky. 715 (1908). Incorporation may be proved by putting in evidence the records, books, and minutes of the company showing an organization in pursuance of the charter. *Glenn v. Orr*, 96 N. C. 413 (1887). A certificate of incorporation, with evidence of organization and user, and of a judgment in another case recovered by the corporation against de-

<sup>1</sup> *People v. Mead*, 200 N. Y. 15 (1910). In a criminal prosecution of a thief for stealing from a corporation it is sufficient to prove the *de facto* existence of the corporation and its possession and ownership of the property. *State v. Sowell*, 85 S. C. 278 (1910). In a criminal trial for larceny from a railroad company the incorporation of the company may be proved by parol or by proof that it is acting as a company. *State v. Rozeboom*, 145 Iowa, 620 (1910). In a criminal prosecution for embezzling the funds of a corporation the incorporation may be proved by user. *Morse*

*v. Commonwealth*, 129 Ky. 294 (1908).

<sup>2</sup> *Madisonville, etc. R. v. Commonwealth*, 140 Ky. 255 (1910). In an indictment against a corporation corporate existence need not be proved where it appears and pleads as such. *State v. Glucose, etc. Co.*, 117 Iowa, 524 (1902). In a criminal proceeding against a corporation the incorporation may be proved by showing that it acted and was accepted in the community as a corporation, or it may be shown by its statement filed with the secretary of state. *Standard Oil Co. v. Commonwealth*, 122 Ky. 440 (1906).



certificate of incorporation under the laws of another state, even though certified under the seal of the state, does not prove incorporation unless

defendant, is sufficient proof that plaintiff "had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation *de facto*, which is all that is necessary to enable it to maintain an action against any one, other than the state, who has contracted with the corporation or who had done it a wrong." *Baltimore, etc. R. R. v. Fifth Bapt. Church*, 137 U. S. 568 (1891). The certificate of the secretary of state reciting that certain members were legally organized and established as a corporation does not prove them a corporation, but is hearsay evidence. *Fish v. Smith*, 73 Conn. 377 (1900). Even though a certificate of incorporation must be filed in the county auditor's office as well as the office of the secretary of state, yet a copy certified to by the county auditor raises a presumption of incorporation. *Spokane, etc. Co. v. Loy*, 21 Wash. 501 (1899). The articles of incorporation, together with oral proof of meetings and transaction of business, as corporate business proves a *de facto* corporation. *Brown v. Webb*, 60 Oreg. 526 (1912). Parol proof of the existence of a corporation will be sufficient. *People v. Morley*, 8 Cal. App. 372 (1908). A *de facto* corporation may sue on a note assigned to it. *Creditors' Union v. Lundy*, 16 Cal. App. 567 (1911). Fifty years' existence as a corporation is a sufficient proof of incorporation. *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42 (1891). It is sufficient to prove the *de facto* existence of the corporation defendant in a suit on contract. *Benesch v. John Hancock, etc. Co.*, 11 N. Y. Supp. 348 (1890). An act recognizing a corporation as such is sufficient proof of incorporation. *Boykin v. State*, 96 Ala. 16 (1892). If proof is given by plaintiff that a copartnership existed, and the defence is that it was a corporation, the defendant must prove that fact. Proof of a *de facto* corporation is sufficient to meet the plea of *nul tiel corporation*. *Cozens v. Chicago, etc. Co.*, 166 Ill. 213 (1897). The *de facto* in-

corporation of a national bank may be shown by oral evidence that it is carrying on a general banking business as a national bank under a certain name. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348 (1893). Proof of the filing of the certificate of incorporation in the county clerk's office is sufficient proof of incorporation without proof of the filing in the office of the secretary of state. *Georgeson v. Caffrey*, 71 Hun, 472 (1893). Where the stockholders are sued as individuals for the debts of the company, it is for them to prove that the corporation existed. The testimony of two persons that they complied with the laws and got a charter is insufficient, it appearing that the law required at least three incorporators. The charter itself is the best evidence. "A mere feigned compliance with the laws of the state of which it is claimed a corporation is a citizen" is not sufficient, nor is the mere adoption of the corporate name sufficient. *Owen v. Shepard*, 59 Fed. Rep. 746 (1894). Where the corporate existence is denied, proof of the execution of the articles of incorporation, and that a certain person acted as president, is not sufficient, there being no proof of the filing, etc. *Goodale, etc. Co. v. Shaw*, 41 Oreg. 544 (1902). A duly authenticated copy of the articles of incorporation of a domestic corporation by the secretary of state and the register of deeds is sufficient proof of incorporation. *Dowagiac, etc. Co. v. Higinbotham*, 15 S. Dak. 547 (1902). Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. *Clark v. Jones*, 87 Ala. 474 (1888). The production of the corporate books showing an election of officers is sufficient to raise a presumption of the existence of the corporation. *Wood v. Jefferson County Bank*, 9 Cow. 194 (1828). "The production of the act of incorporation and proof of user under it by the corporate body afford presumptive proof in the first instance of the fact of incorporation." *People v. Beigler*, Hill



copies of the laws under which it was incorporated are also put in evidence.<sup>1</sup> In a suit in Massachusetts to enforce the statutory liability

& D. Supp. 133 (1843). See also, on the method of proof, *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532 (1875); *Spring Valley Water-works v. San Francisco*, 22 Cal. 434 (1863); *Eastern, etc. Co. v. Vaughan*, 14 N. Y. 546 (1856); *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870); *Leonardsville Bank v. Willard*, 25 N. Y. 574 (1862); *Reynolds v. Myers*, 51 Vt. 444 (1879); *West Winsted Sav. Bank v. Ford*, 27 Conn. 282 (1858); *Society for Prop. Gosp. v. Pawlet*, 4 Pet. 480 (1830); *Alderman, etc. v. Finley*, 10 Ark. 423 (1850); *Oldtown, etc. R. R. v. Veazie*, 39 Me. 571 (1855); *Pullman v. Upton*, 96 U. S. 328 (1877); *Penobscot, etc. R. R. v. Dunn*, 39 Me. 587 (1855); *Heaston v. Cincinnati, etc. R. R.*, 16 Ind. 275 (1861); *Orono v. Wedgewood*, 44 Me. 49 (1857); *Litchfield Bank v. Church*, 29 Conn. 137, 148 (1860); *U. S. v. Insurance Companies*, 22 Wall. 99 (1874); *De Witt v. Hastings*, 40 N. Y. Super. Ct. 463 (1876); *aff'd*, 69 N. Y. 518; *Commonwealth v. Bakeman*, 105 Mass. 53 (1870); *South Bay, etc. Co. v. Gray*, 30 Me. 547 (1849); *Utica Ins. Co. v. Tilman*, 1 Wend. 555 (1828); *Jackson v. Leggett*, 7 Wend. 377 (1831). The federal courts of course take judicial notice of the general statutes of all the states. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747 (1887). The existence of a plank-road corporation is not proved by the fact that the governor had appointed inspectors of it and they had certified that the road was completed. *Bill v. Fourth, etc. Road*, 14 Johns. 416 (1817).

<sup>1</sup> *Law, etc. Soc. v. Hogue*, 37 Oreg. 544 (1900). A copy of a certificate of incorporation, signed by the secretary of state and sealed with the seal of the state, is evidence of incorporation, even in another state. *Commonwealth v. Corkery*, 175 Mass. 460 (1900). A *de facto* foreign corporation may be proved, where corporate existence is a collateral matter, by proving the statutes of the foreign state and the secretary of state's certificate, under the seal of the state,

to the effect that the company had been duly incorporated and had filed the necessary articles with the proper officials. *Petty v. Hayden*, 115 Iowa, 212 (1901). In a suit by an alien corporation to collect unpaid calls the statutes under which the corporation is formed may be proved by the testimony of an English solicitor who produces copies of such statutes. *Nashua, etc. Bank v. Anglo-American, etc. Co.*, 189 U. S. 221 (1903). As to the mode of proving the incorporation of a company in England and the filing of contracts, see *Barber v. International Co.*, 73 Conn. 587 (1901); s. c., 74 Conn. 652. A certificate of incorporation in another state under the seal of the state is admissible in evidence without being exemplified under the federal statutes. *U. S. Vinegar Co. v. Foehrenbach*, 74 Hun. 435 (1893); *aff'd*, 148 N. Y. 58. In a suit on a subscription to a foreign corporation the statutes governing such foreign corporation may be proved by a copy testified to by a witness who has examined and compared the copy with the original. *Anglo-American, etc. Co. v. Dyer*, 181 Mass. 593 (1902). An exemplified copy of the charter of incorporation created by special statute and proof of user thereunder is sufficient proof of incorporation. *United States, etc. Co. v. McClure*, 42 Oreg. 190 (1902). In California a foreign corporation may prove its incorporation by putting in evidence a copy of its appointment as an agent filed in the office of the secretary of state. *Anglo-Californian Bank v. Field*, 146 Cal. 644 (1905). Where a foreign incorporation is denied it must be strictly proved. *Florsheim & Co. v. Fry*, 109 Mo. App. 487 (1905). The rules of an exchange may be proved by an examined or authenticated copy, but not by a witness merely swearing that the paper produced by him was a copy, without showing that he had compared it with the original. A private statute, incorporating a company in another state, should be proved by producing the



of Massachusetts shareholders in an English corporation, English decisions as well as the statute, may be shown, and if there is doubt as to their meaning the question is to be submitted to the jury.<sup>1</sup> The testimony of a lawyer of a foreign country that certain acts, documents, etc., constituted a complainant a corporation under the laws of that country, raises a presumption that it was duly incorporated.<sup>2</sup> A corporation may enjoin the secretary of state from taking its certificate of incorporation out of the state, even though he proposes to prove perjury by the officers in swearing to the certificate.<sup>3</sup> The United States courts will take judicial notice of an act of Congress incorporating a railroad company.<sup>4</sup>

§ 754. *Confession of judgment.* — A corporation may confess judgment, but generally this can be done only by order of the board of directors.<sup>5</sup>

In New York, by statute, a corporation cannot confess judgment in contemplation of insolvency.<sup>6</sup>

official printed statutes. *Miller v. Johnston*, 71 Ark. 174 (1903). A copy of the certificate of incorporation certified by the secretary of a territory may not be sufficient to prove the corporate existence of a foreign corporation, especially where there is no proof of the laws of the foreign state authorizing incorporation, there being no such thing as a common law corporation. *Milwaukee, etc. Co. v. Gordon*, 37 Mont. 209 (1908). A copy of the charter of an Illinois bank certified by the recorder of deeds of Chicago as a true copy, together with the affidavit of the cashier that the bank had been organized and had acted under such charter for ten years, and had never been dissolved, but was still doing business, and that attached thereto were the minutes of the meeting of organization and of the charter of the company, raises a presumption of regular incorporation. *State Bank, etc. v. Carr*, 130 N. C. 479 (1902). A foreign corporation proves incorporation by its papers and proceedings, and by putting in evidence the statute authorizing incorporation. *Savage v. Russell*, 84 Ala. 103 (1888).

<sup>1</sup> *Electric, etc. Co. v. Prince*, 200 Mass. 386 (1909).

<sup>2</sup> *Badische, etc. v. Klipstein & Co.*, 125 Fed. Rep. 543 (1903).

<sup>3</sup> *Delaware, etc. Co. v. Layton*, 50 Atl. Rep. 378 (Del. 1901).

<sup>4</sup> *Heffelfinger v. Choctaw, etc. R. R.*, 140 Fed. Rep. 75 (1905).

<sup>5</sup> A president and treasurer have no power to confess judgment for the corporation. *Adams v. Cross, etc. Co.*, 27 Ill. App. 313 (1888). *Contra*, *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96 (1854). "Upon a confession of judgment by a corporation, the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, . . . and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question." *White v. Crow*, 17 Fed. Rep. 98 (1883); *aff'd*, 110 U. S. 183. The treasurer cannot confess judgment. *Stevens v. Carp River Iron Co.*, 57 Mich. 427 (1885). A corporation may confess judgment. *Solomon v. Schneider & Co.*, 56 Neb. 680 (1898); *Keyser v. Shute*, 3 Ariz. 336 (1892). As to the power of the president and other officers to confess judgment, see ch. XLIII, *supra*.

<sup>6</sup> *Re Waterbury*, 8 Paige, 380 (1840); *Kingsley v. First Nat. Bank*,



§ 755. *Injunction and contempt.* — An injunction against a corporation should run to the corporation in its corporate name. All officers and agents upon whom it is served, or to whose knowledge it comes, are guilty of contempt of court if they disregard it.<sup>1</sup> The corporation and also all of its officers and agents who wilfully violate the injunction may be fined for contempt of court.<sup>2</sup> Where an order requiring a corpo-

31 Hun, 329 (1884); *National Shoe, etc. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467 (1882).

<sup>1</sup> *King v. Barnes*, 113 N. Y. 476 (1889). An injunction against a corporation in New York may be served on a division superintendent of the division interested. Moreover, knowledge of the injunction is as good as service. Disobedience is contempt. *Rochester, etc. R. R. v. New York, etc. R. R.*, 48 Hun, 190 (1888). The directors are bound to obey an injunction against the company if it comes to their notice. *Hatch v. Chicago, etc. R. R.*, 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799; *People v. Sturtevant*, 9 N. Y. 263 (1853). See also *High, Injunctions*; also § 745, *supra*. The company may be indicted for not obeying the order of the court. *Regina v. Birmingham, etc. Ry.*, 9 Car. & P. 469 (1840). An injunction against a foreign corporation may apply to its acts out of the state as well as in it. *Prince Mfg. Co. v. Prince's, etc. Co.*, 51 Hun, 443 (1889). In a proceeding by a New York receiver of a dissolved New York corporation against a former director for interfering with the assets against the injunction of the New York court, held, that the director could not evade the injunction by going out of the state. *Williams v. Hintermeister*, 26 Fed. Rep. 889 (1886). Though a bank may be in contempt, it does not follow that each servant or agent of the bank also is in contempt. *Southern Development Co. v. Houston, etc. Ry.*, 27 Fed. Rep. 344 (1886). *Cf.* § 758, *infra*. An injunction may bind a corporation, though not a party to the suit. *Eagle Mfg. Co. v. Miller*, 41 Fed. Rep. 351 (1890); *rev'd* on another point in 151 U. S. 186. If the employee violates the injunction, not knowing of it, and is arrested, he may sue his corporation

for damages for withholding notice of the injunction. *Guirney v. St. Paul, etc. Ry.*, 43 Min. 496 (1890). In *Golden Gate, etc. Co. v. Yuba County Super. Ct.*, 65 Cal. 187 (1884), it was held that a corporation may be punished for contempt of court. An injunction against a corporation is binding on all its officers, although they are not parties. *Sidway v. Missouri, etc. Co.*, 116 Fed. Rep. 381 (1902).

<sup>2</sup> *Re Tift*, 11 Fed. Rep. 463 (1881).

An injunction against certain directors of the corporation from using patented articles is violated by their forming a new corporation to do the same acts, they being directors also of the latter. *Iowa, etc. Wire Co. v. Southern, etc. Wire Co.*, 30 Fed. Rep. 123 (1887). An injunction against a corporation running a ferry cannot be evaded by the corporation transferring its boats to its president individually. The corporation was fined, and the president imprisoned for contempt. "Injunction orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them; they may be violated by aiding, countenancing, and abetting others in violation thereof as well as by doing it directly; and courts will not look with indulgence upon schemes, however skilfully devised, designed to thwart its orders." *Mayor, etc. v. New York Ferry, etc. Co.*, 64 N. Y. 622 (1876). A foreign corporation violating an injunction may be fined for contempt of court. Service is made in the same way as in ordinary cases. Its agent violating the injunction may also be fined. *U. S. v. Memphis, etc. R. R.*, 6 Fed. Rep. 237 (1881). Where a corporation is guilty of contempt for violating an injunction, its officers who took part therein are also guilty.



ration to produce a certain agent for examination, requires also service on him, the corporation is not in contempt if he is not served.<sup>1</sup> For civil contempt the court may fine a person but not imprison him except to require him to comply with the order of the court.<sup>2</sup> Where contempt consists not in defendant refusing to do an act but in his doing something which has been prohibited, he cannot be imprisoned, but only fined, unless the contempt instead of being civil for the benefit of the complainant, is criminal, and a proceeding has been instituted and tried in behalf of the state or government.<sup>3</sup> A settlement and discontinuance of a suit for an injunction puts an end to contempt proceedings instituted by one of the parties, but does not prevent the court itself vindicating its authority by imprisonment.<sup>4</sup> Questions relative to a suit in the federal court for an injunction, after a similar application has been made in the state court, are considered elsewhere.<sup>5</sup>

§ 756. *Contempt and sequestration.* — Although a corporation is an existence entirely distinct from its officers or members, yet the latter may be held answerable, and in contempt of court, for neglect or refusal to perform the orders, decrees, or judgments of courts.<sup>6</sup> Moreover, the corporation itself is bound to obey the court, and for failure to do so the court will sequester the corporate property. Sequestra-

Merchants', etc. Co. v. Board of Trade, 201 Fed. Rep. 20 (1912).

<sup>1</sup> Wilkens v. American Bank, etc., 133 N. Y. App. Div. 646 (1909).

<sup>2</sup> Gompers v. Bucks, etc. Co., 221 U. S. 418 (1911).

<sup>3</sup> Gompers v. Bucks, etc. Co., 221 U. S. 418 (1911).

<sup>4</sup> Gompers v. Bucks, etc. Co., 221 U. S. 418 (1911).

<sup>5</sup> See §§ 734, 759.

<sup>6</sup> A contempt of court by a corporation may be punished by punishing the corporate officers who do the act or control the action of the corporation. Sercomb v. Catlin, 128 Ill. 556 (1889). The case Lacharme v. Quartz Rock, etc. Co., 1 H. & C. 134 (1862), whereby an order was enforced by reaching the corporate officers, is based on the English statute giving the court such a power. In the ancient case Salmon v. Hamborough Co., 1 Cas. in Ch. 204 (1671), where the corporation defendant did not obey an order of the court and had no property, the House of Lords issued an order directed to the corporate officers ordering them to obey the

former order or be committed for contempt. Cf. 4 Wait, Pr. 206; Curson v. African Co., 1 Vern. 121 (1632). Papers against a corporation are not to be directed against its officers personally, even as officers. Verplanck v. Mercantile Ins. Co., 2 Paige, 438 (1831). Where the corporation is enjoined from doing a certain thing, then the officers are personally liable for contempt if they do the thing enjoined. See § 755, *supra*. In Davis v. Mayor, etc., 1 Duer, 451, 484 (1853), the court said that it was admitted that a *mandamus* directed to the corporation in its corporate name bound all the officers and members (citing municipal corporation cases). Chancellor Bland, in McKim v. Odom, 3 Bland (Md.), 422 (1829), with good reason objected to the technical and illogical rule that corporate officers cannot be compelled to do an act which the corporation is commanded to do. A somewhat similar instance of the power of the court arises in a *mandamus* to make a transfer of stock. See § 390, *supra*.



tion is a chancery remedy whereby the property of a party is seized by officers of the court of chancery to punish contempts and to compel obedience to the order or decree of the court.<sup>1</sup> It is used not only to compel the corporation to do an act commanded by a court of chancery, but also to subject the corporate property to the payment of a money decree which a court of chancery has made against the corporation.<sup>2</sup> Sequestration is the taking of property from the owner for a time till the rents, issues, and profits satisfy a demand. The judgment in such case does not dissolve the corporation.<sup>3</sup>

A sequestration reaches all the goods and chattels and the rents and profits of land belonging to the corporation;<sup>4</sup> but there is some doubt as to whether choses in action and the title to real estate can be subjected to this remedy by a court of chancery. It is clear that originally the corporate realty could not be so reached.<sup>5</sup>

<sup>1</sup> See 2 Daniell, Ch. Pr., p. 1052, etc.; 1 Barb. Ch. Pr., p. 71, etc., 444; Ang. & A. Corp., § 667, etc. As regards corporations, this remedy was used to compel the corporation to appear and answer a bill in equity and also to subject the property of the corporation to the payment of a money decree of a court of chancery. Sequestrations in chancery correspond greatly to executions at law. Sequestration "is most certainly of the nature of an execution." It is demandable of right. It issues though the corporation has no property. *Reid v. Northwestern R. R.*, 32 Pa. St. 257 (1857). The case *Jones v. Boston Mill Corp.*, 21 Mass. 507 (1827), holds that sequestration is a proper remedy to enforce a decree.

<sup>2</sup> If the sequestration is to compel the corporation to do something other than pay money, the corporate property is merely seized and held by the court until the corporation complies. If, however, the sequestration is to compel the payment of a money decree, the corporate property seized will be sold and the proceeds applied to that debt. See authorities cited *supra*.

<sup>3</sup> *Proctor v. Sidney, etc. Co.*, 8 N. Y. App. Div. 42 (1896).

<sup>4</sup> See authorities in note 1, *supra*.

<sup>5</sup> 2 Daniell, Ch. Pr., p. 1054; *Coats v. Elliott*, 23 Tex. 606 (1859). Sequestration is the proper remedy to subject the net profits of a turnpike company

to the payment of a judgment. Neither sequestration nor a common-law execution can effect a sale of the road, however, since the franchise is a trust from the state. *Ammant v. New Alexandria, etc. Road*, 13 Serg. & R. (Pa.) 210 (1825). But where, under the statutes, a receiver is appointed in sequestration proceedings, the decisions are inclined to hold otherwise. *Atlas Bank v. Nahant Bank*, 40 Mass. 480 (1839). But see *Foster v. Townshend*, 68 N. Y. 203 (1877); *N. Y. Code Civ. Proc.*, § 1772. In proceedings under *N. Y. Code Civ. Proc.*, § 1784, etc., all the corporate personalty and realty vest in the receiver. See, in construction of the New York statute, *Bangs v. McIntosh*, 23 Barb. 591 (1857); *Devendorf v. Beardsley*, 23 Barb. 656 (1857); *Judson v. Rossie Galena Co.*, 9 Paige, 598 (1842). See also *Devoe v. Ithaca, etc. R. R.*, 5 Paige, 521 (1835), as to the practice. As regards choses in action the old authorities differed. 1 Barb. Ch. Pr., p. 71, says that the choses in action cannot be reached by sequestration. 2 Daniell, Ch. Pr., p. 1052, says that possibly choses in action in the possession of third persons cannot be reached. The later authorities, however, are inclined to extend this remedy to choses in action. *Grew v. Breed*, 53 Mass. 363 (1847); *Hosack v. Rogers*, 11 Paige, 603 (1845); *White v. Geraerd*, 1 Edw. Ch. 340 (1832).



§ 757. *Foreign corporations may sue and be sued — Stockholders' suits against foreign corporation — Garnishment — Statute of limitations — Usury.* — A foreign corporation is considered a resident of the state wherein it was created; and it is regarded as a citizen of that state in all questions of jurisdiction.<sup>1</sup>

It is discretionary with a court as to whether it will grant equitable relief against a foreign corporation. Especially is this the case in regard to suits brought by stockholders. The courts will often refuse to grant relief, inasmuch as there may be no means of enforcing the decree.<sup>2</sup> A suit to compel a foreign corporation to issue new certificates of stock for certificates lost will lie.<sup>3</sup> A stockholder in a foreign corporation may sue in the courts of New York to enjoin fraudulent

It has been doubted whether sequestration proceedings could reach the books and papers of the corporation, *Lowton v. Colchester*, 2 Meriv. 395 (1817); but it would seem that such papers should be subject to sequestration so far as they contain information or give title to property which has been sequestered.

<sup>1</sup> *Louisville, etc. R. R. v. Letson*, 2 How. 497 (1844); *Haight & Freese Co. v. Weiss*, 156 Fed. Rep. 328 (1907); *Stafford v. American Mills Co.*, 13 R. I. 310 (1881); *Cowardin v. Universal L. Ins. Co.*, 32 Gratt. (Va.) 445 (1879), holding that it is subject to attachment as a non-resident; *Marshall v. Baltimore, etc. R. R.*, 16 How. 314 (1853); *Covington, etc. Co. v. Shepherd*, 20 How. 227 (1857); *Myers v. Dorr*, 13 Blatchf. 22 (1870); s. c., 17 Fed. Cas. 1105; *Merrick v. Van Santvoord*, 34 N. Y. 208 (1866); *Daly v. National L. Ins. Co.*, 64 Ind. 1 (1878); *Hadley v. Freedman's, etc. Co.*, 2 Tenn. Ch. 122 (1874); *Harding v. Chicago, etc. R. R.*, 80 Mo. 659 (1883); *McGregor v. Erie Ry.*, 35 N. J. L. 115 (1871); *Stout v. Sioux City, etc. R. R.*, 8 Fed. Rep. 794 (1881), holding that a foreign corporation which had filed its charter with the secretary of state and otherwise complied with the local statute was a domestic corporation under the law of Nebraska. A foreign corporation may be sued in Massachusetts by a resident. *Young v. Providence, etc. Co.*, 150 Mass. 550 (1890). A non-resident may sue a foreign corporation in Massachusetts.

*Youmans v. Minn. etc. Trust Co.*, 67 Fed. Rep. 282 (1895). A provision in a charter that the company should be sued only in the state where it is incorporated does not prevent suit against it in another state. *Shields v. Union, etc. Ins. Co.*, 119 N. C. 380 (1896). Foreign corporations may be sued in Tennessee. *Telephone Co. v. Turner*, 88 Tenn. 265 (1889). A non-resident may sue a foreign corporation in South Carolina when the cause of action arose within the state. *Central R. R., etc. Co. v. Georgia, etc. Co.*, 32 S. C. 319 (1890). As to restrictions by the state on the right of a foreign corporation to remove cases to the federal courts, see §§ 696-700, *supra*.

<sup>2</sup> See § 734, *supra*.

<sup>3</sup> *Guilford v. Western U. Tel. Co.*, 59 Minn. 332 (1894). A South Carolina corporation may be sued in New Hampshire by a purchaser of a certificate of stock to compel a transfer thereof on the books of the company. *Westminster Nat. Bank v. New England, etc.*, 73 N. H. 465 (1906). Citizens of Idaho may bring suit in Washington to compel a North Dakota corporation to issue original stock to them although the company has already issued it to another promoter, it appearing that the president and secretary reside in Washington, and that a money judgment may be entered if the stock is not transferred as required by the decree. *Lively v. Husebye*, 60 Wash. 47 (1910).



acts and hold the directors and third persons personally liable.<sup>1</sup> But a stockholder's suit to enjoin the company from leasing its property for an adequate sum must be brought in the state where the company is incorporated.<sup>2</sup> A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts and to have a receiver appointed.<sup>3</sup> The courts have frequently refused to entertain jurisdiction over a foreign corporation in cases where the decree of the court cannot be enforced.<sup>4</sup> The statute of Ohio that no suit may be maintained in the courts of that state for death occurring in another state unless the deceased was a citizen of Ohio is constitutional.<sup>5</sup>

Garnishee process does not lie against a foreign corporation to reach a sum of money due from such corporation to a non-resident.<sup>6</sup>

<sup>1</sup> See § 734, *supra*.

<sup>2</sup> See § 734, *supra*.

<sup>3</sup> See § 734, *supra*.

<sup>4</sup> See § 734, *supra*.

<sup>5</sup> *Chambers v. Baltimore, etc. R. R.*, 207 U. S. 142 (1907).

<sup>6</sup> A debt due from a limited partnership to a corporation, both organized under the laws of Massachusetts, cannot be attached in New York. *National Broadway Bank v. Sampson*, 179 N. Y. 213 (1904). In a suit between non-residents, the defendant being a foreign corporation, plaintiff cannot garnishee money owed by another foreign corporation, since under the New York law the defendant could not sue such latter corporation in the New York courts. *Bridges v. Wade*, 113 N. Y. App. Div. 350 (1906). A debt by a foreign corporation to another foreign corporation may be garnisheed by an action against the creditor in Pennsylvania. *Wiener v. American Ins. Co.*, 224 Pa. St. 292 (1909). A non-resident may garnishee a foreign corporation in Kansas. *Sutton v. Heinzle*, 84 Kan. 756 (1911). A foreign corporation cannot be garnisheed on a debt due to its non-resident president, even though such foreign corporation is doing business in the state. *Currie v. Goleconda, etc. Co.*, 157 N. C. 209 (1911). In Arkansas a debt due from a foreign railroad corporation, which has a line in the state, may be garnisheed, even though the debt was for labor per-

formed in another state. The exemption laws where the suit is brought control. *Stone v. Drake*, 79 Ark. 384 (1906). A foreign railroad corporation, owning and operating a railroad in West Virginia, may be garnisheed in that state, irrespective of where the debt was contracted or payable, and even though the creditor is a non-resident. *Baltimore, etc. R. R. v. Allen*, 58 W. Va. 388 (1905). A New Jersey corporation doing all its business in North Carolina, may be garnisheed in the latter state in a suit between two residents of Virginia, the suit having grown out of a contract made in North Carolina. *Goodwin v. Claytor*, 137 N. C. 224 (1904). In Illinois a resident may garnishee a non-resident corporation for money due to another non-resident who is a judgment debtor of the former. *Hannibal, etc. R. R. v. Crane*, 102 Ill. 249 (1882). Where two foreign corporations make a contract in the state a debt arising therefrom may be garnisheed in that state. *Krafve v. Roy, etc. Co.*, 98 Minn. 141 (1906). Under the statutes of Georgia wages due from a non-resident corporation to a non-resident employee may be garnisheed in that state. *Harvey v. Thompson*, 2 Ga. App. 569 (1907), overruling previous decisions to the contrary. A non-resident corporation cannot be garnisheed for a debt due to another non-resident corporation unless the former is legally doing



The cars of an Illinois railroad corporation passing through another state in the transportation of freight or return cannot be attached in that state, neither can sums of money due from railroads in that state to such foreign railroad corporation for freight on interstate shipments be attached.<sup>1</sup>

A foreign corporation cannot set up the statute of limitations where a non-resident could not set it up.<sup>2</sup> But a foreign corporation which

business in the state. *Riter-Conley, etc. Co. v. Mzik*, Ohio Circuit (1901), p. 164. A citizen of Alabama cannot garnishee in Alabama a foreign corporation to pay a claim which he has against a non-resident where the debt from the foreign corporation was not contracted in Alabama and was not to be paid there. *Louisville, etc. R. R. v. Steiner*, 128 Ala. 353 (1900). Garnishment does not lie against a non-resident corporation to reach a fund held by the latter, but payable in another state. *National Bank, etc. v. Furtick*, 2 Marvel, 35 (Del. 1897). A citizen of North Carolina cannot garnishee in Pennsylvania a debt due from a Connecticut corporation to a citizen of North Carolina. *Strause v. Ætna, etc. Co.*, 126 N. C. 223 (1900). Where one foreign corporation in New York sells goods to another foreign corporation in New York, the debt may be attached in New York. *India Rubber Co. v. Katz*, 65 N. Y. App. Div. 349 (1901). No attachment lies on insurance money due by the resident branch of a foreign insurance company to another foreign company. *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882). An insurance by a Missouri corporation on Nebraska property cannot be garnished in Illinois upon the burning of the property. *American Cent. Ins. Co. v. Hettrler*, 37 Neb. 849 (1893). A citizen of Arkansas may garnishee a railroad company of Missouri operating in Arkansas for money due to one of its employees in Missouri. *Kansas City R. R. v. Parker*, 69 Ark. 401 (1901). An attachment or garnishment in Michigan of a debt due from an Illinois corporation to a Washington corporation, and payable in Washington, is not good, even though the Illinois corporation is doing business in

Michigan. *Reimers v. Seateo Mfg. Co.*, 70 Fed. Rep. 573 (1895). The question of garnishment by service on the debtor corporation in a state other than its domicile is fully discussed in *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468 (1895). See also *Alabama, etc. R. R. v. Chumley*, 92 Ala. 317 (1890); *Straus v. Chicago Glycerine Co.*, 46 Hun, 216 (1887); *aff'd*, 108 N. Y. 654. Insurance due from a New York corporation to a citizen of New York cannot be attached in Massachusetts by Massachusetts creditors of the insured. *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209 (1893). A foreign corporation cannot be garnished by service upon an agent within the state. *Associated Press v. United Press*, 104 Ga. 51 (1898).

<sup>1</sup> *Davis v. Cleveland, etc. R. R.*, 146 Fed. Rep. 403 (1906).

<sup>2</sup> A foreign corporation cannot plead the statute of limitations, inasmuch as it has been "out of the state." *Larson v. Aultman, etc. Co.*, 86 Wis. 281 (1893), reviewing the authorities. A foreign corporation cannot plead the New York statute of limitations. It must plead the statute of limitations of its own state. *Robeson v. Central R. R.*, 76 Hun, 444 (1894). "A foreign corporation sued in New York state cannot avail itself of the statute of limitations." *Boardman v. Lake Shore, etc. R. R.*, 84 N. Y. 157, 185 (1881); *Rathbun v. Northern, etc. Ry.*, 50 N. Y. 656 (1872). As to the mode of pleading the statute of limitations of another state against an action for fraud in inducing the purchase of stock, see *Tudor v. Ebner*, 104 N. Y. App. Div. 562 (1905); *aff'd*, 182 N. Y. 562. In admiralty a foreign corporation may set up the statute of limitations, even though it could not under the statute of the state in



has filed its papers and received a license to do business in the state, according to the statutes, is not in contemplation of law a non-resident, within the meaning of the statute of limitations.<sup>1</sup> A foreign corporation may set up the statute of limitations in Tennessee, if it has had an office in the state during the entire period.<sup>2</sup> Service on the owner of the entire capital stock may stop the running of the statute of limitations.<sup>3</sup>

The defense of usury is considered elsewhere.<sup>4</sup>

At common law a corporation cannot be sued except in a *county* where it has property or transacts a substantial part of its business unless the statutes provide otherwise.<sup>5</sup>

By the comity of states the courts of a state will entertain a suit brought by a foreign corporation.<sup>6</sup> A North Carolina corporation may bring suit in the state of New Jersey against a New York corpo-

which the court is sitting. *Davis v. Smokeless Fuel Co.*, 196 Fed. Rep. 753 (1912). A foreign corporation may set up the statute of limitations of its own state when it is sued by a non-resident. *Smith v. Western Pac. Ry. Co.*, 154 N. Y. App. Div. 130 (1912). A foreign corporation cannot plead the statute of limitations in Kansas. *Williams v. Metropolitan, etc. Ry.*, 68 Kan. 17 (1903).

<sup>1</sup> *Sidway v. Missouri, etc. Co.*, 187 Mo. 649 (1905). The statute of limitations runs in favor of a foreign corporation where it has an agent in the state upon whom process may be served. *Chambliss v. Simmons*, 165 Fed. Rep. 419 (1908). The statute of limitations does not run as to a foreign corporation unless it has qualified to do business in the state. *O'Brien v. Big Casino, etc. Co.*, 9 Cal. App. 283 (1908). A foreign corporation doing business in the state during the whole period of a statute of limitations may interpose such statute as a defense to a suit. *Colonial, etc. Co. v. Northwest, etc. Co.*, 14 N. Dak. 147 (1905). In Texas a foreign corporation may plead the statute of limitations. *Thompson v. Texas, etc. Cattle Co.*, 24 S. W. Rep. 856 (Tex. 1893). The statute of limitations runs in behalf of a foreign corporation after it has acquired a domicile in the state for purposes of litigation. *Travellers' Ins. Co. v. Fricke*, 99 Wis. 367 (1898). A foreign corporation may plead the statute of limitations. *St.*

*Paul v. Chicago, etc. Ry.*, 45 Minn. 387 (1891).

<sup>2</sup> *Turecott v. Yazoo, etc. R. R.*, 101 Tenn. 102 (1898).

<sup>3</sup> *Linn, etc. Co. v. United States*, 196 Fed. Rep. 593 (1912).

<sup>4</sup> See § 766, *infra*.

<sup>5</sup> *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. St. 453 (1903).

<sup>6</sup> *Silver Lake Bank v. North*, 4 Johns. Ch. 370 (1820); *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343 (1875); *Lewis v. Bank of Kentucky*, 12 Ohio, 132 (1843); *Smith v. Weed S. Machine Co.*, 26 Ohio St. 562 (1875), holding also that it need not allege in its pleading the terms of its charter showing its capacity to sue; *Hanna v. International Petroleum Co.*, 23 Ohio St. 622 (1873); *Lathrop v. Commercial Bank of Scioto*, 8 Dana (Ky.), 114 (1839); *Louisville, etc. R. R. v. Letson*, 2 How. 497 (1844); *Bank of Augusta v. Earle*, 13 Pet. 519 (1839); *Bank of Michigan v. Williams*, 5 Wend. 478 (1830); *Beaston v. Farmers' Bank*, 12 Pet. 102, 135 (1838); *Marine, etc. Bank v. Jauncey*, 1 Barb. 486 (1847), holding that its authority to sue need not be set forth in its pleading; *Tombigbee R. R. v. Kneeland*, 4 How. 16 (1846); *New York Dry Dock v. Hicks*, 5 McLean, 111 (1850); s. c., 18 Fed. Cas. 151; *Lucas v. Bank of Georgia*, 3 Ala. (O. S.) 147 (1829); *Guaga Iron Co. v. Dawson*, 4 Blackf. 202 (1836); *New Jersey, etc. Bank v. Thorp*, 6 Cow. 46 (1826); *Mutual Benefit L. Ins. Co. v. Davis*, 12 N. Y. 569 (1855);



ration and recover judgment on a note, even though the North Carolina corporation has not complied with the statutes of New York relative to doing business in that state.<sup>1</sup> Frequently the statutes regulate

Direct U. S. Cable Co. v. Dominion Tel. Co., 84 N. Y. 153 (1881); Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367 (1881), holding that it has the same right to remedies and liens as citizens; Williams v. Creswell, 51 Miss. 817 (1876), where a District of Columbia corporation was complainant; American Mut. L. Ins. Co. v. Owen, 81 Mass. 491 (1860); Leasure v. Union, etc. Ins. Co., 91 Pa. St. 491 (1879); Portsmouth Livery Co. v. Watson, 10 Mass. 91 (1813); Bank of Edwardsville v. Simpson, 1 Mo. 184 (1822); National Bank v. De Bernales, 1 Car. & P. 569 (1825); Henriques v. Dutch West India Co., 2 Ld. Raym. 1532 (1727); Lycoming F. Ins. Co. v. Langley, 62 Md. 196 (1884); British American Land Co. v. Ames, 47 Mass. 391 (1843), holding that a corporation of a foreign country may sue; Importing, etc. Co. v. Locke, 50 Ala. 332 (1874); Savage Mfg. Co. v. Armstrong, 17 Me. 34 (1840); American Colonization Soc. v. Gartrell, 23 Ga. 448 (1857). In the case the charter declared the corporation to be created for a specified purpose, "and for no other purpose," and its right to sue in another state was questioned. Bank of Marietta v. Pindall, 2 Rand. (Va.) 465, 473 (1824); Hahnemannian L. Ins. Co. v. Beebe, 48 Ill. 88 (1868), where the right to sue in another state for libel was questioned; U. S. v. Insurance Cos., 22 Wall. 99 (1874), holding that corporations created merely for domestic and business purposes in the seceding states during the rebellion may sue in the federal courts; Insurance Co. v. The "C. D., Jr.," 1 Woods, 72 (1870); s. c., 13 Fed. Cas. 65, holding that it may sue either in state or federal courts; Fidelity Ins. etc. Co. v. Niven, 5 Houst. (Del.) 416 (1878), holding that if empowered to act as an administrator it may sue as such in another state. A foreign corporation may institute suit on a claim which has arisen outside of the state. Alley v. Bowen, etc. Co., 76 Ark. 4

(1905). A non-resident may bring suit in Georgia against a foreign corporation for a tort committed in Alabama, it appearing that the corporation did business in Georgia and had agents therein. Reeves v. Southern Ry., 121 Ga. 561 (1905). In a suit by a New Jersey corporation to protect its title to land in Florida, it is no defense that the company was organized in New Jersey to do all its business in Florida for the purpose of avoiding the laws of Florida relative to incorporation. Indian River Mfg. Co. v. Wooten, 55 Fla. 745 (1908). A foreign corporation may bring suit. Schmidt, etc. Co. v. Mahoney, 60 Neb. 20 (1900). An English corporation may bring suit in a Kansas court. Colonial, etc. Co. v. Catlin, 57 Pac. Rep. 140 (Kan. 1899). A foreign corporation engaged in interstate commerce may sue in a state court without showing that it has complied with the laws of the state entitling it to do business there. Zion, etc. Assoc. v. Mayo, 22 Mont. 100 (1899). A non-resident corporation may sue another non-resident corporation, even though the cause of action did not arise in the state, where the defendant appears and defends. National Coal Co. v. Cincinnati, etc. Co., 168 Mich. 195 (1911). A foreign corporation may be sued by a non-resident in the courts of the state unless he thereby obtains an undue advantage. Hunter v. Wenatchee, etc. Co., 36 Wash. 541 (1905). In Maryland a non-resident may sue a foreign corporation in the courts of that state. Hagerstown Brewing Co. v. Gates, 117 Md. 348 (1912).

<sup>1</sup> Allen v. Alleghany Co., 196 U. S. 458 (1905). A foreign corporation may bring suit to collect a subscription to its capital stock, even though it has not qualified. American, etc. Co. v. American Milling Co., 138 N. W. Rep. 1123 (Wis. 1912). A New Jersey corporation may maintain a suit in New Hampshire against a citizen of



this subject, as in New York, where no non-resident can sue a non-resident corporation in the courts of New York unless the cause of action arose in that state or affects property there.<sup>1</sup> The statute of New York prohibiting suits in that state by a foreign corporation against another foreign corporation on a cause of action arising out of the state is constitutional.<sup>2</sup> Although a non-resident cannot sue a foreign corporation in New York, yet the claim may be assigned to a resident and suit then be brought in the state court.<sup>3</sup> No foreign corporation doing business in New York, except banks, may sue in New York, on a contract made there, unless it has obtained a certificate authorizing it to do business in New York.<sup>4</sup> A foreign corporation may sometimes bring suit in the state on a contract made outside of the state without filing a certificate to do business in the state.<sup>5</sup> That subject, however, is considered elsewhere.<sup>6</sup> A statute against a foreign corporation bringing suit unless it has qualified under the statutes, does not prevent its defending a suit and interposing a counterclaim to the extent of plaintiff's claim.<sup>7</sup> A decision of the state court that a foreign insurance company cannot collect assessments on a policy issued in the state, because the company is not qualified under the state law to do business in such state does not present any federal question.<sup>8</sup> The question of proof of incorporation is considered elsewhere.<sup>9</sup>

§ 758. *Service in suits against a foreign corporation — Jurisdiction where service is on an officer temporarily in the state — Rules in federal courts as to service.* — At common law a state court has no

New Hampshire for a guaranty made in New York, even though such a suit could not be maintained in New York. *South Bay Co. v. Merrill*, 86 Atl. Rep. 351 (N. H. 1913). 142 N. W. Rep. 305.

<sup>1</sup> Code of Civ. Proc., §§ 1779, 1780; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315 (1889). A non-resident may bring a suit in the New York courts against a foreign corporation for breach of a contract where such breach occurred in that state by the non-resident sending a telegram from New York to the foreign corporation refusing to carry out a contract. *Wester v. Casein Co. etc.*, 206 N. Y. 506 (1912).

<sup>2</sup> *Anglo-American, etc. Co. v. Davis, etc. Co.*, 191 U. S. 373 (1903).

<sup>3</sup> *Hadden v. Dooley*, 92 Fed. Rep. 274 (1899). The New York statute is avoided by an assignment of the cause of action to a resident. *McBride v. Farmers' Bank*, 26 N. Y. 450 (1863).

<sup>4</sup> General Corporation Law, § 15. A foreign corporation cannot maintain in New York a suit on a judgment obtained by it in another state against another foreign corporation. *Anglo-Am. etc. Co. v. Davis, etc. Co.*, 169 N. Y. 506 (1902). In regard to a contract made in another state by a foreign corporation, the latter may enforce such a contract in New York state without a license to do business. *Batchelder, etc. Co. v. Knopf*, 54 N. Y. App. Div. 329 (1900).

<sup>5</sup> *MacMillan Co. v. Stewart*, 69 N. J. L. 212 (1903); *Slaytor-Jennings Co. v. Specialty, etc. Co.*, 69 N. J. L. 214 (1903).

<sup>6</sup> See §§ 696-700, *supra*.

<sup>7</sup> *Boston, etc. Co. v. Sesnon Co.*, 199 Fed. Rep. 445 (1912).

<sup>8</sup> *Swing v. Weston, etc. Co.*, 205 U. S. 275 (1907), *aff'g* 140 Mich. 344.

<sup>9</sup> See § 753, *supra*.



jurisdiction over a foreign corporation "unless it voluntarily appears, except so far as its property may be attached, and then only to the extent of the property attached."<sup>1</sup> At common law a state court cannot render a personal judgment against a foreign corporation, there being no statute for service of process.<sup>2</sup> Accordingly at common law a foreign corporation could not be sued outside of the state creating it, inasmuch as service on its officers was held insufficient. The modern view, however, is that jurisdiction over a foreign corporation may be acquired, in suits on contracts made or business done within the jurisdiction, by service upon an officer of the corporation, or upon its agent engaged in the state.<sup>3</sup> The federal courts follow the same rule but are

<sup>1</sup> *Potter v. La Pointe, etc. Co.*, 201 Mass. 557 (1909).

<sup>2</sup> *Swarts v. Christie, etc. Co.*, 166 Fed. Rep. 338 (1909).

<sup>3</sup> *St. Clair v. Cox*, 106 U. S. 350 (1882); *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93 (1879), where service was on the president. This last decision was questioned in *Boston Electric Co. v. Electric Gas L. Co.*, 23 Fed. Rep. 838 (1885). In general, see *Peckham v. North Parish*, 33 Mass. 274, 286 (1834); *Martens v. International, etc. Soc.*, 53 N. Y. 339 (1873); *City F. Ins. Co. v. Carrugi*, 41 Ga. 660 (1871); *Henning v. Planters' Ins. Co.*, 28 Fed. Rep. 440 (1886), holding that the judgment is conclusive only when it shows that the corporation was doing business in the jurisdiction; *Barnett v. Chicago, etc. R. R.*, 4 Hun, 114 (1875); *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305 (1884). Service on a resident attorney of a foreign corporation which does no business in the state is insufficient. *Thach v. Continental, etc. Assoc.*, 114 Tenn. 271 (1905). A foreign corporation may be sued in a state only when it is engaged in transacting business in that state and that fact should appear on the record to support any judgment taken by default. *Multnomah, etc. Co. v. Weston, etc. Co.*, 54 Oreg. 22 (1909). If a foreign corporation is doing business in the state, service on the president temporarily in the state is good. *Kendall v. Orange Judd Co.*, 118 Minn. 1 (1912). As to the presumption that a judgment obtained in another state against a foreign corporation was based upon legal service, see *Old*

*Wayne, etc. Ass'n v. McDonough*, 164 Ind. 321 (1905). A judgment against a foreign corporation, when sued upon in another state, may be attacked on the ground that the corporation did not do business in the state where the judgment was obtained, or that process was not served upon it there. *Johnston v. Mutual, etc. Co.*, 104 N. Y. App. Div. 550 (1905). Service upon an advertising agent of a foreign corporation is not sufficient. *Rich v. Chicago, etc. Ry.*, 34 Wash. 14 (1904). Service upon the president of a foreign corporation, who is in the state to testify as a witness, may be set aside, unless the objection has been waived by practical assent to such service. *Weston v. Citizens', etc. Bank*, 64 N. Y. App. Div. 145 (1901). A suit by a non-resident against a foreign corporation for causes arising out of the state by service on the treasurer gives no jurisdiction. *Newell v. Great Western Ry.*, 19 Mich. 336 (1869). But in Massachusetts a bill lies to subject the assets of a foreign corporation to the payment of its debts. *Silloway v. Columbia Ins. Co.*, 74 Mass. 199 (1857). And attachment lies against it. *Ocean Ins. Co. v. Portsmouth Marine Ry.*, 44 Mass. 420 (1841). And if it has a place of business in the state it may be sued under the statute. *National Bank of Commerce v. Huntington*, 129 Mass. 444 (1880). At common law, service on the officer in charge of the resident business of a foreign corporation gives jurisdiction for a cause of action arising in the jurisdiction. *Newby v. Von Oppen, etc. Co.*, L. R. 7



conservative in regard to what is doing business in the state and who is

Q. B. 293 (1872). But service of injunction papers on a resident selling agent is insufficient. *Carron Iron Co. v. MacLaren*, 5 H. L. Cas. 416 (1855). A corporation incorporated by the United States may be reached by service on the president anywhere in the country. *Eby v. Northern Pac. R. R.*, 13 Phila. 144 (1879). An Iowa corporation could not be sued in the District of Columbia (*Lathrop v. Union Pac. Ry.*, 1 MacArth. 234 — 1873) until a statute authorized service. *Dallas v. Atlantic, etc. R. R.*, 2 MacArth. 146 (1875). Where foreign corporations are forbidden to do business in the state under a penalty of a fine, unless a certificate is filed, this is the only penalty. Contracts made by a foreign corporation without filing a certificate are enforceable. *Toledo, etc. Co. v. Thomas*, 33 W. Va. 566 (1890). An attachment of property in the state does not make the cause one arising in the state. *Whitehead v. Buffalo, etc. Ry.*, 18 How. Pr. 230 (1859). A foreign corporation doing business in the state may be sued. *Thomas v. Placerville, etc. Co.*, 65 Cal. 600 (1884). Service of notice of attachment on a director suffices. *Boyd v. Chesapeake, etc. Canal Co.*, 17 Md. 195 (1860). Service on the treasurer is insufficient to compel a transfer of patents. *Desper v. Continental, etc. Co.*, 137 Mass. 252 (1884). A default is effectual only when the papers show a proper service. *Willamette, etc. Co. v. Williams*, 1 Oreg. 112 (1854); *Bawknight v. Liverpool, etc. Ins. Co.*, 55 Ga. 194 (1875), holding that in Georgia a foreign corporation cannot be sued *in personam* except upon a contract made there. The remedy upon a foreign contract or foreign judgment is *in rem* by attachment and garnishment. *Camden Rolling-Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15 (1866), holding that a foreign corporation which has no place of business in New Jersey cannot be sued in the courts of that state on a contract made in another state, but otherwise on a contract made in the state. See *National Cond. Milk Co. v. Bran-*

*denburgh*, 40 N. J. L. 111 (1878); *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. (Pa.) 173 (1827), holding that an attachment will lie against it. To same effect, *St. Louis, etc. Ins. Co. v. Cohen*, 9 Mo. 416 (1845); *Andrews v. Michigan Cent. R. R.*, 99 Mass. 534 (1868); *Barr v. King*, 96 Pa. St. 485 (1880), holding that it may be garnisheed on execution; *Smith v. Mutual L. Ins. Co.*, 96 Mass. 336 (1867), holding that a citizen of another state cannot sue in the courts of Massachusetts a corporation which is foreign to that state on a cause of action which did not arise within the jurisdiction.

The leading case *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5 (1819), states the common-law rule as to suits against a foreign corporation. Process against a foreign corporation cannot be served upon its officers who may be found within the jurisdiction of the court unless such service is authorized by the statutes of the state where suit is brought. *Pomeroy v. New York, etc. R. R.*, 4 Blatchf. 120 (1857); s. c., 19 Fed. Cas. 965; *Eaton v. St. Louis, etc. Co.*, 7 Fed. Rep. 139 (1881); *Latimer v. Union Pac. Ry.*, 43 Mo. 105 (1868); *Weight v. Liverpool, etc. Co.*, 30 La. Ann. 1186 (1878), holding that process cannot be served on a local agent; *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882), as to judgment by service on an agent doing business in the state. Also *Block v. Atchison, etc. R. R.*, 21 Fed. Rep. 529 (1884); *Emerson, etc. Co. v. McCormick, etc. Co.*, 51 Mich. 5 (1883), holding that foreign corporations may sue each other in Michigan if both are doing business within the state and the cause of action accrued there. See also *Pennoyer v. Neff*, 95 U. S. 714 (1877); *American Exp. Co. v. Conant*, 45 Mich. 642 (1881); *Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222 (1853); *Pope v. Terre Haute, etc. Co.*, 87 N. Y. 137 (1881); *Good Hope Co. v. Railway, etc. Co.*, 22 Fed. Rep. 635 (1884); *Camden Rolling-Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15 (1866). If, under the statute, the



an agent fitted to be served.<sup>1</sup> The supreme court of the United States says it is "well settled in the federal jurisdiction that a foreign corporation can be served with process within the state only when it is doing business therein, and that such service must be upon an agent who represents the corporation in its business" and the return of the sheriff is not conclusive.<sup>2</sup> There have been many decisions and much difference of opinion as to what constitutes doing business in the state.<sup>3</sup> A resident agent selling on commission, but authorized to make abso-

foreign corporation appoints an agent in the state to accept service, a personal judgment may be rendered against the corporation. *Wilson v. Martin-Wilson, etc. Co.*, 149 Mass. 24 (1889). See on this subject generally, an article in 43 Central L. J. 497. See also § 752, *supra*.

<sup>1</sup> A traveling agent of a foreign corporation taking orders for goods is not doing business for it within the state sufficient to sustain service of process on him. *William Grace Co. v. Martin, etc. Co.*, 174 Fed. Rep. 131 (1909). *Cf.* §§ 696-700, *supra*. Service on a commission agent or the solicitor of orders or a mechanic to make repairs is not good service on a foreign corporation. *Fawkes v. American, etc. Co.*, 176 Fed. Rep. 1010 (1910). Where a foreign corporation is doing substantial business in the state, it may be sued there. *Sleicher v. Pullman Co.*, 170 Fed. Rep. 365 (1909). Service on a local agent who sells tickets on commission is not sufficient. *Goepfert v. Compagnie, etc. Transatlantique*, 156 Fed. Rep. 196 (1907). Service in the federal court on a foreign corporation may be made on an officer specified in the state statute. *Toledo, etc. Co. v. Computing, etc. Co.*, 142 Fed. Rep. 919 (1906). Where service on an agent is allowed if certain officers cannot be found in the county, the return of service on an agent must show that the officers were not within the jurisdiction. *Miller v. Norfolk, etc. R. R.*, 41 Fed. Rep. 431 (1889). Approved in *Youngstown, etc. Co. v. White's Adm'r*, 49 S. W. Rep. 36 (Ky. 1899). The legislature may change the mode of service. *Railroad Co. v. Hecht*, 95 U. S. 168 (1877). The statute must be strictly followed. *St. Clair v. Cox*, 106

U. S. 350 (1882). A statute authorizing service upon any employee where a corporation is doing business in the state, does not authorize an employee to accept service. *New River, etc. Co. v. Seeley*, 120 Fed. Rep. 193 (1903). Even though a Pennsylvania insurance company accepts four policies in Wisconsin, yet after the policies are issued the company is not doing business in Wisconsin so far as service of process upon it is concerned, under the Wisconsin statute. *Frawley, etc. v. Pennsylvania, etc. Co.*, 124 Fed. Rep. 259 (1903). A foreign railroad corporation cannot be served even under a statute by serving an agent of another railroad company who sells tickets for the former company, the former company having no office or place of business in the state. *Allen v. Yellowstone, etc. Co.*, 154 Fed. Rep. 504 (1907). The agent who made the contract may be served. *Estes v. Belford*, 22 Fed. Rep. 275 (1884). As to Pennsylvania, see *Hussey Mfg. Co. v. Deering*, 20 Fed. Rep. 795 (1884). A Maine corporation may sue a New Jersey corporation in Massachusetts, where the latter company has filed an agreement with the state of Massachusetts to the effect that it might be sued there. *Consolidated, etc. Co. v. Lamson, etc. Co.*, 41 Fed. Rep. 833 (1890).

<sup>2</sup> *Mechanical, etc. Co. v. Castleman*, 215 U. S. 437, 441 (1910). In the federal courts a foreign corporation can be sued where it is doing business in the state and process is served on an agent who represents it in business in that state. *Michigan, etc. Co. v. Aluminum, etc. Co.*, 190 Fed. Rep. 879 (1911).

<sup>3</sup> See §§ 696, 700, *supra*, and § 758, *infra*.



lute sales, is doing business within the jurisdiction, and may be served by process.<sup>1</sup> But service on a mere soliciting agent of a foreign corporation is insufficient it having no property or agent in the state with power to contract.<sup>2</sup> Service upon a foreign corporation should be upon an agent representing the corporation in the business which it does in the state, and he should be one whose duty, it may fairly be presumed, would be to notify the governing power of the corporation of the service.<sup>3</sup> In England also it is held that a foreign corporation doing business in the jurisdiction may be sued if it is served within the jurisdiction, even though the cause of action arose elsewhere.<sup>4</sup> Service, however, cannot be on a stockholder and hence, though an Illinois railroad corporation owns practically the entire capital stock of a Texas railroad corporation, yet the former cannot be brought into court in Texas by serving officers of the latter.<sup>5</sup> Service upon a foreign corporation doing business in a territory may be made upon the general manager in the territory, even though the corporation has not appointed a local agent for that purpose as required by the statutes.<sup>6</sup>

There has been a vast amount of litigation as to when the service of process upon an officer or agent of a foreign corporation is sufficient

<sup>1</sup> *Saccharin Corp. v. Chemische, etc.*, [1911] 2 K. B. 516.

<sup>2</sup> *Booz v. Texas, etc. Ry.*, 250 Ill. 376 (1911). A soliciting and advertising agent of a foreign railroad company which has no property or office within the state is not an agent upon whom service may be made in Illinois, especially where he has no power to make contracts for the company. *Wall v. Chesapeake, etc. Ry.*, 95 Fed. Rep. 398 (1899). Service on a soliciting agent is not sufficient. *McGuire v. Great, etc. Ry.*, 155 Fed. Rep. 230 (1907). The soliciting of advertisements by traveling agents of a publishing company is not doing business within the state as regards service of process upon one of them. *Boardman v. S. S. M'Clure Co.*, 123 Fed. Rep. 614 (1902). Service upon a person soliciting orders for a foreign corporation, but who is not an agent of the corporation, is not sufficient. *Strain v. Chicago, etc. Co.*, 126 Fed. Rep. 831 (1903). Service on the assistant secretary of a foreign corporation is insufficient where there is no claim that the corporation is doing business in the state. *Earle v. Chesapeake, etc. Ry.*, 127 Fed. Rep. 235 (1904). Service on a traveling

agent may not be sufficient in the federal courts, even though it is held sufficient by the state court. *West v. Cincinnati, etc. Ry.*, 170 Fed. Rep. 349 (1909).

<sup>3</sup> *Central of Georgia Ry. v. Eichberg*, 107 Md. 363 (1908).

<sup>4</sup> Service in a suit against a foreign bank may be on the manager of a local branch. *Logan v. Bank of Scotland*, [1904] 2 K. B. 495. A Canadian railway company may be served by process in England where its advisory committee meets in England and it has a secretary and staff in England and sells its securities there. *Rex v. Lovitt and others*, [1912] A. C. 212.

<sup>5</sup> *Peterson v. Chicago, etc. Ry.*, 205 U. S. 364 (1907). Service on a stockholder of a foreign corporation is not good. *Rand v. Upper Locks and Canals*, 3 Day (Conn.), 441 (1809); *O'Brien v. Shaw's Flat, etc. Co.*, 10 Cal. 343 (1858).

<sup>6</sup> *Henrietta Mining, etc. Co. v. Johnson*, 173 U. S. 221 (1899). A statute requiring foreign corporations to appoint an agent to accept service does not prevent service on an agent who has not been appointed. *Curtis v. Jordan*, 115 La. 918 (1905).



to confer jurisdiction over the corporation. In most of the states there are statutes which provide for service in suits against foreign corporations by service on an officer or agent, the particular officer or agent being specified.<sup>1</sup> The Michigan statute regulating the transaction of

<sup>1</sup> Service of a summons in a cause of action arising out of the state may be made on the head of a department in New York, the company, a foreign corporation, having an office in New York. *Tuchband v. Chicago*, etc. R. R., 115 N. Y. 437 (1889). Under the New York statute service on a foreign corporation cannot be made by serving its attorney. *Taylor v. Granite State Prov. Assoc.*, 136 N. Y. 343 (1893). Even though a foreign corporation is doing business in the state without having qualified, yet it may be served with process as the statute may provide. *Vulcan, etc. Co. v. Harrison*, 95 Ark. 588 (1910). Under the North Carolina statute service on the bookkeeper of a foreign corporation, he being the only financial agent in the state, is sufficient. *Whitehurst v. Kerr*, 153 N. C. 76 (1910). Service on a traveling salesman is not sufficient. *Adams Mach. Co. v. Castleberry*, 106 S. W. Rep. 940 (Ark. 1907). A salesman of a certain article for a corporation is not an agent upon whom service can be made. *Wold v. Colt Co.*, 102 Minn. 386 (1907). Under the South Carolina statutes, service on a traveling salesman of a foreign corporation is good when he was in the state in regard to the same matter. *Abbeville, etc. Co. v. Western, etc. Co.*, 61 S. C. 361 (1901). Under the statutes of North Carolina service may be made on a superintendent of construction of a foreign corporation. *Clinard v. White*, 129 N. C. 250 (1910). A soliciting salesman of a foreign corporation may be served under the North Carolina statutes, even though he is selling on a commission. *McSwain v. Adams, etc. Co.*, 76 S. E. Rep. 117 (S. C. 1912). Service of summons in a foreclosure suit against a foreign corporation must be made in strict accordance with the statute. *Venner v. Denver, etc. Co.*, 15 Colo. App. 495 (1900). In Nebraska service may be made upon a

managing agent of a foreign corporation doing business in the state. *Klopp v. Creston City, etc. Co.*, 34 Neb. 808 (1892). In Michigan, if service is made on a person as a principal officer of a foreign corporation, and that person shows by affidavit that he was not such, the service is set aside. *First Nat. Bank v. Burch*, 76 Mich. 608 (1889). Service on the resident agent of a foreign corporation is sufficient. *Vorheis v. People's, etc. Soc.*, 86 Mich. 31 (1891). See *Hiller v. Burlington, etc. R. R.*, 70 N. Y. 223 (1877); *Childs v. Harris, Mfg. Co.*, 104 N. Y. 477 (1887); *Pope v. Terre Haute, etc. Co.*, 87 N. Y. 137 (1881). Service cannot be upon an officer who has resigned and the resignation accepted. *Ervin v. Oregon, etc. Nav. Co.*, 22 Hun, 598 (1880). See *Barnett v. Chicago, etc. R. R.*, 4 Hun, 114 (1875), to the effect that sometimes the judgment is binding, though the corporation has no property in the jurisdiction. Attachment does not lie against a foreign corporation after a receiver of it has been appointed in the state where it exists. *Thomas v. Merchants' Bank*, 9 Paige, 216 (1841). See also § 871, *infra*. For service under the Pennsylvania statute, see *Benwood Iron Works v. Hutchinson*, 101 Pa. St. 359 (1882); *Hussey Mfg. Co. v. Deering*, 20 Fed. Rep. 795 (1884). Service on a resident agent whose agency is for other states only is not good. *Schmidlapp v. La Cofiance Ins. Co.*, 71 Ga. 246 (1883). Service under the Utah statute, *Walker v. Continental Ins. Co.*, 2 Utah, 231 (1879); the Missouri statute, *McNichol v. U. S., etc. Agency*, 74 Mo. 457 (1881). Service must be on the *de facto* officers. *Berrian v. Methodist Soc.*, 4 Abb. Pr. 424 (1857). Service on a clerk under the statute, *Libbey v. Hodgdon*, 9 N. H. 394 (1838). Service under the New Jersey statute. *National Cond. Milk Co. v. Brandenburgh*, 40 N. J. L. 111 (1878). On a contract made in the



domestic business by a foreign corporation makes such corporations domestic corporations as to such domestic business, and hence they may

state, service on an agent suffices in New York, though the foreign corporation does no business and has no property in the state. *Barnett v. Chicago, etc. R. R.*, 4 Hun, 114 (1875).

Frequently the statute allows service on a "managing agent." Difficulty arises in defining this term. It has been held that a person is a "managing agent" if he is a general manager, *Carr v. Commercial Bank*, 19 Wis. 272 (1865); a local insurance agent, *Bain v. Globe Ins. Co.*, 9 How. Pr. 448 (1854); a local agent, *American Exp. Co. v. Johnson*, 17 Ohio St. 641 (1867); a general freight agent, *Palmer v. Pennsylvania Co.*, 35 Hun, 369 (1885); *aff'd*, 99 N. Y. 679. But a stock transfer agent is not a managing agent. *Reddington v. Mariposa, etc. Co.*, 19 Hun, 405 (1879); nor is an assistant secretary, *Sterett v. Denver, etc. Ry.*, 17 Hun, 316 (1879); nor is a horse-car superintendent, *Emerson v. Auburn, etc. R. R.*, 13 Hun, 150 (1878); nor is a ticket agent, *Doty v. Michigan Cent. R. R.*, 8 Abb. Pr. 427 (1859); nor is a baggage-master, *Flynn v. Hudson River R. R.*, 6 How. Pr. 308 (1851); nor is a boat captain, *Upper Miss. Transp. Co. v. Whittaker*, 16 Wis. 220 (1862). The term "special agent" includes a conductor. *New Albany, etc. R. R. v. Grooms*, 9 Ind. 243 (1857); *New Albany, etc. R. R. v. Tilton*, 12 Ind. 3 (1859); *Ohio, etc. R. R. v. Quier*, 16 Ind. 440 (1861); the person in charge who attends to the business, *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305 (1884); but not the traveling agent, *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422 (1863); nor the collecting attorney, *Moore v. Freeman's Nat. Bank*, 92 N. C. 590 (1885). For many other cases on these and similar statutes and on the general principles governing service of process on corporations, see 8 Southern Law Rev. 199; and 1 Barb. Ch. Pr. 52. In Oregon the statute is construed to hold that a domestic corporation must be sued in the county of the principal office, or where the cause arose. *Hol-*

*gate v. Oregon Pac. R. R.*, 16 Oreg. 123 (1888). *Contra*, *Gaize v. South Carolina R. R.*, 1 Strobb. L. (S. C. 70 (1846)). A vice-president and general superintendent is an "officer" upon whom service may be made under a statute. *Norfolk, etc. R. R. v. Cottrell*, 83 Va. 512 (1887). Service on a foreign corporation is sufficient where the company has an office and general agent doing a substantial business in the state. But see § 759, *infra*. *Cf. Barnes v. Mobile, etc. R. R.*, 12 Hun, 126 (1877). Service upon a director of a foreign corporation sustained under the New York statute. *McElroy v. Continental Ry.*, 6 N. Y. Supp. 306 (1889). Foreign corporations doing business in the state may be sued on a cause of action that arose out of the state, and service may be made on an agent or depot-master if the statutes authorize service to be made in this way. *Humphreys v. Newport News, etc. Co.*, 33 W. Va. 135 (1889). Service may be on the superintendent of insurance at Albany, although the action is in the city court of New York. *People v. City Court Justices*, 11 N. Y. Supp. 773 (1890). Under the Michigan statutes service may be made on foreign corporations by service on a resident agent who is in charge of the property. *Shafer Iron Co. v. Iron County Circuit Judge*, 88 Mich. 464 (1891). Under the statutes of Michigan service on a foreign corporation may be made on a traveling salesman in a cause of action which arose within the state. *Ryerson v. Steere*, 114 Mich. 352 (1897). An advertising agent is not an "agent" upon whom service may be made under the New Jersey statute. *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150 (1890). A local agent of a domestic insurance company is not an agent employed in the general management of the business. *State Ins. Co. v. Waterhouse*, 78 Iowa, 674 (1889). Service may be upon a general superintendent, when the statute authorizes it on a managing agent.



be served by process the same as a domestic corporation.<sup>1</sup> Service upon a director of a foreign corporation in accordance with a statute is legal where the company has been doing business in the state and the cause of action arose in the state.<sup>2</sup> A local broker receiving business and transmitting it to a city brokerage corporation may be an agent of the latter sufficient to sustain service, under the Illinois statute.<sup>3</sup>

The New York court of appeals holds that even though a foreign corporation has no office or business in the state, yet if its president resides and has an office in the state, from which he manages and controls the corporate business, service upon him is sufficient and a judgment thereon is sufficient and binds the parties so far as corporate property in the state is concerned.<sup>4</sup> But the supreme court of the United States holds directly to the contrary, not only as to suits instituted in the federal courts but also as to suits removed from the state to the federal courts. Hence on removal of the case to the federal court the service will be set aside.<sup>5</sup> A special appearance for that purpose may be put

*Barrett v. American, etc. Co.*, 56 Hun, 430 (1890); *aff'd*, 138 N. Y. 491. An employee who attends to the publication of a periodical, and the printing, binding, and mailing, is not a "managing agent." *Ruland v. Canfield Pub. Co.*, 10 N. Y. Supp. 913 (1890). An agent is not an "officer." *Banks v. Gay Mfg. Co.*, 108 N. C. 282 (1891). The attachment papers in an attachment against a foreign corporation must show the jurisdiction of the court. *Oliver v. Walter, etc. Co.*, 10 N. Y. Supp. 771 (1890).

<sup>1</sup> *Showen v. Owens Co.*, 158 Mich. 321 (1909).

<sup>2</sup> *Lumbermen's, etc. Co. v. Meyer*, 197 U. S. 407 (1905).

<sup>3</sup> *Board of Trade v. Hammond, etc. Co.*, 198 U. S. 424 (1905).

<sup>4</sup> *Grant v. Cananea, etc. Co.*, 189 N. Y. 241 (1907).

<sup>5</sup> *Goldey v. Morning News*, 156 U. S. 518 (1895); *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 31 (1890). A foreign corporation may appear specially and remove the case from the state to the federal court and then cause service to be set aside on the ground that it had no office and did no business in the state, and that service was on its president, who happened to be in the state and endeavored to settle the case. *Louden, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 1008

(1904). Service upon the president who happens to be passing through the territory is not sufficient. *Caledonian Coal Co. v. Baker*, 196 U. S. 432 (1905). Service on an officer of a foreign corporation who is casually in the state is not good, where the corporation does no business in the state and has no property in the state connected with the suit. *Case v. Smith, etc. Co.*, 152 Fed. Rep. 730 (1907). Service on the secretary of a foreign corporation who is casually in the state not on business of the company, will be set aside, the company having no business, property, or office in the state. *Phelps v. Connecticut Co.*, 188 Fed. Rep. 765 (1911). Service on the secretary of a foreign corporation who is in the state to attend the taking of a deposition in a suit in which the company is interested, is not sufficient, where the corporation never did any business in the state excepting one transaction. *Ladd, etc. Co. v. American, etc. Co.*, 152 Fed. Rep. 1008 (1907). Service on the president while casually in the state is not good, even though the company solicited and obtained orders for goods in the state by correspondence. *Buffalo Glass Co. v. Manufacturers', etc. Co.*, 142 Fed. Rep. 273 (1905). An officer of a foreign corporation may be served, even though



in. Thus the supreme court of the United States holds that service in New York upon a director of a foreign corporation who resides in

he came into the state to adjust the claim on which suit is brought. *Brush Creek, etc. Co. v. Morgan, etc. Co.*, 136 Fed. Rep. 505 (1905). Service on the president casually in the state was set aside in *Buffalo, etc. Co. v. American, etc. Co.*, 141 Fed. Rep. 211 (1905). The return of the United States marshal in making service in a suit against a foreign corporation must show that the company was transacting business in the state. *Jackson v. Delaware, etc. Co.*, 131 Fed. Rep. 134 (1904). Service upon the secretary while temporarily in the state is not good, the company having no property in the state and no business in the state except isolated transactions, and this particular transaction not having been with the secretary. *Southern, etc. Co. v. American, etc. Co.*, 115 La. 237 (1905). Service on an officer of a foreign corporation temporarily in the state on other business is not sufficient. *Honerine, etc. Co. v. Tallerdav, etc. Co.*, 30 Utah, 326 (1906). A foreign corporation sued in state courts by service on a director casually in the state may remove to United States court and have the suit dismissed. *Bentlif v. London, etc. Corp.*, 44 Fed. Rep. 667 (1890). On removal to the federal court, a suit commenced by service on the president, who casually was in the jurisdiction on private business, will be dismissed, the company never having transacted business or maintained an office in the state. *Reifsnider v. American, etc. Co.*, 45 Fed. Rep. 433 (1891). "Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state so that service can be made upon it." *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98 (1890), holding, however, that where a corporation appears, demurs, removes the case into the federal court, and answers, it cannot attack the jurisdiction of the court,

even though service was on the president, who was enticed into the state. Where a foreign corporation sued in a state court wishes to remove the case to the federal court, and there have the service set aside on the ground of want of jurisdiction, it must enter a special appearance in the state court for the purpose of objecting to the jurisdiction, and then, after filing the objection, but before a hearing thereon, remove the whole case into the federal court. *Tallman v. Baltimore, etc. R. R.*, 45 Fed. Rep. 156 (1891). Where a Kansas mortgage loan company makes its securities payable in New York and deposits securities with the trustee in New York, it may be sued in New York by service upon the president who is casually in that state. *Watkins, etc. Co. v. Elliott*, 62 Kan. 291 (1900). Where a foreign corporation has made a contract within the state and then withdraws its office and service is made upon the president within the state according to the statutes of the state, the federal court will uphold such service. *McCord, etc. Co. v. Doyle*, 97 Fed. Rep. 22 (1899). Even though a director of a foreign corporation lives in the district, yet service upon him is not good where he does not transact and is not charged with any corporate business, but the rule is otherwise if the corporation has property within the state, within the meaning of the New York statute. *Reilly v. Philadelphia, etc. Ry.*, 109 Fed. Rep. 349 (1901). Service on the president of a foreign corporation in a cause of action not arising in the state gives no jurisdiction. *State v. Ramsey County Dist. Ct.*, 26 Minn. 233 (1879). Service on the secretary who is casually in the state is not good. *Middlebrooks v. Springfield F. Ins. Co.*, 14 Conn. 301 (1841). A foreign corporation cannot be bound by obtaining service upon an officer who is casually in the state, where the statute is silent on the subject. *Aldrich v. Anchor Coal Co.*, 24 Oreg. 32 (1893). Service of process upon the



New York does not give jurisdiction where the corporation did no business in New York.<sup>1</sup> And that even though the chief office of a West Virginia corporation is stated in the charter to be New York City, and even though service is made upon its treasurer in New York, yet this does not give jurisdiction if it has never done any business and has no assets in that state.<sup>2</sup> If a foreign corporation desires to deny that it has been properly served, it may put in a special appearance and raise the objection of no jurisdiction.<sup>3</sup> In New Jersey, it is held that the proper common-law practice, where service is made upon a foreign corporation's president, while he was casually in the state, is not to move to set it aside,<sup>4</sup> but to file a plea to the jurisdiction.<sup>5</sup>

president of a foreign corporation who is temporarily within the state is not good service in Pennsylvania. *Phillips v. Burlington Library Co.*, 141 Pa. St. 462 (1891). Service on a domestic corporation cannot be made by personal service on the president outside of the jurisdiction. *Dillard v. Central Va. Iron Co.*, 82 Va. 734 (1887). Judgment in another state against a foreign corporation doing business there, service being on an officer who is accidentally in the state, is conclusive and valid. *Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222 (1853). Service on a corporation which does no business in the state cannot be made by service on an agent who is temporarily in the state. *Crook v. Girard, etc. Co.*, 87 Md. 138 (1898). The manager may be served, although only temporarily in the state on special business, such suit being connected with such business. *Houston v. Filer, etc. Co.*, 85 Fed. Rep. 757 (1898).

<sup>1</sup> *Conley v. Mathieson, etc. Works*, 190 U. S. 406 (1903). Service on the president of a foreign corporation does not give jurisdiction unless the corporation is doing business in the state or has an office in the state. *Knapp v. Wallace*, 50 Oreg. 348 (1907).

<sup>2</sup> *Kendall v. American, etc. Co.*, 198 U. S. 477 (1905).

<sup>3</sup> *Provident, etc. Soc. v. Ford*, 114 U. S. 635 (1885); *Friezen v. Allemania F. Ins. Co.*, 30 Fed. Rep. 349 (1886), holding that a general appearance waives the objection to jurisdiction. See also *Brooks v. New York,*

*etc. R. R.*, 30 Hun, 47 (1883), holding that a general answer has the same effect; also *Cook v. Champlain Transp. Co.*, 1 Denio, 91 (1845); *North Missouri R. R. v. Akers*, 4 Kan. 453 (1868), holding that after entering appearance it cannot question the jurisdiction of the court in an action upon contract. See also § 752, *supra*; *McCormick v. Pennsylvania Cent. R. R.*, 49 N. Y. 303 (1872); *Lung Chung v. Northern Pac. Ry.*, 19 Fed. Rep. 254 (1884); *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882). The fact that a defendant appears in the state court, in order to remove the case to the federal court, does not constitute a general appearance, preventing an objection to the jurisdiction of the person, but amounts only to a special appearance. *International, etc. Co. v. Heartt*, 136 Fed. Rep. 129 (1905). A foreign corporation cannot withdraw a general appearance in order to appear specially to set aside service. *Raymondville, etc. Co. v. St. Gabriel, etc. Co.*, 140 Fed. Rep. 964 (1905). Where a foreign corporation, served in the state where it is incorporated, answers by a plea to the jurisdiction and also files pleas to the merits, reserving its rights under the former plea, it waives any objection to the jurisdiction. *St. Louis, etc. Ry. v. Whitley*, 77 Tex. 126 (1890). See also note 5, p. 2784.

<sup>4</sup> *Puster v. Parker, etc. Co.*, 64 N. J. Eq. 599 (1903).

<sup>5</sup> *Puster v. Parker, etc. Co.*, 70 N. J. Eq. 771 (1904).



A foreign corporation is not necessarily doing business in the state, sufficient to authorize service upon one of its directors under the New York statute, merely because its transfers of stock are registered in the state and its directors meet there and it keeps a bank account there.<sup>1</sup> A foreign corporation maintaining a claims department in the state may be served with process in that state by service on a resident director.<sup>2</sup> Sometimes there is a special exemption, as, for instance, where the president is in the state as a witness, or to make a settlement.<sup>3</sup> The secretary of a foreign corporation may be served in a suit in regard to a contract where he is in the state relative to such contract.<sup>4</sup>

Sometimes the statutes require a foreign corporation to appoint a resident agent to accept service before it does business in the state.<sup>5</sup> A foreign corporation that has filed a certificate appointing a resident

<sup>1</sup> *Honeyman v. Colorado, etc. Co.*, 133 Fed. Rep. 96 (1904). An office in charge of an agent may be an established place of business in the state within the meaning of the New York statute, even though the agent pays the rent. *Chadeloid, etc. Co. v. Chicago, etc. Co.*, 180 Fed. Rep. 770 (1910). See also §§ 696-700, *supra*.

<sup>2</sup> *St. Louis, etc. Ry. v. Alexander*, 227 U. S. 218 (1913).

<sup>3</sup> Service on an officer of a foreign corporation who is in the state to settle the matter, may be set aside, it appearing that the foreign corporation was not doing business in the state. *Noel Const. Co. v. Smith & Co.*, 193 Fed. Rep. 492 (1911). The president is not exempt from service of process even though he is attending a suit against the company, his attendance not being as a party or a witness. *Brooks v. State*, 79 Atl. Rep. 790 (Del. 1911). A director of a foreign company who is in the state to vote stock owned by such company cannot be served with process where such foreign corporation does no substantial business in the state. *Doctor v. Desmond*, 82 Atl. Rep. 522 (N. J. 1912). Where the secretary and manager of a foreign corporation comes into the state to negotiate the settlement of a claim with a resident, the latter may serve process upon him in a suit on such claim. *Fond Du Lac, etc. Co. v. Henningsen, etc. Co.*, 141 Wis. 70 (1909). The president cannot be served while in the state to settle a

claim against the corporation for wrongful death. *Hoyt v. Ogden, etc. Co.*, 185 Fed. Rep. 889 (1911). *Good Hope Co. v. Railway, etc. Co.*, 22 Fed. Rep. 635 (1884).

<sup>4</sup> *Premo, etc. Co. v. Jersey-Creme Co.*, 200 Fed. Rep. 352 (1912).

<sup>5</sup> *Goodwin v. Colorado, etc. Co.*, 110 U. S. 1 (1884); *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114 (1875). See also §§ 696-700, *supra*; also note 1, p. 2802. A judgment obtained by such service cannot be impeached in other jurisdictions. *Lafayette Ins. Co. v. French*, 18 How. 404 (1855); *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882). Transacting business without filing is equivalent to filing. *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471 (1880). The appointment of such an agent does not affect the right of the corporation, as a citizen of another state, to sue and be sued in the federal courts. *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149 (1869); *Gray v. Quicksilver Min. Co.*, 21 Fed. Rep. 288 (1884). For decisions under the Massachusetts statute requiring foreign insurance companies to appoint an agent to accept service, see *Thayer v. Tyler*, 76 Mass. 164 (1857); *National Mut. F. Ins. Co. v. Pursell*, 92 Mass. 231 (1865); *Leonard v. Washburn*, 100 Mass. 251 (1868); *Gillespie v. Commercial, etc. Ins. Co.*, 78 Mass. 201 (1858); *Morton v. Mutual L. Ins. Co.*, 105 Mass. 141 (1870). An appointment, under statute, of a resident agent to accept service continues



agent may at any time cease doing business in the state, and thereafter service upon the agent is not good where such agent has ceased to be agent for that purpose, even though no certificate to that effect is filed with the secretary of state.<sup>1</sup> But this does not apply to business already transacted in the state.<sup>2</sup> After an insurance company has withdrawn from the state and canceled a power of attorney to the secretary of state to accept service, service cannot be made on the secretary of state on a cause of action not arising in that state nor connected with a transaction in that state, nor in favor of a citizen of that state.<sup>3</sup> A statute may provide that where a foreign corporation doing business in the state has no officer or agent in the state upon whom process may be served, service may be made upon the secretary of state,<sup>4</sup> or a local

until a new appointment is made. *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81 (1887).

<sup>1</sup> *Forrest v. Pittsburgh, etc. Co.*, 116 Fed. Rep. 357 (1902). But see *Collier v. Mutual, etc. Assoc.*, 119 Fed. Rep. 617 (1902). The right to make service on the state insurance commissioner ceases after the insurance company ceases to do business in the state. *Friedman v. Empire, etc. Co.*, 101 Fed. Rep. 535 (1899). Service on an agent appointed in accordance with the statute is good, even though the corporation ceases doing business in the state and has sold its property. *Hill v. Empire, etc. Co.*, 156 Fed. Rep. 797 (1907).

<sup>2</sup> Service may be made on a state officer, as allowed by statute, as against a foreign insurance company, even though it has withdrawn from the state, in a suit on a policy issued before such withdrawal. *Mutual Reserve, etc. Ass'n v. Phelps*, 190 U. S. 146 (1903). *Woodward v. Mutual Reserve, etc. Ass'n*, 178 N. Y. 485 (1904). Where by statute service on the state auditor shall be sufficient as against a foreign corporation, unless a resident agent has been appointed, service on him is good on a cause of action arising while a designation of an agent was in force, even though thereafter such designation was revoked. *Davis v. Kansas, etc. Co.*, 129 Fed. Rep. 149 (1904). After a foreign insurance company revokes its appointment of a local agent to accept service, a person

not a resident of that state cannot sue the company in that state on a policy existing before such revocation. *Williams v. Mutual, etc. Assoc.*, 145 N. C. 128 (1907). A foreign insurance company cannot withdraw from the state as to liabilities already incurred. *Smith, etc. Agency v. Hamilton, etc. Co.*, 69 W. Va. 129 (1911). A foreign corporation which has appointed a resident agent and engaged in business, cannot revoke his appointment so far as past transactions are concerned, and hence service may still be made upon him. *Brown-Ketcham, etc. Works v. Swift Co.*, 100 N. E. Rep. 584 (Ind. 1913).

<sup>3</sup> *Hunter v. Mutual, etc. Co.*, 218 U. S. 573 (1910).

<sup>4</sup> A provision that service on a foreign corporation may be made by service on the secretary of state where the business is transacted in the state is valid. *Paulus v. Hart-Parr Co.*, 136 Wis. 601 (1908). Where a corporation temporarily in the state has left and taken all its property, service upon the secretary of state cannot be made good service. *Gouner v. Missouri, etc. Co.*, 123 La. 964 (1909). Service on an assistant secretary of state is not legal where the statute provides for service on the secretary of state, and a judgment entered thereon is void. *Simon v. Southern Ry.*, 195 Fed. Rep. 56 (1912). Service on a foreign corporation, in accordance with a statute, by service on the secretary of state without provision for mailing or delivering the notice to the



doctor,<sup>1</sup> or the secretary of the corporation commission.<sup>2</sup> Even though a foreign corporation transacts business in the state, yet service of process upon it outside of the state does not authorize a personal judgment.<sup>3</sup> A foreign corporation may file a special appearance and a plea to the jurisdiction.<sup>4</sup> An appearance for the sole purpose of raising the question of jurisdiction and removing the case to the federal court is not a general appearance.<sup>5</sup> A foreign corporation waives its right to object to service, if it appears generally<sup>6</sup> or goes to trial and takes an appeal<sup>7</sup> or interposes a counter claim.<sup>8</sup> Service may be set aside for fraud.<sup>9</sup>

In a suit against a foreign corporation the general rule is that the suit may be in any county in the state.<sup>10</sup>

corporation, is invalid. *Southern Ry. Co. v. Simon*, 184 Fed. Rep. 959 (1910); *aff'd*, 195 Fed. Rep. 56. Where by statute the state superintendent of insurance is made agent to accept service of process on foreign insurance companies doing business in the state, service on him by mail is insufficient. *Farmer v. National Life Assoc.*, 50 Fed. Rep. 829 (1892).

<sup>1</sup> Where a foreign insurance company has outstanding policies in a state, the state may by statute authorize service of process on the insurance company's doctor who investigates and adjusts losses. *Commercial, etc. Co. v. Davis*, 213 U. S. 245 (1909).

<sup>2</sup> *Fisher v. Traders', etc. Co.*, 136 N. C. 217 (1904). A citizen of Pennsylvania who takes out a policy of insurance in Indiana in an Indiana insurance company, cannot obtain judgment thereon in Pennsylvania by serving the insurance commissioner of Pennsylvania, even though the Indiana corporation has done business in Pennsylvania without complying with the statute requiring it to consent to the insurance commissioner of Pennsylvania accepting service for it. *Old Wayne, etc. Assoc. v. McDonough*, 204 U. S. 8 (1907).

<sup>3</sup> *Louisville, etc. R. R. v. Missouri, etc. Ry.*, 40 Tex. Civ. App. 296 (1907).

<sup>4</sup> *Groel v. United, etc. Co.*, 68 N. J. Eq. 249 (1904). See § 752, *supra*.

<sup>5</sup> *Commercial, etc. Co. v. Davis*, 213 U. S. 245 (1909).

<sup>6</sup> In a suit by a non-resident against a non-resident corporation which has qualified under the statutes, the de-

fendant by appearing generally waives the objection that the cause of action arose outside of the state, and that the statutes do not provide for service on the foreign corporation in such a case. *Banks v. Pennsylvania Ry. Co.*, 111 Minn. 48 (1910). Service on three of nine directors is not service on the corporation, but if an attorney appears generally for the corporation that is sufficient. *Thoroughgood v. Georgetown, etc. Co.*, 77 Atl. Rep. 720 (Del. 1910).

<sup>7</sup> Where the motion of a foreign corporation to set aside service on the ground that it was not properly served, is denied, and a trial is had on the merits, and an appeal taken, this is a waiver of the objection. *Chinn v. Foster-Milburn Co.*, 195 Fed. Rep. 158 (1912).

<sup>8</sup> *Merchants', etc. Co. v. Clow & Sons*, 204 U. S. 286 (1907). Even though service on the foreman of a foreign corporation in the justice of the peace court is not sufficient and a special appearance is made and the objection raised, yet if the corporation appeals it thereby submits itself to the jurisdiction. *Gulf, etc. Co. v. Vanderberg*, 28 Okla. 637 (1911).

<sup>9</sup> *Cavanagh v. Manhattan, etc. Co.*, 133 Fed. Rep. 818 (1905).

<sup>10</sup> *Boyer v. Northern, etc. Ry.*, 8 Idaho, 74 (1901). A suit against a foreign corporation may be brought in any county of the state, unless there is a statute to the contrary. *Waechter v. Atchison, etc. Ry.*, 101 Pac. Rep. 41 (Cal. 1909).



§ 759. *Jurisdiction of the federal courts — Removal of causes to federal courts — “Dummy” corporations — Federal corporations.* — By the act of Congress of 1887, reënacted in 1911,<sup>1</sup> a suit in the federal courts can be instituted only in the district where either the plaintiff or defendant resides, where the jurisdiction of the court is due to the parties being citizens of different states.<sup>2</sup> Thus a suit by shippers to enjoin a railroad company from increasing its rates, if instituted in the federal court on the ground that a law of the United States is involved, must be instituted in the district where the defendant resides.<sup>3</sup> An

<sup>1</sup> 36 U. S. Stat. at Large, p. 1101, § 51.

<sup>2</sup> Stat. at L. 1887, sess. II, ch. 373.

In the circuit court of the United States it was formerly the law that a corporation incorporated beyond the circuit in which the suit was brought might be made a defendant by such service as suffices in the state wherein the suit was brought, if it did business there. *New England Mut. Ins. Co. v. Woodworth*, 111 U. S. 138, 146 (1883); *Eaton v. St. Louis, etc. Co.*, 7 Fed. Rep. 139 (1881); *M'Coy v. Cincinnati, etc. R. R.*, 13 Fed. Rep. 3 (1882); *St. Louis, etc. Co. v. Consolidated, etc. Co.*, 32 Fed. Rep. 802 (1887); *Hunter v. International Ry. Imp. Co.*, 26 Fed. Rep. 299 (1886); *Block v. Atchison, etc. R. R.*, 21 Fed. Rep. 529 (1884); *Carpenter v. Westinghouse Air-brake Co.*, 32 Fed. Rep. 434 (1887). But see *Good Hope Co. v. Railway, etc. Co.*, 22 Fed. Rep. 635 (1884), holding that service on the president, who was there to adjust a difficulty, was insufficient. *Cf. Estes v. Belford*, 22 Fed. Rep. 275 (1884), where a patent-right had been used in the jurisdiction. Service on an agent of a domestic corporation does not give jurisdiction over a foreign corporation, though the latter operates through the former. *U. S. v. American Bell Tel. Co.*, 29 Fed. Rep. 17 (1886). Unless the state statute provide otherwise, no jurisdiction is acquired by attachment of property and service of papers on resident officers of a foreign corporation. *Boston Electric Co. v. Electric Gas L. Co.*, 23 Fed. Rep. 838 (1885), reviewing the authorities. Where the foreign corporation has appointed a resident agent to accept service, the federal court has jurisdiction by service on such agent. *Ex parte Schollen-*

*berger*, 96 U. S. 369 (1877); *Knott v. Southern L. Ins. Co.*, 2 Woods, 479 (1874); s. c., 14 Fed. Cas. 785; *Merchants' Mfg. Co. v. Grand Trunk Ry.*, 13 Fed. Rep. 358 (1882), where a foreign corporation sued an alien corporation; *Lung Chung v. Northern Pac. Ry.*, 19 Fed. Rep. 254 (1884), where service was insufficient; *Gray v. Quicksilver Min. Co.*, 21 Fed. Rep. 288 (1884). The fact that a state is a stockholder in a corporation does not deprive the United States courts of jurisdiction where the corporation is a party. *Bank of U. S. v. Planters' Bank*, 9 Wheat. 904 (1824). In the federal courts service on a ticket solicitor of a railroad defendant for a cause of action arising in another circuit is insufficient. *Maxwell v. Atchison, etc. R. R.*, 34 Fed. Rep. 286 (1888). As to the affidavit to be made by the corporation in order to remove a case to the United States court, see *Mix v. Andes Ins. Co.*, 74 N. Y. 53 (1878). An order to show cause may be served on the cashier of an insolvent bank, although the bank is in a receiver's hands. *Platt v. Archer*, 9 Blatchf. 559 (1872); s. c., 19 Fed. Cas. 822. A Connecticut corporation cannot be sued by an alien in the California circuit court of the United States. *Denton v. International Co.*, 36 Fed. Rep. 1 (1888); *Filli v. Delaware, etc. R. R.*, 37 Fed. Rep. 65 (1888). But see *Riddle v. New York, etc. R. R.*, 39 Fed. Rep. 290 (1889). See also *Connor v. Vicksburg, etc. R. R.*, 36 Fed. Rep. 273 (1888). *Preston v. Fire Extinguisher Mfg. Co.*, 36 Fed. Rep. 721 (1888).

<sup>3</sup> *Macon Grocery Co. v. Atlantic Coast Line R. R.*, 215 U. S. 501 (1910).



allegation that a corporation is a citizen of a certain state is not sufficient to give jurisdiction to the federal court, but it should be shown that it was incorporated in that state.<sup>1</sup> After decree it is too late for one of the parties to claim that it was a corporation of a different state from the one shown by the papers, and hence that the federal court had no jurisdiction of the case.<sup>2</sup> The objection that neither of the parties resides in the district where suit is brought is waived by appearing generally.<sup>3</sup> The Missouri statute forfeiting the right to a foreign corporation to do business in the state if it brings a suit in the United States court, is void.<sup>4</sup>

A case cannot be removed from the state to the federal court, where neither of the parties reside in the state,<sup>5</sup> but the plaintiff may waive the objection to the removal of a case to the United States court that neither of the parties are citizens of the state wherein the suit is brought, it appearing, however, that they are citizens of different states.<sup>6</sup> Where a suit against a foreign corporation for damages for a tort is removed

<sup>1</sup> *Knight v. Litcher, etc. Co.*, 136 Fed. Rep. 404 (1905). A complaint by a corporation in the United States court should allege its organization and existence under the laws of a specified state. It is insufficient to merely allege that it is a citizen of that state. *Parker Washington Co. v. Cramer*, 201 Fed. Rep. 878 (1912).

<sup>2</sup> *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188 (1905).

<sup>3</sup> *Interior Constr. & Imp. Co. v. Gibney*, 160 U. S. 217 (1895). If the necessary diversity of citizenship exists, the federal court may by consent entertain a suit and appoint a receiver, although none of the parties reside in the district. *Horn v. Pere Marquette R. R.*, 151 Fed. Rep. 626 (1907). A New York corporation may, by bill filed in the Virginia district of the United States court, have a receiver appointed of property there of a New Jersey corporation, if the defendant does not object to the jurisdiction. Stockholders and creditors of the defendant company cannot by intervening raise the question of jurisdiction. *Central T. Co. v. McGeorge*, 151 U. S. 129 (1894). The objection that a suit in the federal court is not brought in the district where one of the parties resides is waived by the defendant corporation appearing and not objecting, and an intervening

stockholder cannot afterwards raise the objection. *Citizens', etc. Co. v. Union, etc. Co.*, 106 Fed. Rep. 97 (1900).

<sup>4</sup> *Herndon v. Chicago, etc. Ry.*, 218 U. S. 135 (1910). See §§ 696-700, *supra*, and notes p. 2793, *infra*.

<sup>5</sup> Where a citizen of Michigan sues a corporation of Missouri in the court in Louisiana, the defendant cannot remove the case to the United States court. *Ex parte Wisner*, 203 U. S. 449 (1906). *Kansas City, etc. R. R. v. Interstate Lumber Co.*, 37 Fed. Rep. 3 (1888). See also *Zambrino v. Galveston, etc. Ry.*, 38 Fed. Rep. 449 (1889); *Riddle v. New York, etc. R. R.*, 39 Fed. Rep. 290 (1889). As to removal on the ground of interference with interstate commerce, see *South Carolina v. Port Royal, etc. Ry.*, 56 Fed. Rep. 333 (1893). Where a state sues a corporation in a state court, the defendant cannot remove the case into the federal court on the ground of diverse citizenship, inasmuch as the state is not a citizen. *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482 (1894).

<sup>6</sup> *Central Trust Co. v. McGeorge*, 151 U. S. 129 (1894); *Re Moore*, 209 U. S. 490 (1908); *Western Loan Co. v. Butte, etc. Co.*, 210 U. S. 368 (1908), overruling to that extent. *Ex parte Wisner*, 203 U. S. 449 (1906).



to the United States court the suit will not be dismissed on the ground that the tort occurred outside of the jurisdiction of the court.<sup>1</sup> Where a person in bringing suit has a right to join a resident as one of the defendants, it is immaterial that his motive in doing so was to prevent the removal of the case to the United States court.<sup>2</sup> Condemnation proceedings in the state court may be removed to the United States court if there is diverse citizenship and the amount involved is over three thousand dollars, interest and costs.<sup>3</sup> A defendant cannot remove a case to the federal court on the ground that it arises under the constitution and laws of the United States, unless the complaint or bill in equity shows on its face that it does so arise.<sup>4</sup> Questions relative to a stockholder's suit being removed to the federal court when it has been commenced in the state court are considered elsewhere.<sup>5</sup>

A state statute interfering with the removal of causes to the United States court is void.<sup>6</sup> Although a state has no power to require a foreign corporation to agree not to remove cases into the federal courts, yet a state may exclude a foreign corporation from doing intrastate business in the state if it does remove cases to the federal courts.<sup>7</sup> But a foreign

<sup>1</sup> *Denver, etc. R. R. v. Roller*, 100 Fed. Rep. 738 (1900).

<sup>2</sup> *Illinois Cent. R. R. v. Sheegog*, 215 U. S. 308 (1909). Even though a resident corporation is joined as defendant with a non-resident corporation in an action for tort to prevent the case being removed to the United States court, the case cannot be removed. *Chicago, etc. Ry. v. Willard*, 220 U. S. 413 (1911). A suit against a non-resident corporation and its alleged resident foreman for negligence, may be removed by the corporation to the United States court, where there was no allegation that the foreman acted under the directions of the corporation, especially where the corporation denied that he was its foreman and that there was any joint liability. *Shaver v. Pacific Coast, etc. Co.*, 185 Fed. Rep. 316 (1911). A suit by a state in the state court against a street railway company and its federal receivers to forfeit the franchises, cannot be removed to the United States court. The federal court has no power to forfeit street railway franchises granted by a city under a statute. *People v. Bleecker St., etc. R. R.*, 178 Fed. Rep. 156 (1910). If under state practice a joint judgment can be obtained against a corpora-

tion and its foreman for negligence, the case cannot be removed by the corporation to the United States court, the foreman being a resident. *Chicago, etc. Ry. v. Schwyhart*, 227 U. S. 184 (1913). *Cp. Macutis v. Cudahy Packing Co.*, 203 Fed. Rep. 291 (1913). 229 U. S. 102.

<sup>3</sup> *Madisonville, etc. Co. v. Saint Bernard, etc. Co.*, 196 U. S. 239 (1905).

<sup>4</sup> Even though in a suit by a telegraph company to enjoin a purchaser of a railroad at a foreclosure sale from interfering with a telegraph line on the railroad right of way, the telegraph company alleges that it has accepted the Post Road Act of Congress of 1866, and that it had a right to maintain its telegraph line on the railroad right of way, under the statutes of the United States, yet this is not an allegation that the suit arises under the laws of the United States sufficient to enable the defendant to remove the case to the federal court on that ground. *Western Union Tel. Co. v. Ann Arbor R. R.*, 178 U. S. 239 (1900).

<sup>5</sup> See § 734, *supra*.

<sup>6</sup> See §§ 697-700, *supra*.

<sup>7</sup> *Security, etc. Co. v. Prewitt*, 202 U. S. 246 (1906). Where an insurance company is sued at law in the



corporation doing business in Missouri may enjoy its secretary of state from canceling its state license to do business in that state, because it has removed a case to the United States court, even though the statutes of Missouri prescribe that the license shall be revoked if a case is removed to the United States court.<sup>1</sup>

A state can neither prohibit nor impose conditions on the power of a foreign corporation to transact interstate business within the state, even though it may prohibit such corporation from transacting intrastate business within the state.<sup>2</sup> Hence a New Jersey manufacturing company may sell goods in Colorado, through a selling Colorado corporation, and may sue the Colorado corporation in the United States court on the contract, even though the former has not complied with the Colorado statutes as to filing its charter and paying an annual license tax, and even though it may not be able to maintain a suit in the state court. The jurisdiction of the federal court cannot be impaired by such legislation.<sup>3</sup> A statute prohibiting foreign corporations from maintaining suits in the state courts unless certain statutes are complied with, does not prevent suits in the federal court and does not prevent a corporation defending in the state court.<sup>4</sup> The supreme court of the United States

state court on a policy, it cannot maintain a suit in equity in the United States court to cancel a policy on the ground of fraud, even though it alleges that it does not remove a suit in the state court to the United States court because thereby its license will probably be revoked by the state on account of such removal. *Cable v. United States, etc. Co.*, 191 U. S. 288 (1903). A state cannot make it a condition on a foreign corporation doing business in the state that it shall not remove cases to the federal courts, but it may forfeit the permit if such foreign corporation does remove such cases to the federal court. *State v. Louisville & N. R. R.*, 97 Miss. 35 (1910). A foreign railroad corporation which has removed a case to the United States court in violation of the Mississippi statute, may be enjoined by the state from continuing intrastate commerce in that state. *State v. Louisville & N. R. R.*, 61 S. Rep. 425 (Miss. 1913). See note 4, p. 2791, *supra*, and §§ 696-700, *supra*.

<sup>1</sup> *Chicago, etc. Ry. v. Swanger*, 157 Fed. Rep. 783 (1908).

<sup>2</sup> See §§ 696-700, *supra*.

<sup>3</sup> *Butler, etc. Co. v. United States*

*Rubber Co.*, 156 Fed. Rep. 1 (1907). *Dunlop v. Mercer*, 156 Fed. Rep. 545 (1907), the latter case being a case where two Arizona corporations had been doing business in Minnesota without complying with the statute, and both became bankrupt, and the trustee of one petitioned that the trustee of the other return certain property. The court held that a state statute prohibiting a suit in such a case did not apply to the federal courts.

<sup>4</sup> *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893 (1903). A state statute which does not invalidate a contract made by a foreign corporation which has not complied with the statutes, but prohibits its bringing suit thereon, does not prevent suit in the United States court. *Vitagraph Co. v. Twentieth, etc. Co.*, 157 Fed. Rep. 699 (1907). A state statute prohibiting a foreign corporation from bringing a suit in the state on any contract made in the state without qualifying under the statute refers to suits in the state court, and does not prevent a suit in the federal court, the contract itself not being rendered void by the statute. *Richmond, etc. v. Buckner*, 181 Fed. Rep. 424 (1910). See §§ 696-700, *supra*.



has recently held that inasmuch as the only penalty prescribed by the New York statute for foreign corporations doing business in the state without obtaining a license therefor, is disability to bring suit thereon in the courts of New York, without rendering the contract itself void, such a suit may be maintained in the United States court, even though it could not be maintained in the New York courts.<sup>1</sup> But where the state statute renders the contract void a different rule may prevail.<sup>2</sup>

In determining whether the federal court has jurisdiction, the court may disregard nominal parties.<sup>3</sup>

The federal courts have original jurisdiction of a case irrespective of citizenship where the matter in controversy arises under the constitution or laws of the United States and involves more than three thousand dollars.<sup>4</sup> Hence where a state statute or city ordinance is in violation of a contract, the federal court may have jurisdiction irrespective of citizenship.<sup>5</sup> But the mere resolution of the common council order:

<sup>1</sup> David Lupton's, etc. Co. v. Automobile Club, 225 U. S. 489 (1912).

<sup>2</sup> Where a contract by a foreign corporation is made void by statute on account of its not having qualified, the contract cannot be enforced in the federal court. *Thomas v. Birmingham Ry., etc.*, 195 Fed. Rep. 340 (1912). See also §§ 696-700, *supra*.

<sup>3</sup> See §§ 734, *supra*, 827, *infra*. In a suit by a vendee against a vendor of stock to compel specific performance, the corporation is but a nominal party and is not considered in deciding whether the suit may be removed to the federal court. *Lucas v. Milliken*, 139 Fed. Rep. 816 (1905). The corporation as a party defendant is to be considered in determining whether the federal court has jurisdiction. *McClelland v. McKane*, 154 Fed. Rep. 164 (1907). In determining whether a stockholder's suit to cancel stock and bonds which he alleges are illegal may be removed to the federal court the corporation being an indispensable party will be considered a party complainant only when it is shown that its officers or persons controlling it are actually opposed to the suit. *Groel v. United, etc. Co.*, 132 Fed. Rep. 252 (1904). The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a

party defendant and resides in the same state as the complaining corporation. The trustee in such a suit is merely a formal party. *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900). In a suit between stockholders as to the title to stock the corporation is a proper party defendant, but is a nominal party, and is not considered in determining whether the suit is removable to the United States court. *Higgins v. Baltimore, etc. R. R.*, 99 Fed. Rep. 640 (1900). See also § 338, *supra*.

<sup>4</sup> 36 U. S. Stat. at Large, p. 1091, § 34.

<sup>5</sup> See §§ 902, 913, 931, *infra*. A city under charter authority to provide water for itself and to allow the use of its streets therefor for a term not exceeding twenty-five years may grant to a water-works company such right for twenty-five years and may agree in that grant not to construct works for itself during that time, unless the company fails to furnish a substantial supply or to perform its other agreements. If the city afterwards, in violation of this agreement, attempts to construct its own works, the company may obtain an injunction against it and may file its bill for that purpose in the United States court. *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1 (1898). Even though a contract between a city and a water-



ing a street railway to remove tracks, and directing the city solicitor to take action if they are not removed, is merely an order to bring suit, and hence is not in itself a violation of any contract giving the United States court jurisdiction.<sup>1</sup> And the jurisdiction of the supreme court of the United States, based on the constitution being involved in a case, does not apply to a suit by a Kentucky telephone company to enjoin a Tennessee municipality from enforcing a reduction of telephone rates under an ordinance, which the lower court declared unauthorized and invalid, inasmuch as an ordinance is not the same as a statute of the state, and a suit to enjoin the enforcement of the ordinance does not arise under the constitution of the United States.<sup>2</sup> The United States court has jurisdiction of a suit by the trustee of bondholders of a water-works company to enjoin the city from constructing its own water-works in violation of an exclusive right granted to the company.<sup>3</sup> Where there are three trustees and one of them is a citizen of the same state as the mortgagor corporation, two of the trustees may bring suit for the foreclosure in the federal court, the third trustee being made a party defendant, he having refused to join in bringing the suit.<sup>4</sup> But where a non-resident trustee of a mortgage of a street railway files a bill to restrain property owners from objecting to double tracking of the railway, and it is evident that it sues merely in order to bring the suit in the United States court, there having been no default in the mortgage, the court will dismiss the suit.<sup>5</sup> The federal court has jurisdiction of a bill in equity by a telegraph company to obtain an injunction against the collection of a license fee of \$1,000 where it is alleged that it amounts to a tax on interstate commerce and will damage the telegraph company much more than \$3,000.<sup>6</sup> A state cannot maintain a suit in the United States court to compel a railroad to comply with a statute in regard to railroad rates.<sup>7</sup> A stockholder in a railroad company may enjoin the company and state officers from enforcing a state statute unreasonably reducing railroad rates, and the United States court has jurisdiction on the ground that it deprives the company of

works company expires pending litigation as to the validity of a reduction of rates, yet the court is not thereby ousted from jurisdiction of the case. *Kimball v. City of Cedar Rapids*, 100 Fed. Rep. 802 (1900).

<sup>1</sup> *Des Moines v. City Ry.*, 214 U. S. 179 (1909).

<sup>2</sup> *City of Memphis v. Cumberland Tel. Co.*, 218 U. S. 624 (1910). *Cp. Grand Trunk, etc. Ry. v. South Bend*, 227 U. S. 544 (1913).

<sup>3</sup> *Mercantile Trust Co. v. Columbus*, 203 U. S. 311 (1906). The federal

court has jurisdiction irrespective of citizenship in a suit instituted by a street railway company to enjoin a city from violating its grant. *Des Moines, etc. Ry. v. City of Des Moines*, 151 Fed. Rep. 854 (1907).

<sup>4</sup> *Einstein v. Georgia, etc. Ry.*, 120 Fed. Rep. 1008 (1903).

<sup>5</sup> *Williams v. City, etc. T. Co.*, 186 Fed. Rep. 419 (1911).

<sup>6</sup> *Postal, etc. Co. v. City of Mobile*, 179 Fed. Rep. 955 (1909).

<sup>7</sup> *Oklahoma v. Atchison, etc. Ry.*, 220 U. S. 277 (1911).



its property without due process of law and denies the equal protection of the law, but a preliminary injunction will not be granted if the railroad is already charging only the reduced rate.<sup>1</sup>

The United States court has jurisdiction of a suit brought by a railroad corporation of one state against the members of a railroad commissioner in another state, such suit not being against the state itself.<sup>2</sup>

A trustee of a mortgage of a water-works company cannot file a bill in the United States court against the company and the city in which the water-works are located, where the company and the city are citizens of the same state and it transpires that the interests of the trustee and company are the same, the suit being practically against the city.<sup>3</sup> In a suit by the trustee of a mortgage to enjoin the condemnation of the mortgaged property, the mortgagor is a necessary party, and, if it is a citizen of the same state as the party that is condemning, the federal court has no jurisdiction.<sup>4</sup> An Ohio stockholder in an Illinois railroad corporation may bring suit in the United States court in Illinois against the corporation, and other Illinois corporations and a New York trustee of a mortgage on the property to set aside an alleged illegal lease and deed of the property of the first-named corporation. The New York corporation may be served by publication.<sup>5</sup> Stock is located where the corporation is incorporated, and a non-resident stockholder may file a bill in the United States court in the district where the corporation was organized to set aside an illegal forfeiture of the stock for non-payment of assessments, and in such suit he may bring in non-resident defendants by substituted service.<sup>6</sup> But a suit in equity does not lie in the United States court in Nevada, at the instance of a resident of that state, to recover stock owned by non-residents in an Arizona corporation where service upon them is made only upon the publication. The stock is not within that district, within the meaning of the federal statute.<sup>7</sup>

<sup>1</sup> Perkins v. Northern, etc. Ry., 155 Fed. Rep. 445 (1907).

<sup>2</sup> Mississippi R. R. v. Illinois Central R. R., 203 U. S. 335 (1906).

<sup>3</sup> Boston, etc. Co. v. City of Racine, 97 Fed. Rep. 817 (1899). Where a water-works mortgage is foreclosed and on the sale the purchaser is a citizen of another state, he can bring suit in the federal court to collect, under a contract between the old company and the city for the supply of water, even though the company itself could not have brought suit in the federal court, it being a citizen of the same state as the city. Portage City,

etc. Co. v. City of Portage, 102 Fed. Rep. 769 (1900). See also § 931, *infra*.

<sup>4</sup> Old Colony, etc. Co. v. Atlanta Ry. 100 Fed. Rep. 798 (1899).

<sup>5</sup> Citizens', etc. Co. v. Illinois, etc. R. R., 205 U. S. 46 (1907).

<sup>6</sup> Jellenik v. Huron, etc. Co., 177 U. S. 1 (1899). See also § 363, *supra*. In ascertaining the jurisdiction of the United States court in a suit relative to stock, it is presumed to be worth par. Bernier v. Griscom-Spencer Co., 161 Fed. Rep. 438 (1908).

<sup>7</sup> McKane v. Burke, 132 Fed. Rep. 688 (1904).



A federal court has jurisdiction of an injunction case relative to a license fee where the value of the right to be protected or the extent of the injury to be prevented is over three thousand dollars, interest and costs, even though the license itself is not that amount.<sup>1</sup>

The federal court has jurisdiction over subordinate suits affecting the property in its possession, irrespective of the citizenship of the parties.<sup>2</sup> The question of the jurisdiction of the federal courts in a suit by or against a federal receiver is considered elsewhere, as is also the question of the right of such receiver to remove such a suit from the state court into the federal court.<sup>3</sup>

The federal court may have jurisdiction of a suit at law brought by a non-resident against an alien corporation, even though under the statutes of the state wherein the court is sitting, the state courts would have no jurisdiction of the case.<sup>4</sup> An alien corporation may be sued wherever service may legally be obtained upon it.<sup>5</sup> A suit brought by an alien in the state court in Missouri against an Illinois corporation cannot be removed by the latter to the federal court if the alien objects.<sup>6</sup>

A requirement that a foreign corporation shall file its charter with the secretary of state does not turn such corporation into a domestic

<sup>1</sup> *Humes v. City of Fort Smith*, 93 Fed. Rep. 857 (1899). In a suit in a state court by a city against a non-resident telegraph company for \$1,772 for the use of streets or for a forfeiture of the defendant's rights in the streets, defendant by petition stating that the amount involved is over \$2,000 (now \$3,000) may remove the case to the United States court. *City of Memphis v. Postal, etc. Co.*, 145 Fed. Rep. 602 (1906).

<sup>2</sup> *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at

foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895).

<sup>3</sup> See § 868, *infra*. Where a receiver has power by statute to enforce the statutory liability, and files a bill in equity in the state court against various stockholders to recover an assessment already levied by the court, a non-resident stockholder who is one of the defendants may remove his part of the case into the federal court. *Calderhead v. Downing*, 103 Fed. Rep. 27 (1900).

<sup>4</sup> *Barrow S. S. Co. v. Kane*, 170 U. S. 100 (1898).

<sup>5</sup> If it has financial agents in New York City, and an office there for the transaction of its monetary and financial business in the United States, service in New York upon the head of the firm which acts as the agents of the corporation is a sufficient service upon the corporation itself. *Re Hohorst*, 150 U. S. 653 (1893). An alien corporation may remove a case to the federal courts. *Purcell v. British, etc. Co.*, 42 Fed. Rep. 465 (1890).

<sup>6</sup> *Mahopoulus v. Chicago, etc. Co.*, 167 Fed. Rep. 165 (1909).



corporation so far as the jurisdiction of the United States courts is concerned, even though the statute says that it shall have that effect.<sup>1</sup> Merely being licensed to do business in the state does not make a foreign corporation a resident of the state.<sup>2</sup> Where a domestic railroad is leased to a foreign corporation, under a statute which thereby expressly makes the latter a domestic corporation, it becomes such for purposes of jurisdiction.<sup>3</sup>

Collusion in order to give jurisdiction to a federal court is cause for

<sup>1</sup> *St. Louis, etc. Ry. v. James*, 161 U. S. 545 (1896); *Stephens v. St. Louis, etc. R. R.*, 47 Fed. Rep. 530 (1891). See also § 910, *infra*. Even though a state statute requires a foreign corporation doing business in the state to file certain papers and declares that it thereby becomes a domestic corporation, yet so far as the jurisdiction of the United States courts is concerned it is still a foreign corporation. *Southern Ry. v. Allison*, 190 U. S. 326 (1903). A Virginia corporation does not become a citizen of South Carolina as regards federal jurisdiction, even though it takes out a charter in South Carolina as required by its laws. *Atlantic, etc. R. R. v. Dunning*, 166 Fed. Rep. 850 (1908). Where by the terms of the statute authorizing a foreign railroad company to purchase a railroad within the state at foreclosure sale, the foreign railroad company shall thereby become a domestic corporation, such statute has that effect and the company cannot remove a case to the United States court on the ground of its being a citizen of another state. *Carolina, etc. Co. v. Southern Ry.*, 144 N. C. 732 (1907). A railroad corporation of the state of Indiana, even though it is afterwards incorporated in Kentucky, remains a corporation of Indiana alone so far as the jurisdiction of the United States court is concerned. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899). The Kentucky statute requiring foreign railroad corporations doing business in the state to become domestic corporations by a certain procedure does not prevent such railroad corporations suing as foreign corporations in the federal court. *Taylor v. Illinois Cent.*

*R. R.*, 89 Fed. Rep. 119 (1898). Even though a Nebraska railroad corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stockholders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to the federal court. *Walters v. Chicago, etc. R. R.*, 104 Fed. Rep. 377 (1900); *aff'd*, 186 U. S. 479. Under the statute of North Carolina requiring foreign telephone companies to file copies of their charter and by-laws and thereby become domestic corporations, before doing business in the state, a foreign telephone company that has complied with this statute cannot remove a case to the federal court on the ground of diverse citizenship. *Debnam v. Southern, etc. Co.*, 126 N. C. 831 (1900). A contrary conclusion was reached in South Carolina as to a foreign railroad corporation. *Wilson v. Southern Ry.*, 36 S. E. Rep. 701 (S. C. 1900).

<sup>2</sup> *Martin v. Baltimore, etc. R. R.*, 151 U. S. 673 (1894).

<sup>3</sup> *Western, etc. R. R. v. Roberson*, 61 Fed. Rep. 592 (1894). The fact that by statute a foreign corporation by filing certain papers is declared to be a domestic corporation does not prevent it from removing a case to the federal court as being a foreign corporation. *Markwood v. Southern Ry.*, 65 Fed. Rep. 817 (1895). Although a statute authorizes a foreign corporation to build a road in this state, this does not make the corporation a domestic corporation so far as the jurisdiction of the federal courts is concerned. *Chapman v. Alabama, etc. R. R.*, 59 Fed. Rep. 370 (1894).



dismissal of a case, under the act of Congress of March 3, 1875.<sup>1</sup> Hence where a California corporation organizes a Nevada corporation, and sells all its property to the latter in exchange for the capital stock of the latter, and does not distribute such stock among its stockholders but continues to hold it, it appearing that the purpose of the whole plan is to give jurisdiction to the United States court, that court will dismiss the suit under this act of Congress.<sup>2</sup> And where citizens of Georgia incorporate a company in South Dakota for the sole purpose of bringing a suit in the United States court against a citizen of Georgia, the court has no jurisdiction, the corporation being a sham and no dispute between citizens of different states being really and substantially involved.<sup>3</sup> Nevertheless even though shares exceeding in par value \$3,000 are transferred out and out to a non-resident in order to enable him to bring a suit in the United States court, yet he may maintain the suit, and his allegation that the par value of the stock is over \$3,000 is sufficient.<sup>4</sup> Where a California corporation files a bill of injunction in the state court and fails to obtain a temporary injunction except for a limited time, and then incorporates a company in Nevada and files a similar bill in the United States court, the latter bill will be dismissed as a fraud on the jurisdiction of the court.<sup>5</sup> A suit may be brought in the federal court even though a similar suit is pending in the state court or has been brought and then discontinued.<sup>6</sup> Although a bill in equity

<sup>1</sup> See 18 U. S. Stat. at Large, 470, 472.

<sup>2</sup> *Miller & Lux v. East, etc. Co.*, 211 U. S. 293 (1908).

<sup>3</sup> *Southern, etc. Co. v. Walker*, 211 U. S. 603 (1909). Although the court may inquire whether the company was organized merely to give jurisdiction to the United States court in a suit, yet unless it is clearly proved that that was the sole cause of the incorporation the United States court will take jurisdiction. *Percy Summer Club v. Astle*, 163 Fed. Rep. 1 (1908). But where a non-resident trustee of a mortgage of a street railway files a bill to restrain property owners from objecting to double tracking of the railway, and it is evident that it sues merely in order to bring the suit in the United States court, there having been no default in the mortgage, the court will dismiss the suit. *Williams v. City, etc. T. Co.*, 186 Fed. Rep. 419 (1911).

<sup>4</sup> *Re Cleland*, 218 U. S. 120 (1910). But compare *Lehigh, etc. Co. v. Kelly*,

160 U. S. 327 (1895), holding that where property is transferred to a non-resident corporation for the sole purpose of enabling the parties to litigate a claim in the United States courts, the United States courts will refuse to take jurisdiction. The federal courts have no jurisdiction of a suit brought by the holder of coupons where it appears that he does not own them, but is merely allowing his name to be used to give jurisdiction to the court. *Lake County, etc. v. Dudley*, 173 U. S. 243 (1899). Where bonds and stock in a Pennsylvania corporation of little or no value are assigned to a citizen of New Jersey without consideration, although absolutely, for the purpose of giving jurisdiction to the United States court for a receiver, this is a fraud on the court's jurisdiction, and the suit will be dismissed. *Kreider v. Cole*, 149 Fed. Rep. 647 (1907).

<sup>5</sup> *Moss & Co. v. McCarthy*, 191 Fed. Rep. 202 (1911).

<sup>6</sup> See § 748, *supra*.



sets forth that a corporation is merely a pretended corporation as a part of a fraudulent scheme, and is really nothing but a partnership, nevertheless if such corporation has an existing charter, it exists as a corporation, sufficiently at least to oust a federal court of jurisdiction of the case.<sup>1</sup> As to jurisdiction the federal courts will sometimes look beyond corporate existence. Hence, where there are two corporations of the same name, chartered in two states, each owning a part of a certain property which is covered by mortgage, the foreclosure decree based on an allegation of diverse citizenship will not be disturbed on the ground that the wrong state was named in the bill as the state in which one of the parties was incorporated.<sup>2</sup> The federal court has no jurisdiction of a suit in behalf of the trustee of a water-works company mortgage to test the validity of a city ordinance repudiating the water-works grant, where the arrangement of parties is merely a contrivance to give jurisdiction to the United States court, after the highest court in the state in which the controversy arose has decided that the ordinance is legal.<sup>3</sup> But the jurisdiction of a suit in the United States court is not collusive, even though the suit is brought by an amicable arrangement between the parties and the defendant admits the allegations of the complaint.<sup>4</sup> An attorney may be disbarred for organizing a sham corporation without capital or business but for the purpose of bringing

<sup>1</sup> *Empire, etc. Transp. Co. v. Empire, etc. Min. Co.*, 150 U. S. 159 (1893). In *Irvine Co. v. Bond*, 74 Fed. Rep. 849 (1886), an owner of land in California incorporated a company under the laws of West Virginia and transferred to it, in payment for stock, certain portions of his land. He owned all the stock, and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was legal so far as the jurisdiction of the United States court was concerned. As regards the jurisdiction of the federal courts the incorporation of a company cannot be questioned on the ground that the charter required a certain amount of money to be paid in before business was commenced, and that business had been commenced without that amount being paid. *Wells Co. v. Gastonia Co.*, 198 U. S. 177 (1905); rev'g *Gastonia, etc. Co. v. Wells Co.*, 128 Fed. Rep. 369 (1904).

<sup>2</sup> *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188 (1905).

<sup>3</sup> *City of Dawson v. Columbia Trust*

*Co.*, 197 U. S. 178 (1905), rev'g 130 Fed. Rep. 152.

<sup>4</sup> *In re Metropolitan*, 208 U. S. 90 (1908), holding also that the circuit court of the United States for the Southern District of New York has jurisdiction to appoint receivers of an insolvent New York street railway company under a bill of a general creditor alleging diverse citizenship of the parties, and that more than \$2,000 (now \$3,000) is involved, and alleging also the insolvency of the defendant, and praying for the administration of its assets, where the defendant answers, admitting the allegations of the bill, and joins in the prayer for the appointment of the receiver. The court held also that the defense that complainants are not judgment creditors is waived by such an answer. An insolvent corporation may consent to a receiver being appointed, and the fact that a non-resident creditor filed a bill in equity therefor in the United States court is not evidence of collusion. *Burton v. Peters, etc. Co.*, 190 Fed. Rep. 262 (1911).



suits in the United States court where he brings suits in its name in the state court after it has been adjudged illegal by the United States court.<sup>1</sup>

As regards the jurisdiction of the federal court, the citizenship of a corporation is in the state wherein the corporation is incorporated, and not in the state or states wherein the stockholders are citizens.<sup>2</sup>

Where a railroad runs through several federal districts in a state, it is a citizen and inhabitant of the district where it does the general business and has its headquarters and general offices.<sup>3</sup>

A consolidated railroad running into two states is a separate corporation in each state and, being sued in one state, cannot remove the case to the federal court on the ground that it is a citizen of the other state.<sup>4</sup>

<sup>1</sup> Gelders v. Haygood, 182 Fed. Rep. 109 (1910).

<sup>2</sup> St. Louis, etc. Ry. v. James, 161 U. S. 545 (1896). In Interstate Commerce Commission v. Texas & Pac. Ry., 57 Fed. Rep. 948 (1893), the court held that the principal office and domicile of the defendant was in New York city, where the company held its stockholders' and directors' meetings and kept its stock books and records, even though the general or administrative offices of the heads of departments were in Texas. The company itself existed under a charter granted by congress. "The members of a corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled." Shaw v. Quincy Min. Co., 145 U. S. 444 (1892). A corporation is a resident only of the state that incorporates it, so far as the jurisdiction of the federal courts is concerned. Myers v. Murray, etc. Co., 43 Fed. Rep. 695 (1890). The place of residence of a corporation is the state wherein it is incorporated. So held under the act for the removal of causes. Miller v. Wheeler, etc. Co., 46 Fed. Rep. 882 (1891); Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. Rep. 577 (1891); Railway Co. v. Whitton, 13 Wall. 270, 283 (1871), holding that a corporation is deemed to be a citizen of the state creating it for the purpose of conferring jurisdiction upon the courts of the United States, and the legislation of other states will not affect this presumption; Insurance Co. v. Francis, 11 Wall. 210 (1870), holding that an allegation that a New York corpo-

ration is located and doing business in Mississippi was not an allegation that it was a citizen of the latter state; Steamship Co. v. Tugman, 106 U. S. 118 (1882), holding that the residence of the corporation does not at all depend on the residence of its stockholders. In the United States court an allegation that the corporation is a citizen and resident of a certain state is insufficient. It should also be alleged that it was incorporated under the laws of that state. Dalton v. Milwaukee, etc. Co., 118 Fed. Rep. 876 (1902).

<sup>3</sup> Galveston, etc. Ry. v. Gonzales, 151 U. S. 496 (1894).

<sup>4</sup> See § 910, *infra*. Where a railroad ran through five states and was owned by five separate corporations, one in each state, and then a new corporation was created in one of these states, and all the five conveyed their property to that one, in accordance with an agreement of consolidation contemplating such new corporation and conveyances, the new corporation was held to be a citizen only of the state in which it was first incorporated, and not a citizen of even one of the other states which permitted consolidation upon such terms as might be agreed upon. The court said: "The courts have recognized at least three distinct forms of railroad consolidation: (1) an agreement of consolidation between two companies, and the continuance in existence of both corporations; (2) the merger of one corporation into another, and the continuance in existence of one of the two, and the extinction of the other;



A large number of decisions are given in the notes below on the various phases of the jurisdiction of the federal courts in suits brought against foreign corporations.<sup>1</sup>

(3) the creation of the consolidated corporation as a new corporation, and the extinction at the same time of the constituent companies as separate entities." *Westheider v. Wabash R. R.*, 115 Fed. Rep. 840 (1902). This same consolidation, however, came before the federal court in Missouri, and it was there held that the consolidation of four railroad corporations of four different states creates a consolidated corporation, which is a citizen of each of the four states, and hence it cannot remove a suit to the federal court in one of the states on the ground of its being a non-resident. *Winn v. Wabash R. R.*, 118 Fed. Rep. 55 (1902).

<sup>1</sup> A corporation organized in one state cannot be sued in the federal court in another state by a citizen of a third state. *Shaw v. Quincy Min. Co.*, 145 U. S. 444 (1892), holding also that the defendant may appear specially. Service upon the highest officer within the county is sufficient where the statutes so prescribe. *Kansas City, etc. R. R. v. Daughtry*, 138 U. S. 298 (1891). Service upon an attorney of a corporation, appointed under a state statute to accept service, is good service for the federal courts. *Re Louisville Underwriters*, 134 U. S. 488 (1890). Under a state statute authorizing service of process upon a local agent of a foreign corporation, jurisdiction may be obtained by the federal courts. *Société Foncière v. Milliken*, 135 U. S. 304 (1890). Even though a New York contracting company is interested in a contract in Ohio, yet it cannot be sued in the United States court in Ohio, inasmuch as it is not "found" in that district, it having no place of business there. *Eirich v. Donnelly, etc. Co.*, 104 Fed. Rep. 1 (1900). An alien corporation doing business in Oregon may be sued there in the federal courts. It is an "inhabitant" to that extent. *Miller v. Eastern, etc. Min. Co.*, 45 Fed. Rep. 345 (1891). The status of a corporation in regard to the jurisdiction of

the federal courts is stated in *U. S. v. Southern Pac. R. R.*, 49 Fed. Rep. 297 (1892). A foreign corporation doing business in Ohio and having a managing agent there may be garnisheed there under the statutes of Ohio. *Rainey v. Maas*, 51 Fed. Rep. 580 (1892). A railroad corporation is a resident of each federal district through which it runs. *East Tennessee, etc. R. R. v. Atlanta, etc. R. R.*, 49 Fed. Rep. 608 (1892). Where an alien corporation appoints a resident agent to accept service, it becomes an "inhabitant," and may be sued in the federal court. *Gilbert v. New Zealand Ins. Co.*, 49 Fed. Rep. 884 (1892). The word "inhabitant" applies to corporations, in respect to statutory jurisdiction of courts. *Gilbert v. New Zealand Ins. Co.*, 49 Fed. Rep. 884 (1892). A corporation is not an "inhabitant" of any state except the one wherein it is incorporated. *Campbell v. Duluth, etc. Ry.*, 50 Fed. Rep. 241 (1892). The place of residence of a corporation is the state wherein it is incorporated. So held under the act for the removal of causes. *Miller v. Wheeler, etc. Co.*, 46 Fed. Rep. 882 (1891); *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 577 (1891). The decision that a foreign corporation filing a certificate as required by statute is not a non-resident as regards the right to remove cases to the federal courts in *Scott v. Texas, etc. Co.*, 41 Fed. Rep. 225 (1889), was overruled in *Brandon v. Miller*, 118 Fed. Rep. 361 (1902). A corporation is a resident only of the state wherein it is incorporated, as regards the jurisdiction of the United States courts. Although another party defendant is an actual resident in the district where suit is brought, yet the foreign corporation cannot be sued there on that account. *Bensinger, etc. Co. v. National Cash Reg. Co.*, 42 Fed. Rep. 81 (1890). If two corporations sued on a tort are liable severally, one may remove the case, although the other



The United States courts have no original jurisdiction to issue a *mandamus*. A stockholder, accordingly, may maintain a bill in equity in that court to compel a corporation to register a transfer of stock to him, the remedy of *mandamus* not being available and the court having jurisdiction otherwise.<sup>1</sup> A corporation incorporated by the United

cannot, to the federal court. *Spangler v. Atchison, etc. R. R.*, 42 Fed. Rep. 305 (1890). A foreign corporation defendant may remove a case to the federal court although it has filed a statutory certificate authorizing service on a designated agent. *Amsden v. Norwich, etc. Ins. Soc.* 44 Fed. Rep. 515 (1890). A statute prohibiting a foreign corporation from suing in the state courts unless it has filed a copy of its articles, etc. in the state, if it is doing business in the state, does not prevent such a corporation from bringing suit in the federal courts, although it has not filed its articles, etc. *Bank of British N. A. v. Barling*, 44 Fed. Rep. 641 (1890). A judgment creditor of an insolvent corporation may file a bill in equity in the federal court to subject the property to the payment of the debt, although a suit is pending in the state court to reduce the amount of complainant's claim to a less figure. *Coffin v. Chattanooga, etc. Co.*, 44 Fed. Rep. 533 (1891). A suit cannot be brought in the federal court against a corporation except in the district where the company is incorporated. *National Typog. Co. v. New York Typog. Co.*, 44 Fed. Rep. 711 (1890). When a defendant foreign corporation seeks to remove a case to the federal courts it need not aver that it is a non-resident. An averment of its citizenship is insufficient; *Myers v. Murray, etc. Co.*, 43 Fed. Rep. 695 (1890), overruling *Hirsehl v. J. I. Case, etc. Co.*, 42 Fed. Rep. 803 (1890). A non-resident corporation may be sued in the federal courts although it has an office and does business in the state. *Henning v. Western U. Tel. Co.*, 43 Fed. Rep. 97 (1890). The fact that the C. B. & Q. R. R. Co., an Illinois corporation, first took a lease of and then purchased the road of the B. & M. R. R. Co. in Iowa, does not make the

former company an Iowa corporation. It continues an Illinois corporation. *Conn. v. Chicago, etc. R. R.*, 48 Fed. Rep. 177 (1891).

A railroad corporation of one state purchasing a railroad in another state does not thereby become a resident of the latter state so as to prevent its removing cases to the federal court. *Morgan v. East Tennessee, etc. R. R.*, 48 Fed. Rep. 705 (1883). Although a New York corporation does practically all of its business in Missouri, yet it is a citizen of New York. *Baughman v. National, etc. Co.*, 46 Fed. Rep. 4 (1891). Entering appearance may waive the right to object to the jurisdiction of a federal court. *Blackburn v. Selma, etc. R. R.*, 2 Flipp. 525 (1879); s. c., 3 Fed. Cas. 526. To same effect, *De Sobry v. Nicholson*, 3 Wall. 420 (1865); *Hayden v. Androsoggin Mills*, 1 Fed. Rep. 93 (1879), holding that it may be sued in federal courts, though its property has been attached, if doing business in the state and process can be served; this decision was questioned in *Boston Electric Co. v. Electric Gas L. Co.*, 23 Fed. Rep. 838 (1885). In this case a Maine corporation had its principal office in Massachusetts, where also a majority of its officers and directors resided. *Held*, that the federal courts of Massachusetts had no jurisdiction over it, though suit was begun by attachment and service upon the corporate officers. *Hatch v. Chicago, etc. R. R.*, 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799, holding that having an office and doing business in another state does not affect its citizenship; *Williams v. Missouri, etc. Ry.*, 3 Dill. 267 (1875); s. c., 29 Fed. Cas. 1377; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149 (1869).

<sup>1</sup> *Jessup v. Chicago, etc. Ry.*, 188 Fed. Rep. 931 (1911).



States may, by reason of that fact, bring suits in or remove them to the federal courts, unless the statute provides otherwise.<sup>1</sup> A Pennsylvania

<sup>1</sup> *Pacific R. R. Removal Cases*, 115 U. S. 2 (1885); *Union Pac. R. R. v. McComb*, 1 Fed. Rep. 799 (1880); *Eby v. Northern Pac. R. R.*, 36 Leg. Int. 164 (1879); *Hughes v. Northern Pac. Ry.*, 18 Fed. Rep. 106 (1883). A case to the contrary is *Myers v. Union Pac. Ry.*, 16 Fed. Rep. 292 (1882). Where one of the defendants is a federal corporation it may remove the case into the federal court. *Matter of Dunn*, 212 U. S. 374 (1909). A corporation created by an act of Congress may remove to the United States court a suit brought against it in the state court for negligence. *Texas, etc. Ry. v. Huber*, 103 Tex. 1 (1909). A corporation organized under an act of Congress may institute its suits in the United States courts. *U. S., etc. Co. v. Gallegos*, 89 Fed. Rep. 769 (1898). As to national banks, see *Cruikshank v. Fourth Nat. Bank*, 16 Fed. Rep. 888 (1883); *Farmers' Nat. Bank v. McElhinney*, 42 Fed. Rep. 801 (1890); *Farmers', etc. Nat. Bank v. Dearing*, 91 U. S. 29 (1875), followed in *Rhoner v. First Nat. Bank*, 14 Hun, 126 (1878), holding that an attachment cannot be issued against national banks until after final judgment; and overruling *Southwick v. First Nat. Bank*, 7 Hun. 96 (1876), and *Bowen v. First Nat. Bank*, 34 How. Pr. 408 (1867). It has been held that they are so far foreign corporations that they may be required to give security for costs. See *National Park Bank v. Gunst*, 1 Abb. N. Cas. 292 (1876). But they may obtain an attachment on property to the same extent that a domestic corporation may. *Market Nat. Bank v. Pacific Nat. Bank*, 64 How. Pr. 1 (1882). A suit in a state court against the officers of a national bank on the ground that they had violated the national bank act is removable to the United States court. *Bailey v. Mosher*, 95 Fed. Rep. 223 (1899). A company incorporated in a territory cannot thereby remove a case to the United States courts. *Adams Exp. Co. v. Denver, etc. Ry.*, 16 Fed. Rep. 712 (1883). A right to

change of venue to the residence of the defendant may enable a corporation defendant to change it to the place where it does its business, though incorporated elsewhere. *Guinn v. Iowa Cent. Ry.*, 14 Fed. Rep. 323 (1882). A District of Columbia insurance company cannot remove cases to a federal court for that cause alone. *Scheffer v. National Life Ins. Co.*, 25 Minn. 534 (1879). National banks are citizens of the state wherein they are located. *National Park Bank v. Nichols*, 4 Biss. 315 (1869); s. c., 17 Fed. Cas. 1228; *Manufacturers' Nat. Bank v. Baack*, 8 Blatchf. 137 (1871); s. c., 16 Fed. Cas. 671; *Davis v. Cook*, 9 Nev. 134 (1874). Cf. *Kennedy v. Gibson*, 8 Wall. 498 (1869); U. S. Rev. Stat., § 640; *Wilson County v. National Bank*, 103 U. S. 770 (1880); *Osborn v. Bank of U. S.*, 9 Wheat. 738 (1824); *Cooke v. State Nat. Bank*, 52 N. Y. 96 (1873); *St. Louis Nat. Bank v. Allen*, 5 Fed. Rep. 551 (1881); *First Nat. Bank v. Bohne*, 8 Fed. Rep. 115 (1881); *Third Nat. Bank v. Harrison*, 8 Fed. Rep. 721 (1881); *Union Nat. Bank v. Miller*, 15 Fed. Rep. 703 (1883), holding that the act of July 12, 1882, placed national and other banks, as to their right to sue in the federal courts, on the same footing. Cf. Acts of Congress, 1888, ch. 866. A railway corporation created by act of congress "is, in every state and territory of the Union in which it may lawfully exercise its powers, a domestic institution," and may be sued in the federal courts in any district where it is doing business and has an agent upon whom service can be made. Where a lease is made without statutory authority, the lessor may be served with process as though no lease had been made. Where the statutes of a state prescribe the mode in which service may be made, all corporations subsequently doing business in the state are bound by service so made. *Van Dresser v. Oregon, etc. Nav. Co.*, 48 Fed. Rep. 202 (1891). "The circuit court of the United States has no jurisdiction, either original or by re-



“partnership association” organized under the statutes of Pennsylvania is not a corporation so far as the jurisdiction of the United States is concerned.<sup>1</sup>

removal from a state court, of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim. . . . While the court does not say in terms that, to authorize the removal of a cause from a state to a federal court, it must appear from the plaintiff's complaint that he relies upon some provision of the constitution, laws, or treaties of the United States, it does decide that he must so far rely, or that his claim must so far be predicated, upon some provision of the constitution, law, or treaty of the United States, as would authorize him to

bring an original action in the circuit court.” *State v. Atchison, etc. Ry.*, 77 Fed. Rep. 339, 341, 343 (1896).

<sup>1</sup> *Great Southern, etc. Co. v. Jones*, 177 U. S. 449 (1900), overruling *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. Rep. 585 (1898).

A company organized under the statutes of Pennsylvania and having mixed characteristics of a partnership and corporation is a corporation so far as removal to the federal court is concerned. *Bushnell v. Park*, 46 Fed. Rep. 209 (1891). As to unincorporated joint-stock companies, see *Chapman v. Barney*, 129 U. S. 677 (1889).



## PART V.

### BONDS, MORTGAGES, FORECLOSURES, RECEIVERS, AND REORGANIZATIONS.

#### CHAPTER XLVI.

#### BONDS, NOTES, ETC., OF A CORPORATION — GUARANTIES AND ACCOMMODATION PAPER.

- § 760. A corporation may borrow money — Loans in excess of the charter or contract limit — Overissues of bonds.
761. Bills, notes, and acceptances may be made and issued by corporations.
762. Bonds may be issued by corporations — Bonds may be valid although the mortgage securing them is invalid — Bonds to preferred creditors — Reissues.
763. Pledge of bonds by a corporation and enforcement thereof.
764. Forged bonds — Priorities among bonds — Incomplete bonds — References to the mortgage — Variance between bond and mortgage — Purposes of the issue — Certification and registration of bonds.
765. Attachments levied on bonds — Form of bonds — Gold clause — Seal — Payment, substitution, cancellation and subrogation — Consolidated bonds — Bonds issued after consolidation.
766. Bonds issued below par for cash, property, or construction work — Dividend of bonds — Bonds, notes, or mortgages given without consideration — Statutory and constitutional prohibitions relative to issues of bonds — Fraudulent issues of bonds — *Bona fide* purchasers of bonds issued at less than their par value are protected — Fraudulent issues of bonds to the directors, or through directors who are “dummies” or to construction companies in which the directors are interested.
- § 766a. Who may complain of an issue of bonds at less than par — Stockholders — The state — The corporation itself — Bondholders — Corporate creditors.
- 766b. Usury as affecting bonds issued at less than par.
- 766c. Bonds delivered or to be delivered to contractors for construction work — Failure of the contractor to complete the work — Remedy of contractor for failure of corporation to deliver — Right of adverse claimants to particular bonds or stock.
767. Negotiable character of bonds of a corporation payable to order, bearer, or holder — Lost or stolen bonds — Registered bonds.
768. The negotiability of the bonds extends also to the mortgage.
769. Miscellaneous features of bonds — Issue in payment for the property of another corporation — Consolidations — Bondholders’ suit — Bonds exchangeable into stock.
770. Suits at law on bonds — Demand of payment — Form of action — Statute of limitations.



- § 771. Coupons and interest on bonds — Negotiability of coupons — Participation in foreclosure — Interest on overdue bonds and coupons — Purchase of coupons when presented for payment.
772. Suit to collect coupons — Execution cannot be levied upon the mortgaged property — Demand of payment — Statute of limitations.
773. Income bonds.
774. Accommodation paper by a corporation — *Bona fide* holders.
775. Guaranty by one corporation of the bonds or dividends of another corporation — Guaranty by an individual.
- § 776. Debentures.
777. Debenture stock secured by an American mortgage.
778. Mode of authorizing, drafting, signing, sealing, and acknowledging corporate obligations to pay money — Liability of the corporation and the corporate officers on irregularly executed instruments — Charter provisions as to authorizing the instruments.

§ 760. *A corporation may borrow money — Loans in excess of the charter or contract limit — Overissues of bonds.* — The power of a corporation to borrow money is implied; and exists without being expressly granted by charter or statute.<sup>1</sup> A bank may borrow money,

<sup>1</sup> *Ingraham v. National Salt Co.*, 130 Fed. Rep. 676 (1904); s. c., 139 Fed. Rep. 684; *aff'd*, 143 Fed. Rep. 805. *Eastman v. Parkinson*, 133 Wis. 375 (1907); *Peoria Star Co. v. Cutright*, 115 Ill. App. Rep. 492 (1904); *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884); *Philadelphia, etc. R. R. v. Stichter*, 21 Am. L. Reg. 713 (Pa. 1882); s. c., 11 W. N. Cas. 325; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Beers v. Phoenix Glass Co.*, 14 Barb. 358 (1852); *Mead v. Keeler*, 24 Barb. 20 (1857); *Partridge v. Badger*, 25 Barb. 146 (1857); *Clark v. Titecomb*, 42 Barb. 122 (1864); *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *Barnes v. Ontario Bank*, 19 N. Y. 152 (1859); *Smith v. Law*, 21 N. Y. 296 (1860); *Nelson v. Eaton*, 26 N. Y. 410 (1863); *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 177 (1879); *Coats v. Donnell*, 94 N. Y. 168 (1883); *Oxford Iron Co. v. Spradley*, 46 Ala. 98 (1871); *Alabama, etc. Ins. Co. v. Central, etc. Assoc.*, 54 Ala. 73 (1875); *Taylor v. Agricultural, etc. Assoc.*, 68 Ala. 229 (1880); *Hays v. Galion Gas, etc. Co.*, 29 Ohio St. 330, 340 (1876); *Hope Ins. Co. v. Perkins*, 38 N. Y. 404 (1868). A corporation may borrow money and give notes therefor. *Grommes v. Sullivan*, 81 Fed. Rep. 45 (1897); *Magee v. Mokelumne Hill, etc. Co.*, 5 Cal. 258 (1855), where a statute

prohibiting corporations from issuing bills, notes, etc., "upon loans or for circulation as money," was held to be intended to prevent their loaning their credit, and not to restrict their right to borrow for business purposes; followed in *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1 (1856); *Santa Cruz R. R. v. Spreckles*, 65 Cal. 193 (1884), holding that the loan may be obtained from a director; *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248 (1873); *Commercial Bank, etc. v. Newport Mfg. Co.*, 1 B. Mon. 13 (1840); *Lucas v. Pitney*, 27 N. J. L. 221 (1858); *Hackettstown v. Swackhamer*, 37 N. J. L. 191 (1874); *Thompson v. Lambert*, 44 Iowa, 239 (1876); *Larwell v. Hanover Sav. Fund Soc.*, 40 Ohio St. 274 (1883); *Bradley v. Ballard*, 55 Ill. 413 (1870); *Fay v. Noble*, 66 Mass. 1 (1853); *Craven County Com'rs v. Atlantic, etc. R. R.*, 77 N. C. 289 (1877); *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256 (1825); *Moss v. Harpath Academy*, 7 Heisk. (Tenn.) 283 (1872); *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515 (1845); *Rockwell v. Elkhorn Bank*, 13 Wis. 653 (1861); *Furniss v. Gilchrist*, 1 Sandf. 53 (1847); *Holbrook v. Basset*, 5 Bosw. 147 (1859); *Life & F. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. 31 (1831); *Australian, etc. Co. v. Mounsey*, 4 K. & J. 733 (1858); *Re*



but it is so unusual that the loaner must inquire into the authority of the officer or agent acting for the bank which borrows the money. Special authority or ratification by the board of directors must be shown.<sup>1</sup> However, although the officers of a bank have no power to borrow money for the bank without special authority from the board of directors, yet if for a long time they have been accustomed to do so, this is the same as though express authority had been given.<sup>2</sup> And it recently has been held that "it is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use."<sup>3</sup>

Even if the corporation has no implied power to borrow, it will be compelled to repay the money actually received by it.<sup>4</sup>

It is legal for the company to borrow money of its directors. The

National, etc. Co., 1 Dr. & Sm. 55 (1860); *Ulster Ry. v. Banbridge, etc. Ry.*, Ir. Rep. 2 Eq. 190 (1868); *Bank of Australasia v. Breillat*, 6 Moore, P. C. 152 (1847); *Laing v. Reed*, L. R. 5 Ch. 4 (1869); *Re Cork, etc. Ry.*, L. R. 4 Ch. 748 (1869); *MacLae v. Sutherland*, 3 El. & Bl. 1, 39 (1854); *Gibbs's Case*, L. R. 10 Eq. 312 (1870) — an insurance company. See also *Hawtayne v. Bourne*, 7 M. & W. 595 (1841); *Lowndes v. Garnett, etc. Co.*, 33 L. J. (Ch.) 418 (1864); *Ex parte Pitman*, L. R. 12 Ch. D. 707 (1879); *Hill's Case*, L. R. 9 Eq. 605, 618 (1870); *Burmester v. Norris*, 6 Ex. 796 (1851), holding that a mining company cannot borrow. Under a power to borrow on bonds or debenture, the company may borrow without issuing bonds or debentures. *Commercial Bank v. Great Western Ry.*, 3 Moore's P. C. Rep. (N. S.) 295 (1865). A canoe club may borrow money to erect a building; *Bradbury v. Boston Canoe Club*, 153 Mass. 77 (1891). A building association has power to borrow money and give security for it; *North, etc. Assoc. v. First Nat. Bank*, 79 Wis. 31 (1891). A trading corporation has power to borrow money and mortgage its property and pay a bonus; *Farrell v. Carribou Gold, etc. Co.*, 30 Nova Scotia, 199 (1897).

<sup>1</sup> *Western Nat. Bank v. Armstrong*, 152 U. S. 346 (1893).

<sup>2</sup> *Armstrong v. Chemical Nat. Bank*, 83 Fed. Rep. 556 (1897); *aff'd*, 176 U. S. 618 (1900).

<sup>3</sup> *Cherry v. City Nat. Bank*, 144 Fed. Rep. 587 (1906); *aff'd*, 208 U. S. 541.

<sup>4</sup> *Manville v. Belden Min. Co.*, 17 Fed. Rep. 425 (1883); *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884); *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248 (1873); *Humphrey v. Patrons' Mercantile Assoc.*, 50 Iowa, 607 (1879); *Larwell v. Hanover, etc. Assoc.*, 40 Ohio St. 274 (1883); *Re Magdalena Steam Nav. Co.*, Johns. (Eng. Ch.) 690 (1860); *Bradley v. Ballard*, 55 Ill. 413, 417 (1870); *Darst v. Gale*, 83 Ill. 136, 141 (1876); *Hays v. Galion Gas, etc. Co.*, 29 Ohio St. 330, 340 (1876); *Hoare's Case*, 30 Beav. 225 (1861); *Troup's Case*, 29 Beav. 353 (1860). Compare *White v. Carmarthen, etc. Ry.*, 1 Hem. & M. 786 (1863). *Contra*, *Burmester v. Norris*, 6 Exch. 796 (1851). Where a statute prohibits savings banks from borrowing money, it cannot be avoided by taking a certificate of deposit for such money. Such certificate of deposit cannot be enforced. *State v. Corning, etc. Bank*, 136 Iowa, 79 (1907). Where money is borrowed by the president for the benefit of the company, the company is liable, although he borrowed in his individual name. *Watson v. Proximity Mfg. Co.*, 147 N. C. 478 (1908).



fiduciary relation of the directors toward the stockholders does not prevent such a loan.<sup>1</sup> A street railroad company may borrow money and give a promissory note for the same, and a *bona fide* holder is protected even though it was given to a director in payment for services in procuring the franchise.<sup>2</sup> Where a corporation has power to borrow money, neither it nor its stockholders can evade payment of a loan by the defense that the money was used for an unauthorized business, and that the party loaning the money knew that fact.<sup>3</sup> But a note or bill of exchange issued or accepted by a corporation for purposes which the corporation is not authorized to engage in cannot be enforced by the payee or by an indorsee taking the same with notice.<sup>4</sup> An agreement to pay dividends, whether earned or not, is illegal, and hence certificates of indebtedness issued in advance of such dividends cannot be enforced.<sup>5</sup>

<sup>1</sup> See § 692, *supra*.

<sup>2</sup> *Kneeland v. Braintree Street Ry.*, 167 Mass. 161 (1896).

<sup>3</sup> *Bradley v. Ballard*, 55 Ill. 413 (1870). Neither the corporation nor stockholders can repudiate a loan made by the corporation, even though it was in excess of its authorized indebtedness, and even though the money was used for an *ultra vires* purpose. *Traer v. Lucas, etc. Co.*, 124 Iowa, 107 (1904). A person who loans money to a company is not affected by the fact that the company uses the money for *ultra vires* purposes, he not knowing thereof. *Re David Payne & Co., Ltd.*, [1904] 2 Ch. 608, overruling *Re Durham, etc. Soc.*, 25 L. T. Rep. 83. A holder of notes of the corporation may collect them even though they were issued to purchase stock in violation of an anti-trust statute, he having no notice of such purpose, although he knew of the purchase of the stock. *National Salt Co. v. Ingraham*, 143 Fed. Rep. 805 (1906). A lender of money to a corporation is not bound to see that it is applied to corporate purposes. *Watson v. Proximity Mfg. Co.*, 147 N. C. 478 (1908). A preference for money borrowed to purchase stock *ultra vires* is illegal, the lender knowing that the money was to be so used. *Adams, etc. Co. v. Deyette*, 5 S. Dak. 418 (1894); s. c., 8 S. Dak. 119. Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* pur-

pose, yet he may enforce the same. *Wright v. Hughes*, 119 Ind. 324 (1889); *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165 (1883), holding that, if a bank borrows money, the fact that its officers misappropriated the money cannot defeat the right to recover it from the bank. A person loaning money to a corporation on its note may collect it, even though he knew the money was to be used for an *ultra vires* purpose, provided he did not take part in such use and such use was not made a condition of the loan. *Marion, etc. Co. v. Crescent, etc. Co.*, 27 Ind. App. 451 (1901). It is no defense to a note that the corporate officer embezzled the proceeds, the lender having no knowledge of that fact. *Reagan v. First Nat. Bank*, 157 Ind. 623 (1902).

<sup>4</sup> *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116 (1856); *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144 (1861); *Pearce v. Madison, etc. R. R.*, 21 How. 441 (1858), where a note given by a railroad company for the purchase of a steamboat was held void; *Ehrgott v. Bridge Manufactory*, 16 Kan. 486 (1876), where the payee took the note in payment of a third person's debt. Parties taking a corporate bill of exchange in payment of business which they knew the corporation was not authorized to carry on cannot enforce it. *Balfour v. Ernest*, 5 C. B. (N. S.) 601 (1859).

<sup>5</sup> *Strickland v. National Salt Co.*, 79 N. J. Eq. 182 (1911).



The common law places no limit upon the amount which the corporation may borrow. The amount borrowed may be greater than the capital stock.<sup>1</sup>

Although a statute forbids a corporation from borrowing more than a specified amount, yet if the corporation actually does borrow in excess of that amount it cannot escape payment to the lender.<sup>2</sup>

<sup>1</sup> *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844).

<sup>2</sup> *Ossipee, etc. Mfg. Co. v. Canney*, 54 N. H. 295 (1874); *De Camp v. Dobbins*, 29 N. J. Eq. 36 (1878); *Humphrey v. Patrons' Mercantile Assoc.*, 50 Iowa, 607 (1879); *Garrett v. Burlington Plow Co.*, 70 Iowa, 697 (1886); *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291 (1881). A lender of money to a bank is not bound to know that its aggregate loans exceed the amount allowed by its charter. *Citizens' Bank v. Bank, etc.*, 126 Ky. 169 (1907). Municipal bonds issued in excess of a limit fixed by constitutional provision are void. *Bona fide* holders are not protected. *Millerstown v. Frederick*, 114 Pa. St. 435 (1886). The defense of debt in excess of the amount allowed must be pleaded. *German Sav. Inst. v. Jacoby*, 97 Mo. 617 (1889). Where the charter prescribes that the debts shall not exceed one half of the capital stock, capital stock means the paid-in capital stock and not the capital stock as stated in the charter. *Lehigh, etc. Ry. Co.'s Appeal*, 129 Pa. St. 405 (1889). Although the power of a railroad to borrow be limited, yet preferred stock may be issued, secured by a mortgage, where the power to mortgage has been given, and such preferred stock may be deprived of the power to vote. *Miller v. Ratterman*, 47 Ohio St. 141 (1890). Where by statute corporate debts must not exceed two thirds of the capital stock unless secured by "real-estate securities," a mortgage on real estate is such "real-estate securities." *First Nat. Bank v. Sioux City, etc. Warehouse Co.*, 69 Fed. Rep. 441 (1895); *aff'd*, 173 U. S. 99. A note for a loan in excess of a statutory limit is valid to at least the extent of the limit. *Moon, etc. Co. v. Waxahachie, etc. Co.*, 13 Tex. Civ. App. 103 (1896);

*aff'd*, 89 Tex. 511 (1896). A bank cannot collect from a corporation money loaned in excess of the amount limited by the articles of such corporation. *First Nat. Bank v. Kiefer Milling Co.*, 95 Ky. 97 (1893). Where the charter prohibits the directors making a contract for over \$250 unless a stockholders' meeting authorizes the same, a contract for \$2,000 without such authorization is void. *Georgetown, etc. Co. v. Central, etc. Co.*, 34 S. W. Rep. 435 (Ky. 1896). Where the charter limits the indebtedness to \$1,000, a person loaning it \$1,500 can recover only \$1,000. *Kraniger v. People's Bldg. Soc.*, 60 Minn. 94 (1895). A defense that the debts exceed the charter limit is not good as against claims existing before the charter limit was reached, and is not good except as to the excess over the charter limit. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249 (1896). A by-law prohibiting directors from contracting debts beyond a certain amount does not invalidate a loan by the directors to a corporation in excess of that amount, where the stockholders knew of the loan and did not object thereto, and allowed the money to be used on the plant of the company. The corporation being a private one, no one else is interested. The corporation cannot repudiate the debt. *Bensiek v. Thomas*, 66 Fed. Rep. 104 (1895). See also *Flint v. Boston, etc. Co.*, 183 Mass. 114 (1903). Where a statute limits the amount of notes the company may issue but does not declare any excess void, excess notes may be enforced. *Scherer & Co. v. Everest*, 168 Fed. Rep. 822 (1909). A corporation with a capital stock of \$10,000 and limited by its charter to debts of \$2,000 has no power to speculate in pork and grain in a single day to the amount of \$40,000 and hence such



A debt contracted in excess of the statutory limit cannot be attacked by the corporation or its stockholders or subsequent creditors.<sup>1</sup> Thus, a national bank is liable on a debt contracted by it, even though its entire indebtedness exceeds the amount allowed by act of Congress.<sup>2</sup> Although a gas company has no power to issue bonds in excess of its capital stock, yet this does not restrict its right to issue notes.<sup>3</sup> A *bona fide* purchaser is protected, even though there was an excess of power.<sup>4</sup> The attorney-general may enjoin a corporation from incurring debts in excess of a limit fixed by the charter.<sup>5</sup> A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do not know of it.<sup>6</sup>

Bonds secured by mortgage and issued by a corporation are valid and enforceable although they exceed in amount the limit prescribed by charter or statute.<sup>7</sup> Where one street railroad buys out another

transactions are void, the party dealt with having knowledge of the charter. *Farmers', etc. Assn. v. Adams Grain Co.*, 84 Neb. 752 (1909). A statutory provision that the bonds shall not exceed the stock does not invalidate a resolution for a bonded debt greater than the capital stock, inasmuch as the capital stock may be increased before the bonds are issued. *Merced River, etc. Co. v. Curry*, 157 Cal. 727 (1910). A charter limit on corporate debts does not apply to a note issued when such limit had not been exceeded. *Perry, etc. Co. v. Holbrook, etc. Co.*, 135 N. W. Rep. 219 (Neb. 1912).

<sup>1</sup> *Beach v. Wakefield*, 107 Iowa, 567 (1898).

<sup>2</sup> *Weber v. Spokane Nat. Bank*, 64 Fed. Rep. 208 (1894), rev'g 50 Fed. Rep. 735. Neither the corporation nor stockholders can repudiate a loan made by the corporation, even though it was in excess of its authorized indebtedness, and even though the money was used for an *ultra vires* purpose. *Traer v. Lucas, etc. Co.*, 124 Iowa, 107 (1904). The payment of a debt incurred in excess of the amount authorized by statute cannot be enjoined by a stockholder where the corporation has received and retained the benefits. *Rankin v. Southwestern, etc. Co.*, 12 N. M. 49 (1903).

<sup>3</sup> Quoted and approved in *Fidelity*

*Trust Co. v. Louisville Gas Co.*, 118 Ky. 588 (1904). In this case it was held that the fact that the charter of a gas company provides that it might issue bonds for \$500,000, and secure them by mortgage, did not prevent the company borrowing additional sums of money, nor from guaranteeing bonds in other companies which it had lawfully acquired.

<sup>4</sup> *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505 (1893).

<sup>5</sup> *Lehigh, etc. Ry. Co.'s Appeal*, 129 Pa. St. 405 (1889). Cf. § 635, *supra*. Concerning the constitutional and statutory provision limiting corporate debts in Pennsylvania, see *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889).

<sup>6</sup> *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). Even though money is not borrowed in the manner required by the by-laws, yet, if the company uses the money, it must repay the same. *St. Joseph's, etc. Soc. v. St. Hedwig's Church*, 4 Pen. (Del.) 141 (1902). See also § 725, *supra*.

<sup>7</sup> A mortgage securing a debt in excess of the amount allowed by statute is nevertheless binding on the corporation and its subsequent creditors. *Sioux City, etc. Warehouse Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); aff'd, 173 U. S. 99 (1899). In England the rule is *contra*. *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868),



and assumes the bonds of the latter, it cannot question such bonds on the ground that they exceed the capital stock, in violation of the stat-

where debentures issued in excess of authority were held void; *Wenlock v. River Dee Co.*, L. R. 10 App. Cas. 354 (1885); *Re Pooley Hall Colliery Co.*, 21 L. T. (N. S.) 690 (1869), where similar debentures were said to be "not voidable, but absolutely void." The holder was allowed to come in as a general creditor. And see two cases turning upon the construction of "rules" or by-laws. *Davis's Case*, L. R. 12 Eq. 516 (1871), and *Wilson's Case*, L. R. 12 Eq. 521 (1871). But see *Gordon v. Sea*, etc. Ins. Co., 1 H. & N. 599 (1857). Subsequent creditors cannot complain that a corporation has incurred debts in excess of the amount allowed by its charter. The state alone can complain. *Central Trust Co. v. Columbus*, etc. Ry., 87 Fed. Rep. 815 (1898). A mortgage to secure bonds in excess of the amount allowed in the charter cannot be repudiated by the mortgagor, and not even the *cestui que trust* of the mortgagor can complain, if he has participated in the same. *Union T. Co.*, etc. v. *Mercantile*, etc. Co., 189 Pa. St. 263 (1899). Neither the mortgagor nor creditors of the mortgagor can attack its mortgage on the ground that it was for more than one half the cost of the company's property, in violation of the statute. *International*, etc. Co. v. *Davis*, etc. Co., 70 N. H. 118 (1900). Debts in excess of the charter amount are void as to subsequent creditors without notice, and the recording of a mortgage securing the same is not such notice. *Bell*, etc. Co. v. *Kentucky*, etc. Co., 106 Ky. 7 (1899). Bonds are valid although the amount exceeds twice the capital stock of the company, the limit fixed by statute. *Fidelity*, etc. Co. v. *West Pennsylvania*, etc. R. R., 138 Pa. St. 494 (1891). Cf. *Pittsburg*, etc. R. R.'s Appeal, 4 Atl. Rep. 385 (Pa. 1886). A mortgage is enforceable although it is given to secure a debt contracted in excess of the amount limited by the charter of the corporation. *Allis v. Jones*, 45 Fed. Rep. 148 (1891), holding also that a

subsequent creditor whose claim also is open to this objection cannot have the mortgage set aside. Bonds in excess of the charter limit may be valid. *Des Moines Gas Co. v. West*, 50 Iowa, 16 (1878); *Warfield v. Marshall*, etc. Co., 72 Iowa, 666 (1887). A corporate mortgage is valid though it secures a sum in excess of the amount allowed by statute. *Warfield v. Marshall*, etc. Co., 72 Iowa, 666 (1887). Although the statutes authorize a mortgage for an amount not exceeding two thirds of the capital paid in, yet if a mortgage is given for an amount in excess of the limit, but not in excess of two thirds of the authorized capital, *bona fide* holders of the bonds may enforce the mortgage. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). A contractor who takes part in the issue of bonds in excess of the capital stock, an act prohibited by statute, is estopped from questioning the validity of the mortgage securing the bonds. *Reed's Appeal*, 122 Pa. St. 565 (1888). Although bonds issued by the company to raise money are unauthorized and illegal by statute, yet the holders may collect from the company the amount received by the company on the bonds. *Re Cork*, etc. Ry., L. R. 4 Ch. 748 (1869). But see *Davis's Case*, L. R. 12 Eq. 516 (1871). A mortgage is not void although the bonds are in excess of the statutory limit. *New Britain Nat. Bank v. A. B. Cleveland Co.*, 91 Hun, 447 (1895); *aff'd*, 158 N. Y. 722 (1899). A mortgage under the New York act cannot exceed the capital stock or two thirds of the value of the property at the time of the execution of the mortgage, even though a part of the bonds are not to be issued until subsequently. *Flynn v. Coney*, etc. R. R., 26 N. Y. App. Div. 416 (1898). Cf. *Baker v. Guarantee*, etc. Co., 31 Atl. Rep. 174 (N. J. 1895). Bonds in excess of the charter limit of two of the three states in which the company is incorporated are nevertheless valid in the third. *Atwood v. Shenandoah*, etc. R. R., 85



ute.<sup>1</sup> It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years.<sup>2</sup> Even though bonds are issued in violation of law, which first requires the capital stock to be paid up, yet the corporation must pay back what it received for the bonds and must pay the full par value to *bona fide* holders, but after proof of illegality of issue no one is presumed to be a *bona fide* purchaser.<sup>3</sup> An overissue, however, of corporate certificates of indebtedness is not binding on the corporation, even though the president signed them in blank and the treasurer countersigned and issued them fraudulently for his own purposes, such certificates not being negotiable in form, but being in the form of certificates of stock.<sup>4</sup> Constitutional and statutory provisions requiring the consent of stockholders to an issue of bonds are considered elsewhere.<sup>5</sup>

Va. 966 (1889). In *Commonwealth v. Smith*, 92 Mass. 448 (1865), it is held that mortgage bonds issued in excess of the charter limit are void. When the constitution of a state forbids "county, political, or other municipal corporations" within the state to "become indebted in any manner" beyond a named percentage "on the value of the taxable property within such county or corporation," negotiable bonds issued by such corporations in excess of such limit are invalid without regard to any recitals which they contain. *Nesbit v. Riverside Independent District*, 144 U. S. 610 (1892). Where the power to mortgage does not exist, except it be expressly given by statute, as in the case of railroads, a mortgage in excess of the statutory authorization is void. *Commonwealth v. Smith*, 92 Mass. 448 (1865). An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount. If the bonds are not issued, but the land in payment therefor is deeded to the company, the party has a lien on the land, but must demand the bonds before suing. *Cordova Coal Co. v. Long*, 91 Ala. 538 (1891). Even though a city exceeds its charter power to incur debt in acquiring a waterworks system, yet if the city afterwards has power to incur the debt it is legal. *City of*

*Santa Cruz v. Wykes*, 202 Fed. Rep. 357 (1913).

<sup>1</sup> Such bonds are not void. *Smith v. Ferries, etc. Ry.*, 51 Pac. Rep. 710 (Cal. 1897).

<sup>2</sup> *Farmers' L. & T. Co. v. Toledo, A. A., etc. Ry.*, 67 Fed. Rep. 49 (1895). Even though a corporation cannot give a mortgage for more than one half of its capital stock, the validity of the mortgage cannot be questioned on the ground that the capital stock had been irregularly increased. *First National Bank v. Wyoming, etc. Co.*, 136 Fed. Rep. 466 (1905). Where the stockholders formally increase the capital stock and certify that it has been increased and issue mortgage bonds to the full amount of such increased capital stock, under a statute which prohibits the issue of bonds in excess of the capital stock, they will be held to have subscribed *pro rata* to such increased capital stock. *Kreisser v. Ashtabula, etc. Co.*, Ohio Circuits (1903), p. 313. Bonds issued in excess of the charter limit are valid to the extent of the consideration received for them. *Peatman v. Centerville, etc. Co.*, 100 Iowa, 245 (1896).

<sup>3</sup> *Shellenberger v. Altoona, etc. R. R.*, 212 Pa. St. 413 (1905).

<sup>4</sup> *Amer. Ex. etc. Bank v. Woodlawn Cemetery*, 194 N. Y. 116 (1909). See also § 293, *supra*.

<sup>5</sup> See ch. XLVII, § 808, *infra*.



A mortgage usually does and should specify how many bonds it is intended to secure.<sup>1</sup> Where there is an overissue of bonds by reason of the issue of a greater amount of bonds than the mortgage recites and secures, great difficulty is found in determining whether all of the bonds participate in the benefit of the mortgage security. The rule is that all *bona fide* holders participate in the security even though this includes some or all of the overissue, where it is impossible to tell which are the overissued bonds.<sup>2</sup> As against subsequent mortgages, however, the rule is different.

In England it has been held that where a company had power to borrow, but the power had been already exhausted, and the directors nevertheless raised more money, they were personally liable to repay it.<sup>3</sup>

<sup>1</sup> In the case *Flynn v. Coney Island, etc. R. R.*, 26 N. Y. App. Div. 416 (1898), the court in a *dictum* said that in a mortgage, securing bonds, a part of which bonds were to be issued in the future, it is necessary that the mortgage fix a limit on the amount of bonds to be issued, "for otherwise no bondholder could know the extent or sufficiency of his security." It is of course familiar law that a mortgage running to a single creditor may secure future advances, even though the amount of such future advances is not specified. *Brown v. Keifer*, 71 N. Y. 610 (1877); *Robinson v. Williams*, 22 N. Y. 380 (1860); *Ackerman v. Hunsicker*, 85 N. Y. 43 (1881). Although the statute requires the articles to state the amount of indebtedness which may be incurred, the articles may fix the amount, with the right to the stockholders to increase it up to the statutory limit. *Thorn-ton v. Balcom*, 85 Iowa, 198 (1892).

<sup>2</sup> Where there are two sets of numbers for two sets of bonds, all secured by the same mortgage, a purchaser is not bound to know of an overissue where the method of numbering is not explained. Hence, where by error \$420,000 of bonds are issued, while the mortgage secures but \$400,000, the extra \$20,000 are secured also by the mortgage as against the company, and also as against income bondholders secured by an unrecorded mortgage; but as against a subsequent recorded third mortgage, the \$20,000 of bonds are unsecured, and the income bond-

holders take the rights of the third mortgage bondholders to come in ahead of this \$20,000. *Stephens v. Benton*, 1 Duv. (Ky.) 112 (1863). Where a mortgage is given to secure bonds to the amount of \$16,000 per mile of road thereafter built, to be determined on certain certificates to be given by the chief engineer and others, and more than \$16,000 of bonds per mile are issued, all of the bonds share equally in the foreclosure assets, since it is impossible to tell which are overissued bonds except by the numbers, which are not sufficient proof of the date of issue. *Stanton v. Alabama, etc. R. R.*, 2 Woods, 523 (1875); s. c., 22 Fed. Cas. 1070. See also *State v. Cobb*, 64 Ala. 127 (1879), sustaining the validity of the same bonds and enforcing the state's guaranty of them. But neither the court nor the trustees have power to make an overissue of bonds in order to fulfill a corporate contract. *Vose v. Bronson*, 6 Wall. 452 (1867).

<sup>3</sup> *Weeks v. Propert*, L. R. 8 C. P. 427 (1873); *Chapleo v. Brunswick, etc. Building Soc.*, L. R. 6 Q. B. D. 696 (1881); *Richardson v. Williamson*, L. R. 6 Q. B. 276 (1871), explained by *Mellish, L. J.*, in *Beattie v. Ebury*, L. R. 7 Ch. 801 (1872). Where a person advanced money to a company on the security of an invalid Lloyd's bond of the company, the directors who issued it were held not to be personally liable to repay the money advanced. *Rashdall v. Ford*, L. R. 2 Eq. 750 (1866). See as to this case



Sometimes the statutes make the directors personally liable for debts of the company contracted in excess of a certain amount.<sup>1</sup>

The defense of usury on the part of a corporation is considered else-

West London Com. Bank *v.* Kitson, L. R. 13 Q. B. D. 363 (1884). Where the directors of a benefit building society had power to borrow if a rule enabling them to do so had been passed, and they borrowed money for the society in the absence of any rule enabling them so to do, it was held that they were personally liable to repay it. *Richardson v. Williamson*, L. R. 6 Q. B. 276 (1871), explained by *Mellish, L. J.*, in *Beattie v. Ebury*, L. R. 7 Ch. App. 801 (1872). See also *West London Commercial Bank v. Kitson*, L. R. 12 Q. B. D. 157 (1883), and L. R. 13 Q. B. D. 360 (1884). Where a company had power to issue debenture stock to a limited extent, and the directors, after the power was exhausted, issued more debenture stock, they were held personally liable to the holders of the unauthorized stock. The damages were held to be the value which the stock would have had if it had been authorized. *Firbank v. Humphreys*, L. R. 18 Q. B. D. 54 (1886). Although the directors have agreed to pay for goods in debentures, and although the company is unable to fulfill by reason of all its authorized debentures having already been issued, nevertheless the directors are not personally liable to the vendor to make good the failure to deliver the debentures. *Elkington v. Hürter*, [1892] 2 Ch. 452. Where a person bought new preference stock of a railway company which both he and the directors *bona fide* believed they had power to issue, but which in truth they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law. *Eaglesfield v. Londonderry*, L. R. 4 Ch. D. 693 (1876); *aff'd*, (H. L.) 26 W. R. 540. See also § 682, *supra*.

<sup>1</sup> Where the statutes provide that directors are liable for an excess of indebtedness, this liability has been held to be a general one, inuring to the benefit of all creditors upon bill

filed and not for the benefit of individual creditors. *Hornor v. Henning*, 93 U. S. 228 (1876). *Cf. Rossiter v. Rossiter*, 8 Wend. 494 (1832); *Palmer v. Stephens*, 1 Denio, 471 (1845). See also ch. XII, *supra*, and § 682, *supra*. A statute rendering directors liable for debts in excess of the capital stock does not prohibit the incurring of such debts. In Massachusetts this statutory liability does not apply to past debts which have been reduced to less than the capital stock at the time suit is commenced. *Flint v. Boston, etc. Co.*, 183 Mass. 114 (1903). The provision making the directors liable for corporate debts in excess of the capital stock does not relieve the corporation from liability for such excess nor invalidate the debt. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). Under the Illinois statute rendering directors liable for debts in excess of the capital stock, if they assent thereto, directors who do not know of such excess until after it has been contracted are not liable, even though they allow one director to transact all the business. *Lewis v. Montgomery*, 145 Ill. 30 (1893). Where the directors incur debts in excess of the amount allowed by the charter, debts due them are postponed until the other debts are paid, and the directors are legally guilty of fraud as to creditors who did not know of the excessive indebtedness, and hence are personally liable to such creditors. *Guenther v. Basket, etc. Co.*, 107 Ky. 44 (1899). If directors give their personal notes for corporate debts contracted in excess of the charter limit, they cannot sue the stockholders for contribution. *Heald v. Owen*, 79 Iowa, 23 (1890). Where the statute renders the directors liable for money received in excess of a certain limit, they are liable even though by reason of the fraud of the secretary they did not know that the excessive borrowing was being done. *Cross v. Fisher*, L. R. [1892] 1 Q. B. 467.



where;<sup>1</sup> as is also the subject of the power of a corporation to loan money, discount notes, and take a mortgage;<sup>2</sup> and the subject of issuing bonds to become due after the charter of the corporation expires.<sup>3</sup>

§ 761. *Bills, notes, and acceptances may be made and issued by corporations.* — A private corporation may make and issue a promissory note.<sup>4</sup>

A note given under the seal of the corporation is not necessarily a sealed instrument, inasmuch as the seal is the old mode of signature to an instrument by a corporation.<sup>5</sup> Such a note is not a sealed instrument in its effect on the negotiability of the instrument, nor on the remedy to enforce it, nor on the statute of limitations.<sup>6</sup> There are cases,

<sup>1</sup> See § 766b, *infra*.

<sup>2</sup> See § 690, *supra*.

<sup>3</sup> See § 642, *supra*.

<sup>4</sup> *Moss v. Averell*, 10 N. Y. 449, 457 (1853); *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Clark v. Farmers', etc. Mfg. Co.*, 15 Wend. 256 (1836); *Mead v. Keeler*, 24 Barb. 20 (1857); *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 177 (1879); *Mott v. Hicks*, 1 Cow. 513 (1823); *Attorney-General v. Life, etc. Ins. Co.*, 9 Paige, 470 (1842); *Moss v. Oakley*, 2 Hill, 265 (1842); *Smith v. Law*, 21 N. Y. 296 (1860); *Lucas v. Pitney*, 27 N. J. L. 221 (1858); *Richmond, etc. R. R. v. Snead*, 19 Gratt. (Va.) 354 (1869), a due-bill; *Rockwell v. Elkhorn Bank*, 13 Wis. 653 (1861); *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515 (1845); *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59 (1855); *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *Oxford Iron Co. v. Spradley*, 46 Ala. 98 (1871); *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1 (1856); *Ex parte Estabrook*, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794; *Barnes v. Ontario Bank*, 19 N. Y. 152 (1859); *Mumford v. American, etc. Co.*, 4 N. Y. 463 (1851); *McMasters v. Reed*, 1 Grant Cas. (Pa.) 36 (1854), holding that they may also issue bonds; *Pitman v. Kintner*, 5 Blackf. (Ind.) 250 (1839); *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13 (1840); *Leavitt v. Blatchford*, 17 N. Y. 521 (1858); *Magee v. Mokelumne Hill, etc. Co.*, 5 Cal. 258 (1855); *Hamilton v. Newcastle, etc. R. R.*, 9 Ind. 359 (1857); *Randolph, Com. Paper*, §§ 327-335;

*Millard v. St. Francis, etc. Academy*, 8 Bradw. (Ill.) 341 (1880), where an educational institution borrowed money and gave a note therefor. A corporation has an implied authority to issue a note. *Reade v. Pacific, etc. Assoc.*, 40 Oreg. 60 (1901). A corporation may make a promissory note. *Barker v. Mechanics', etc. Ins. Co.*, 3 Wend. 94 (1829). A private corporation may borrow money and issue notes therefor. *Johnson v. Johnson Bros.*, 108 Me. 272 (1911). A corporation has inherent power to borrow money and give a note. *Alton Mfg. Co. v. Garrett, etc. Inst.*, 243 Ill. 298 (1910). It is no defense to a corporate note that the payee knew that the corporation had been dishonestly administered. *Randall v. Fox*, 13 Ariz. 87 (1910). Corporations may issue notes and bills of exchange "where the nature and character of their business warrants it." *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). A corporation organized without business powers and without capital has no inherent power to issue a promissory note. *Scott v. Bankers', etc.*, 73 Kan. 575 (1906).

<sup>5</sup> Quoted and approved in *Smith v. Woman's, etc. College*, 72 Atl. Rep. 1107 (Md. 1909).

<sup>6</sup> The note of a corporation is negotiable, even though the corporate seal is attached thereto. *Chase Nat. Bank v. Faurot*, 149 N. Y. 532 (1896); *St. James's Parish v. Newburyport, etc. R. R.*, 141 Mass. 500 (1886). An instrument in the form of a promissory



however, to the contrary.<sup>1</sup> A corporation may draw or accept a bill of exchange for the purposes of its business.<sup>2</sup>

sory note does not become an instrument under seal by having the corporate seal affixed. The corporate seal is the corporate mode of signing. *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). The seal of a corporation stamped on its promissory note does not destroy the negotiability of the note. The seal is the proper signature of the corporation. *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). Stockholders who indorse a bond of a corporation may set up the five years' statute of limitations although the bond was a sealed instrument. Facts connected with the stockholders indorsing the bond may be explained by *parol*. *Somers v. Florida, etc. Co.*, 50 Fla. 275 (1905). The written obligation of the corporation to pay money is not a specialty, even though it is executed under the corporate seal, unless the words of the instrument indicate that it was intended to be a specialty. *Smith v. Woman's, etc. College*, 72 Atl. Rep. 1107 (Md. 1909). It is not necessary that the corporate seal be attached. *Mott v. Hicks*, 1 Cow. 513 (1823); *Hamilton v. Newcastle, etc. R. R.*, 9 Ind. 359 (1857). See also *Buckley v. Briggs*, 30 Mo. 452 (1860); also §§ 721, 722, *supra*. The promissory note of a corporation, signed by its president and treasurer as such, is negotiable, even though the seal of the corporation is attached, there being no evidence that it was the intention that the instrument should be under seal, and no words in the note stating that it was to be under seal, and no evidence that the seal was the seal of the corporation, or that it was affixed by authority. *Weeks v. Esler*, 68 Hun, 518 (1893). In this case on appeal, 143 N. Y. 374 (1894), the court doubted whether a corporate seal upon a promissory note could affect its negotiability and held that, where there was no evidence that the seal was affixed by authority, the negotiability was certainly not affected. The note of a corporation is a note and not a bond, although the corporate seal is affixed thereto.

*Landauer v. Sioux, etc. Co.*, 10 S. Dak. 205 (1897). In the case *St. Joseph's, etc. Soc. v. St. Hedwig's Church, etc.*, 3 Pen. (Del.) 229 (1901), the court seems to have held that a note was insufficient because it did not contain the seal of the corporation.

<sup>1</sup> *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836), holding that such a note is not negotiable so as to authorize a suit by an indorsee in his own name. The note may be sued upon as a sealed instrument. *St. James's Parish v. Newburyport, etc. R. R.*, 141 Mass. 500 (1886). An instrument in form a note, but signed by the corporate seal, must be sued on as a sealed instrument. *Benoist v. Carondelet*, 8 Mo. 250 (1843). See, also, concerning this subject, §§ 767, 770, *infra*.

<sup>2</sup> For instances of making bills, see *Olcott v. Tioga R. R.*, 40 Barb. 179 (1862); s. c., *aff'd*, 27 N. Y. 546 (1863); *Safford v. Wyckoff*, 4 Hill, 442 (1842), holding that a negotiable bill irregularly issued will bind the corporation in favor of a *bona fide* indorsee. For instances of accepting bills, see *Munn v. Commission Co.*, 15 Johns. 44 (1818); *Partridge v. Badger*, 25 Barb. 146 (1857); *Prairie Lodge v. Smith*, 58 Miss. 301 (1880), where the corporation accepted an order drawn by its contractor; *City Bank of Columbus v. Beach*, 1 Blatchf. 425 (1849); s. c., 5 Fed. Cas. 739. In England it is held that a bill of exchange cannot be accepted by a mining company unless proof is given that it is necessary. *Dickinson v. Valpy*, 10 B. & C. 128 (1829). Nor by a railroad. *Bateman v. Mid-Wales Ry.*, L. R. 1 C. P. 499 (1866). Nor a salt company. *Bult v. Morrell*, 12 Ad. & E. 745 (1840); *Broughton v. Manchester, etc. Works*, 3 B. & Ald. 1 (1819). Nor a salvage company. *Thompson v. Universal, etc. Co.*, 1 Exch. 694 (1848) (a promissory note case). Nor a cemetery. *Steele v. Harmer*, 14 M. & W. 831 (1845). But the right may exist if specified in the articles of incorporation. *Re Peruvian Rys.*, L. R. 2 Ch. App. 617



A corporation cannot set up the defense of *ultra vires* to a note where it has received the property for which the note was given.<sup>1</sup> Even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the note are used to take it up, the money cannot be recovered back.<sup>2</sup> The indorsers of a corporate note cannot question the power of the corporation to make the note.<sup>3</sup>

A *bona fide* purchaser of a corporate note is protected as he would be if the maker were an individual,<sup>4</sup> excepting where he takes the

(1867). Directors who had accepted bills on behalf of a company, which had no power under its private acts of parliament to accept bills, were held liable to the holders, who had no notice in fact that the company was not empowered to accept bills. *West London Com. Bank v. Kitson*, L. R. 12 Q. B. D. 157 (1883), and L. R. 13 Q. B. D. 360 (1884).

<sup>1</sup> *Dewey v. Toledo, etc. Ry.*, 91 Mich. 351 (1892). Even though a company buys the stock of another company *ultra vires*, yet if it borrows money from a bank to pay for the stock and gives a mortgage to the bank, it is bound by its note and mortgage, and it is no defense that the bank knew that the money was to be used to pay for the stock. *Jenson v. Toltet Ranch Co.*, 174 Fed. Rep. 86 (1909). A *bona fide* purchaser of a corporate note is protected, even though it was issued for an *ultra vires* purpose, such as purchasing the stock of another company. *Jefferson Bank v. Chapman, etc. Co.*, 122 Tenn. 415 (1909). See also ch. XL, *supra*.

<sup>2</sup> *McClure v. Trask*, 161 N. Y. 82 (1899).

<sup>3</sup> *Glidden v. Chamberlain*, 167 Mass. 486 (1897). An indorser of a corporate note cannot set up that such note is *ultra vires*. *Donohoe v. Meeker*, 35 N. Y. App. Div. 43 (1898).

<sup>4</sup> *Bissell v. Michigan, etc. R. R. Cos.*, 22 N. Y. 258, 289 (1860); *Daniel*, Neg. Inst., §§ 1502-1504; *Stoney v. American, etc. Ins. Co.*, 11 Paige, 635 (1845). See *Attorney-General v. Life, etc. Ins. Co.*, 9 Paige, 470 (1842), holding that the burden of proof is on the holder; *Genesee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438 (1884). A *bona fide*

purchaser of a corporate note is protected, even though its purpose was *ultra vires*. *Stouffer v. Smith, etc. Co.*, 154 Ala. 301 (1908). A *bona fide* purchaser of a promissory note executed by the officers of a private trading corporation is protected in assuming that the officers have not exceeded their authority in issuing the note. *National, etc. Co. v. Rockland Co.*, 94 Fed. Rep. 335 (1899). Although an agent duly authorized by the corporation to make notes for it issues its notes for accommodation, yet a *bona fide* holder cannot hold the agent liable in tort. He should sue the corporation on the notes. *Bird v. Daggett*, 97 Mass. 494 (1867). See also *Monument Nat. Bank v. Globe Works*, 101 Mass. 57 (1869); *Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299 (1876). In these cases the agent indorsed paper for the accommodation of third parties. *Madison, etc. R. R. v. Norwich Sav. Soc.*, 24 Ind. 457 (1865), where an agent represented a railroad company as being the owner of certain bonds, when in fact it was an accommodation guarantor. It was held liable upon the guaranty.

In *Merchants' Bank v. State Bank*, 10 Wall. 604, 644 (1870), Mr. Justice Swayne said: "Where a party deals with a corporation in good faith — the transaction is not *ultra vires* — and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be



note from an officer of the corporation in connection with the officer's personal business matters.<sup>1</sup> Even though a corporate obligation to pay money is drawn in the shape of a certificate of stock, yet it is not *quasi* negotiable like a certificate of stock.<sup>2</sup>

valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." This remark was quoted with approval in *Gano v. Chicago, etc. Ry.*, 60 Wis. 12 (1884); *Claffin v. Farmers', etc. Bank*, 25 N. Y. 293 (1862), where, however, the certification of his personal check by the president of a bank was considered to constitute such a suspicious circumstance as should put a purchaser upon his guard, and render the certification invalid even in the hands of a *bona fide* holder for value. See also § 293, *supra*. *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256 (1825), where a draft fraudulently drawn by a president was enforced against the corporation; *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859), holding that bonds were not void because secured by a mortgage executed without authority; *Rowland v. Apothecaries' Co.*, 47 Conn. 384 (1879), a note of a corporation given by its treasurer for money for his personal use being held valid against the corporation; *Mechanics' Banking Assoc. v. New York, etc. Co.*, 35 N. Y. 505 (1866), accommodation indorsement by president; *Ex parte Estabrook*, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794, a note given by a manager without authority; *Thompson v. Lambert*, 44 Iowa, 239 (1876), misappropriation by officers of money obtained on mortgage; *White v. How*, 3 McLean, 291 (1843); s. c., 29 Fed. Cas. 1019, where the corporate agent improperly issued notes; *Genesee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438 (1884), where the treasurer was authorized to issue notes and did so, but improperly, it was claimed. The rule was stated to be (p. 446) that

"where a corporation has, under any circumstances, power to issue negotiable paper, the *bona fide* holder has the right to presume that it was issued under circumstances which gave the requisite authority; and the negotiable paper of a corporation which appears on its face to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder"; *Western, etc. R. R. v. Franklin Bank*, 60 Md. 36 (1882), where a clerk forged certificates of coupons surrendered for funding. The preceding language was quoted and approved in *Jefferson Bank v. Chapman, etc. Co.*, 122 Tenn. 415 (1909). Certificates of deposit issued by a bank cashier for the purpose of raising money for the bank's use, though not based on an actual deposit, have been held binding upon the bank when held by *bona fide* purchasers without notice. See § 718, *supra*. In *The Floyd Acceptances*, 7 Wall. 666 (1868), it was held that acceptances of drafts due in the future for army supplies not delivered were void as not being within the authority of the secretary of war. *Barnes v. Ontario Bank*, 19 N. Y. 152 (1859); *Elsworth v. St. Louis, etc. R. R.*, 33 Hun, 7; *aff'd*, 98 N. Y. 553 (1885), where bonds were issued in violation of the charter; *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). See also *Re Land Credit, etc. Co.*, L. R. 4 Ch. 460 (1869); *Beers v. Phoenix Glass Co.*, 14 Barb. 358 (1852), secretary borrowing money without authority. The *bona fide* purchaser of a note indorsed by a corporation may enforce it against the company. *Central Bank v. Empire, etc. Co.*, 26 Barb. 23 (1857); *Bridgeport City Bank v. Empire, etc.*

<sup>1</sup> Quoted and approved in *In re Troy, etc. Co.*, 136 Fed. Rep. 420, 433 (1905); *aff'd*, 142 Fed. Rep. 1038. See also § 293, *supra*.

<sup>2</sup> *Amer. Ex., etc. Bank v. Woodlawn Cemetery*, 194 N. Y. 116 (1909).



A corporation has no power to become an accommodation indorser of a note; but where all the stockholders assent thereto and creditors are not injured, the indorsement is sustained.<sup>1</sup> A corporation may of course draw checks on its bank account.<sup>2</sup>

The authority of the president or cashier or other officer to issue a note in the name of the corporation is discussed elsewhere.<sup>3</sup> Sometimes the charter or a statute forbids a corporation from issuing a note. In such a case the note would be void.<sup>4</sup> The holder, however, may collect from the corporation the money or value advanced for the note.<sup>5</sup> The power of a corporation to sell and indorse notes received by it in connection with its own business is of course undoubted. It is a part of the everyday business of most corporations.<sup>6</sup>

Co., 30 Barb. 421 (1859). But a purchaser of a bill of exchange before it is accepted by the company is not such a *bona fide* purchaser. *Farmers', etc. Bank v. Empire, etc. Co.*, 5 Bosw. 275 (1859).

<sup>1</sup> See § 774, *infra*.

<sup>2</sup> *Waterlow v. Sharp*, L. R. 8 Eq. 501 (1869); *Re Cefn Cilcen Min. Co.*, L. R. 7 Eq. 88 (1868).

<sup>3</sup> See §§ 716, etc., *supra*. In New York it is the rule that a business corporation is not liable on commercial paper issued in its name, unless it is shown not only that it was issued by the corporate officers, but that it was authorized by a resolution of the board of directors, or by the by-laws, or by a course of dealing by which the corporation held out that the officers were authorized to issue such paper, or by a ratification of the corporation by accepting and retaining the benefits of the paper. *Miners', etc. Bank v. Ardsley Hall Co.*, 113 N. Y. App. Div. 194 (1906).

<sup>4</sup> *Leavitt v. Palmer*, 3 N. Y. 19 (1849); *Root v. Wallace*, 4 McLean, C. C. 8 (1845); s. c., 20 Fed. Cas. 1167; *Davis v. River Raisin Bank*, 4 McLean, C. C. 387 (1848); s. c., 7 Fed. Cas. 111; *Attorney-General v. Life, etc. Ins. Co.*, 9 Paige, 470 (1842); *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678 (1824); *Weed v. Snow*, 3 McLean, 265 (1843); s. c., 29 Fed. Cas. 572; *Root v. Godard*, 3 McLean, 102 (1842); s. c., 20 Fed. Cas. 1159; *Hayden v. Davis*, 3 McLean, 276 (1843); s. c., 11 Fed. Cas. 898, where

an acceptance and bond given to secure it were held void; *Broughton v. Manchester, etc. Co.*, 3 B. & Ald. 1 (1819), where the bill of exchange contravened the statute giving the Bank of England a monopoly; *Bank of Chillicothe v. Dodge*, 8 Barb. 233 (1850), holding, however, that a foreign corporation innocently holding a draft issued in violation of a statutory provision stands in the same situation as if it had paid money under a mistake of material facts, and may recover the money paid for it. See also *Smead v. Indianapolis, etc. R. R.*, 11 Ind. 104 (1858). Certificates of deposit payable to bearer are not within the New York restraining statutes prohibiting the issue of notes for circulation as money. *Mumford v. American, etc. Co.*, 4 N. Y. 463 (1851).

<sup>5</sup> *Oneida Bank v. Ontario Bank*, 21 N. Y. 490 (1860). Cf. *Attorney-General v. Life, etc. Ins. Co.*, 9 Paige, 470 (1842). See also the English cases, *supra*.

<sup>6</sup> Quoted and approved in *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588 (1904); *Olcott v. Tioga, etc. R. R.*, 27 N. Y. 546 (1863); *Hardy v. Merriweather*, 14 Ind. 203 (1860); *Frye v. Tucker*, 24 Ill. 180 (1860); *Buckley v. Briggs*, 30 Mo. 452 (1860); *Smith v. Johnson*, 3 H. & N. 222 (1858), the last case being that of a bill of exchange. A coal company is presumed to have authority to issue a note and to indorse a note given to it and such indorsement is presumed to be legal. *Edward Knapp*



§ 762. *Bonds may be issued by corporations — Bonds may be valid, although the mortgage securing them is invalid — Bonds to preferred creditors — Reissues.* — A corporation has inherent power to issue bonds for the payment of money, and no express power is necessary to authorize the issue.<sup>1</sup> A corporation has no power to issue perpetual bonds under its charter power to borrow money, because borrowing implies repayment at some time, and the granting of perpetual annuities is not borrowing.<sup>2</sup> Bonds, issued as a part of a lottery scheme, are illegal.<sup>3</sup> A provision in a charter that prop-

& Co. v. Tidewater, etc. Co., 81 Atl. Rep. 1063 (Conn. 1912).

<sup>1</sup> *Thatcher v. Consumers', etc. Co.*, 72 N. J. Eq. 825 (1907); *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859); *Commonwealth v. Smith*, 92 Mass. 448 (1865). Also many cases *infra*. They may be issued to carry out a reorganization scheme. *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884), and 120 U. S. 287 (1887). A railroad company has inherent power to issue bonds. *Craven County Com'rs v. Atlantic, etc. R. R.*, 77 N. C. 289 (1877); *Miller v. New York, etc. R. R.*, 8 Abb. Pr. 431 (1859); *McMasters v. Reed*, 1 Grant Cas. (Pa.) 36 (1854). A furnace and chemical company may issue first mortgage bonds, and may sell them, partial payments to be made from time to time. These payments may be enforced. *Davis v. Montgomery, etc. Co.*, 101 Ala. 127 (1890). A subscription for bonds, the amount being payable on call, may be paid at once and the bonds demanded. *Watjen v. Green*, 48 N. J. Eq. 322 (1891). A railroad corporation may issue bonds without express authority so to do. *Miller v. New York, etc. R. R.*, 8 Abb. Pr. 431 (1859). "There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter or in some other legislative act. A bond is merely an obligation under seal." *Commonwealth v. Smith*, 92 Mass. 448 (1865), holding, however, that in Massachusetts the statute specify-

ing the purposes for which bonds may be issued and regulating their issue prevents a common-law issue of them. Power to mortgage property gives power to borrow money and issue bonds. *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). Where a corporation has power under the statute to execute bonds and mortgages neither a preferred nor common stockholder can prevent it on the theory that the directors may possibly use the bonds for other purposes than those specified in the statute and mortgage. *Thompson v. Erie Ry.*, 42 How. Pr. 68 (1871); s. c., 11 Abb. Pr. (N. S.) 188. Purchase-money bonds given by a cemetery corporation in New York are legal. *Seymour v. Spring Forest Cem. Assoc.*, 19 N. Y. Supp. 94 (1892); s. c., 157 N. Y. 697. Where a land-improvement company causes a street railway to be built and the two companies, having substantially the same stockholders, join in the execution and issue of bonds secured by a mortgage on both their properties, the bonds and mortgage are legal. *Northside Ry. v. Worthington*, 88 Tex. 562 (1894). In Kentucky a water-works company has no power to issue negotiable coupon bonds. *Georgetown Water Co. v. Fidelity, etc. Co.*, 117 Ky. 325 (1904). Where three companies join in the execution of debentures creating a lien on their property, each will be required to pay such part as it received, although such debentures are *ultra vires*. *Re Johnston, etc. Co. Ltd.*, [1904] 2 Ch. 234.

<sup>2</sup> *Re Southern, etc. Ry. Co. Ltd.*, [1905] 2 Ch. 78.

<sup>3</sup> In the case *Attorney-General v. Preferred Mercantile Co.*, 187 Mass.



erty should not be mortgaged or pledged except with the consent of the stockholders is for their benefit, and cannot be set up by one creditor as against another creditor.<sup>1</sup>

516 (1905), the charter of a corporation was forfeited because its sole business was to sell for cash its contracts to deliver diamonds to the oldest holders of such contracts, the sole source of revenue being the price received for the contracts. The court held that this was not a lottery, but was in violation of the statute prohibiting obligations redeemable in numerical order or in any arbitrary order. A company organized to deal in lottery bonds bearing a small rate of interest to be added to the bonds when paid and payment to be by drawings is illegal and will be wound up. *Re International, etc. Corporation, Ltd.*, 99 L. T. Rep. 581 (1908). Even though a corporation goes into an illegal lottery business, yet it cannot be convicted of an offense as a rogue and vagabond under the Lotteries Act of Parliament. *Hawke v. Hulton and Co. Ltd.*, [1909] 2 K. B. 93. A subscription to the bonds of an investment company cannot be enforced where the company never had any assets excepting such subscriptions, and the only way of paying the bonds is by lapses of some of the subscriptions after being partially paid. *German, etc. v. McCulloch*, 89 S. W. Rep. 5 (Ky. 1905). A bonding scheme by which the bonds were to be paid in consecutive order, and hence the time of payment and value depended on their number, is a lottery and is illegal. *Siver v. Guarantee Inv. Co.*, 183 Mo. 41 (1904). In *McLanahan v. Mott Co.*, 73 Hun, 131 (1893), the court declared illegal a proposed issue of \$100,000,000 of bonds payable in the year 4343, and to draw interest at six per cent. annually, two per cent. to be paid semi-annually, and the remaining two per cent. at the maturity of the bonds, two thousand four hun-

dred and fifty years hence. A sinking fund was to be established for gradual redemption. This was to be made up of \$500,000 deposited with the trustee of the mortgage before each interest day, and also a sum equal to the semi-annual interest, two per cent., on all bonds previously redeemed. The bonds to be redeemed were to be designated by the trustees by lot one month before the bonds were redeemed. They were to be redeemed "at their maturity value"; and this language was construed by the directors to mean that each bond was to be redeemed by the payment of \$5,000, such amount being arrived at by taking the principal of the bond, \$100, and adding to it items of the annual interest at two per cent. for two thousand four hundred and fifty years. For another lottery scheme in the issue of bonds, see the indictment in *MacDonald v. U. S.*, 63 Fed. Rep. 426 (1894). In the case *State v. New Orleans, etc. Co.*, 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if deferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid, and that they were redeemable in numerical order in six years, and that it would be impossible for the company

<sup>1</sup> *Alabama, etc. Co. v. McKeever*, 112 Ala. 134 (1896). See also § 808, *infra*. Where the stockholders have not authorized the issue of bonds as

required by statute, the statutory liability of the stockholders cannot be enforced to pay such bonds. *Boyd v. Heron*, 125 Cal. 453 (1899).



The corporation may issue bonds unsecured by mortgage. Hence, where a mortgage is made to secure the bonds and the mortgage is illegal and declared void by the courts, the bonds may be valid as unsecured obligations.<sup>1</sup> The invalidity of some of the bonds cannot

to pay them. The same conclusion was reached in *State v. Louisiana, etc. Co.*, 51 La. Ann. 1795 (1899). A scheme by which shares are sold, each share representing a lot in a tract of land, and upon a sale of all the shares the shareholders elect a board of directors who sell at auction the best lots and distribute the remaining lots by the remaining shareholders drawing the remaining lots "by lot," is not a lottery scheme prohibited by statute. *Elder v. Chapman*, 176 Ill. 142 (1898).

<sup>1</sup> The bond may be valid although the mortgage is invalid for want of power to make it. *Illinois T. & S. Bank v. Pacific Ry.*, 117 Cal. 332 (1897); *Union Trust Co. v. New York, etc. R. R.*, 17 Weekly Law Bull. 176 (Ohio, 1887). A holder of corporate bonds issued without authority may nevertheless be protected in equity. *Roberts v. Hughes*, 83 Atl. Rep. 807 (Vt. 1912). A note given by a corporation may be enforced against it, where it received and kept the money, even though the mortgage securing the note was void for want of the consent of the stockholders as required by statute. *Curtin v. Salmon River, etc. Co.*, 141 Cal. 308 (1903). Where a stockholder of a vendor corporation sets aside the sale of a railroad as *ultra vires*, a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee. *Knoxville v. Knoxville, etc. R. R.*, 22 Fed. Rep. 758 (1884). Where one road has been leased to another, the two roads may subsequently be consolidated and consolidated mortgage bonds issued, of which a part shall go to the former lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor, the court will not disturb it. *Hazard v. Vermont, etc. R. R.*, 17 Fed. Rep. 753 (1883). The bonds of a railroad

company are not rendered void in consequence of being secured by a mortgage which is void because the company had no authority to execute it. *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859). Bonds may be issued which are not a lien upon any property and are not secured by any mortgage or deed of trust. It is immaterial that they are called "equipment bonds." They may, however, by contract constitute an equitable lien. *Tysen v. Wabash Ry.*, 15 Fed. Rep. 763 (1883). Equipment bonds unsecured by mortgage are subject to future mortgages made by a consolidated company into which the company issuing the bonds has been consolidated. Though the holders might have exchanged their bonds for consolidated mortgage bonds, a failure to exercise the right is a bar. *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). Cf. *Compton v. Jesup*, 167 U. S. 1 (1897). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895). Bonds issued under an amendment to a charter with the consent of all the stockholders will be enforced, even though the amendment was invalid. *Johnson v. Mercantile*



affect the validity of the mortgage or of the proceedings for foreclosure.<sup>1</sup> The validity of mortgage bonds given to certain creditors by way of preference is considered elsewhere.<sup>2</sup> A bond dividend is sometimes made. When made under proper circumstances it is legal.<sup>3</sup>

It is legal for a corporation to sell its bonds to its directors, provided the sale is a fair one. It is true that directors hold a fiduciary relation towards the stockholders, and sales of corporate property to the directors are voidable at the instance of a stockholder,<sup>4</sup> but, unless a stockholder objects, the sale is valid. These principles apply to a director's purchase of bonds.<sup>5</sup>

Although the amount of bonds that may be issued is limited by the charter or by statute, yet bonds in excess of that amount may be enforced against the corporation.<sup>6</sup> An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount.<sup>7</sup> Where a company has issued \$112,000 of \$200,000 mortgage bonds and then sells its property, the vendee assuming the mortgage cannot issue the remaining bonds and make them equal in right to the \$112,000 of bonds.<sup>8</sup> The company may reissue such of its own bonds as it has purchased.<sup>9</sup> A corporation cannot have specific per-

Trust, etc. Co., 94 Ga. 324 (1894). Where a city, in order to get water-works, causes a corporation to be organized and to issue mortgage bonds to pay for the water-works, and the city buys its stock, but before a mortgage is made a taxpayer's suit is commenced to enjoin the project, and this suit finally succeeds, a foreclosure of the mortgage is subject to the invalidity of the project, yet the mortgage is good as to property not involved in the illegal part of the project. *City of Laporte v. Northern T. Co.*, 187 Fed. Rep. 20 (1911). Upon corporate insolvency unsecured bonds have no priority over other general claims. *Blair v. Clayton, etc. Co.*, 77 Atl. Rep. 740 (Del. 1910).

<sup>1</sup> *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899). See also § 766, *infra*.

<sup>2</sup> See § 691, *supra*.

<sup>3</sup> See § 766, *infra*.

<sup>4</sup> See § 653, *supra*.

<sup>5</sup> See § 692, *supra*. A stockholder may purchase the bonds of a company. *Broomall v. North Am. etc. Co.*, 70 W. Va. 591 (1912).

<sup>6</sup> See § 760, *supra*.

<sup>7</sup> *Cordova Coal Co. v. Long*, 91 Ala.

538 (1891), holding also that if the bonds are not issued, but the land in payment therefor is deeded to the company, the party has a lien on the land, but must demand the bonds before suing.

<sup>8</sup> *Security, etc. Co. v. St. Louis, etc. Co.*, 137 N. W. Rep. 807 (Mich. 1912). See also § 765, *infra*.

<sup>9</sup> Outstanding bonds which are purchased by a corporation may be reissued. *Pruyne v. Adams Furniture, etc. Co.*, 92 Hun. 214 (1895); *aff'd*, 155 N. Y. 629; *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880); *Re Mortgage Bonds*, 15 S. C. 304 (1880); *Ex parte Williams*, 18 S. C. 289 (1881). Such part of the first-mortgage bonds as are reissued may be issued and deposited as additional security for second-mortgage bonds. *Atwood v. Shenandoah, etc. R. R.*, 85 Va. 966 (1889). Bonds which have been purchased by the corporation and not reissued cannot participate in the proceeds of a foreclosure sale. An assignment by the company of past-due coupons which it has purchased is not a reissue of them where they are not actually delivered. *New York Security, etc. Co. v. Equitable Mortgage Co.*,



formance of an agreement of a person to purchase its debentures. The remedy is an action for damages.<sup>1</sup> For breach of an agreement to subscribe to bonds of a corporation the damage is the loss actually sustained, the contract really being a contract to loan money.<sup>2</sup> An executory contract of a corporation to issue debentures is enforceable, even though the corporation has become insolvent.<sup>3</sup> Upon a sale of the assets and the winding up of the company bonds not yet due may be paid at par and accrued interest.<sup>4</sup> Where a corporation deposits securities with a trust company, and the corporation issues and sells interest-bearing certificates against them, the holder of such a certificate is a creditor of the corporation.<sup>5</sup> Certificates of indebtedness issued by a corporation at par to receive dividends equal to dividends on the capital stock, the dividends being guaranteed, are debts provable in bankruptcy.<sup>6</sup>

§ 763. *Pledge of bonds by a corporation and enforcement thereof.*

— A corporation has power to pledge its bonds as security for a corporate debt.<sup>7</sup> A corporation may pledge its unissued bonds as security

77 Fed. Rep. 64 (1896). A *bona fide* pledgee of bonds which have been paid, but which have been fraudulently reissued by the trustee of a mortgage, may enforce them against the railroad mortgagor, even though the pledgee knew that the trustee was borrowing money on his own account. *Real Estate Trust Co. v. Washington, etc. Ry.*, 191 Fed. Rep. 566 (1911); *rev'd* on this point 177 Fed. Rep. 306. In England it is held that when a company purchases its own debentures they are thereby canceled and cannot be reissued by the company. *Re George Routledge & Sons, Ltd.*, [1904] 2 Ch. 474. A reissue of debentures in the case *Re Perth, etc. Ltd.*, [1906] 2 Ch. 216, was held to be illegal. A debenture that has been pledged by the company itself, and then redeemed and then reissued, does not stand on equal terms with other debentures of that issue. *Re Tasker & Sons, Lim.*, [1905] 1 Ch. 283; *aff'd*, [1905] 2 Ch. 587. In England where debentures have been pledged by the company and the debt is then paid, the debentures are thereby spent and cannot be reissued. *Re Russian, etc. Co., Ltd.*, [1907] 2 Ch. 540.

<sup>1</sup> *South, etc. Co. v. Wallington*, [1898] A. C. 309.

<sup>2</sup> *South African Territories, Ltd. v. Wallington*, [1897] 1 Q. B. 692.

<sup>3</sup> *Pegge v. Neath, etc. Co.*, [1898] 1 Ch. 183.

<sup>4</sup> *Re Southern, etc. Ry. Co. Ltd.*, [1905] 2 Ch. 78. See also § 765, *infra*.

<sup>5</sup> *Gallagher v. Asphalt Co. etc.*, 65 N. J. Eq. 258 (1903).

<sup>6</sup> *Re Spot Cash Hooper Co.*, 188 Fed. Rep. 861 (1911).

<sup>7</sup> *Lembeck v. Jarvis, etc. Co.*, 70 N. J. Eq. 757 (1906), *aff'g* 69 N. J. Eq. 450. *Union Trust Co. v. Electric Park, etc. Co.*, 163 Mich. 687 (1910). A corporation may pledge its bonds at less than par. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190 (1881). In this case \$34,000 of bonds were pledged to secure an overdue note for \$5,000 and interest. The court said (p. 202) that the pledgee "had unquestionably the right to take as large a 'margin' for his loan as the borrower was willing to grant. Nor can we discern any valid reason why a railroad corporation may not dispose of its bonds by way of pledge as well as of sale, and in the absence of proof that the proceeds of the loan were, with the knowledge of both parties, to be applied to some purpose not authorized by the statute permitting their issue, we can see no reason, as has already been said, why they might not be used as a pledge to secure an indebtedness already existing." A railroad company having



for the payment of other bonds of the same issue.<sup>1</sup> A receiver, if au-

statutory authority to issue bonds to build, operate, and maintain a railroad may pledge its bonds to secure the payment of rent for its business office. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190, 207 (1881). The minority stockholders cannot prevent the directors pledging unissued bonds. *Smiley v. New River Co.*, 77 S. E. Rep. 976 (W. Va. 1913). A corporation may pledge its unissued bonds, and such pledge may be made by the board of directors for present and future debts. *Rawlings v. New Memphis, etc. Co.*, 105 Tenn. 268 (1900). See also *Peck v. New Jersey, etc. R. R.*, 22 Hun, 129 (1880); *Peck v. New York, etc. Ry.*, 85 N. Y. 246 (1881). Bonds made to retire and pay other bonds and debts may be issued as collateral security for such other debts. *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880); *County Court v. Baltimore, etc. R. R.*, 35 Fed. Rep. 161 (1888). Where bonds are authorized for extension purposes, and the mortgage and bonds so provide, they cannot, after the company becomes insolvent, be used as a pledge for old debts where the pledgees are really the directors. *Farmers' L. & T. Co. v. San Diego, etc. Ry.*, 45 Fed. Rep. 518 (1891). Bonds may be pledged by the company for past or new debts. *Lehman v. Tallassee, etc. Co.*, 64 Ala. 567 (1879); *Grand Rapids, etc. R. R. v. Sanders*, 54 How. Pr. 214 (1877); *rev'd* on another point in 17 Hun, 552; *Re Regents', etc. Co.*, L. R. 3 Ch. Div. 43 (1876). A corporation may deposit its bonds as collateral security for notes made for its benefit by its stockholders under a verbal agreement that the bonds shall be held for the protection and security of the makers against liability on the note, their respective interests in the bonds being proportionate with their agreed liability on the note as between themselves. *Reid v. Bank of Mobile*, 70 Ala. 199 (1881); *Rice's Appeal*, 79 Pa. St. 168 (1875), holding that the accommodation indorser for the com-

pany may enforce the bonds to the extent of his liability. The company may pledge its unissued bonds to secure its debts. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). A *bona fide* pledgee of bonds from the company is protected in his pledge. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. But not if the pledge was in bad faith in order to buy the property in cheaply. See § 766, *infra*. The issue of bonds as a pledge and security for an antecedent indebtedness of the company has been held to be contrary to the provisions of the constitution of California relative to fictitious bonds. *Farmers' L. & T. Co. v. San Diego, etc. Ry.*, 45 Fed. Rep. 518 (1891). Where a subscriber to bonds fails to pay, and the corporation then pledges them, it can hold him liable only for the value of the bonds at the time of the pledge, and not the value at a later date. *Cleveland Iron Co. v. Ennor*, 14 N. E. Rep. 673 (Ill. 1888); s. c., *Galena, etc. R. R. v. Ennor*, 116 Ill. 55. Pledgees from the company itself may be *bona fide* holders and will then be protected as such. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. It is legal for a railroad company to pledge its bonds. Power to sell gives power to pledge. *Farmers' L. & T. Co. v. Toledo, etc. Co.*, 54 Fed. Rep. 759 (1893). Where the pledgor is the corporation itself, and by agreement the pledgee is authorized to purchase the bonds at a pledgee's sale upon default, and does so, and the mortgage is foreclosed, an outside creditor cannot question the full title of the pledgee to the bonds, the company itself not objecting. *Farmers', etc. Co. v. Toledo, etc. Co.*, 54 Fed. Rep. 759 (1893). A corporation may pledge its unissued bonds. *Nelson v. Hubbard*, 96 Ala. 238 (1892); *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136 (1895). In *Ex parte Carolina Nat. Bank*, 18 S. C. 289 (1882), the receiver borrowed money to oper-

<sup>1</sup> *Royal Bank, etc. v. Grand Junction R. R.*, 100 Mass. 444 (1868).



thorized by the court, may pledge corporate bonds as collateral to certificates, but the pledgee is not protected as against equities.<sup>1</sup>

The statutes of the state may, however, limit this right, as in Wisconsin, where bonds can be issued at not less than seventy-five cents on the dollar.<sup>2</sup> A constitutional provision against the issue of bonds except for money, labor, or property does not prevent the corporation from pledging its bonds.<sup>3</sup> Where a railroad company deposits its bonds with a trustee as security for its notes, *bona fide* holders of the

ate the railroad and pledged the unissued bonds of the company. He borrowed \$20,000, and pledged \$134,000 of bonds. The pledgee sold them out for \$13,000, and then applied to have the remaining \$7,000 paid out of the income. The court so ordered, the bondholders having failed to object for six years. That a corporation may pledge its unissued stock, see § 465, *supra*.

<sup>1</sup> *Roberts v. Hughes Co.*, 83 Atl. Rep. 807 (Vt. 1912).

<sup>2</sup> Where a statute forbids the issue of bonds at less than seventy-five cents on the dollar, and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. *National, etc. Works v. Oconto, etc. Co.*, 52 Fed. Rep. 29 (1892). Bonds issued in Wisconsin in pledge for a debt of the company, with a stipulation that they should be accounted for at least seventy-five cents on the dollar, are void by statute, and the pledgees cannot maintain a bill in equity to enforce their lien by reason of the bonds. *Pfister v. Milwaukee Electric Ry.*, 83 Wis. 86 (1892). Where a person pledges his stock as additional security to a corporate creditor who has bonds of the company in pledge for the same debt, such pledge of bonds, however, being illegal, the pledgor of the stock cannot compel the creditor to resort to the bonds first; nor, although a fictitious sale of the stock is alleged, can he compel the transferee of the stock to return the stock so that the pledgor may vote it, unless the pledgor pays the amount due. *Hinckley v. Pfister*, 83 Wis. 64 (1892). This case holds also that although bonds are issued illegally, being given in pledge for less than seventy-five cents on the dollar, yet neither the com-

pany, nor an officer, nor a stockholder, can maintain an action for the surrender and cancellation of such bonds, unless they tender the amount for which the bonds were pledged, the company and its officers being in equal wrong with the pledgee. Under the Wisconsin statute it is held that bonds cannot be pledged by a corporation as security for an antecedent debt. *Nichols v. Waukesha, etc. Co.*, 195 Fed. Rep. 807 (1912).

<sup>3</sup> *Illinois T. & S. Bank v. Pacific Ry.*, 117 Cal. 332 (1897). A corporation may pledge its unissued bonds even though the statute prohibits the issue of bonds except for labor, money, or property actually received. *William Firth Co. v. South Carolina, etc. Co.*, 122 Fed. Rep. 569 (1903). The New York statute requiring bonds to be issued at their fair valuation does not prevent their being pledged by the corporation. *In re Waterloo, etc. Co.*, 134 Fed. Rep. 345 (1904). The constitutional provision that bonds shall be issued only for money paid does not prevent the bonds being pledged, and such pledgee on foreclosure may prove up the par value thereof, the amount to be paid him, however, not to exceed the debt. *Western, etc. Co. v. United States, etc. Co.*, 41 Tex. Civ. App. 478 (1906). Although a corporation pledges \$150,000 unissued bonds to secure a corporate debt of \$85,000, yet there is no fictitious issue of bonds. *Dexter v. McClellan*, 116 Ala. 37 (1897). The corporation may pledge its own bonds, even under the constitution of South Carolina, which prohibits the issue of bonds except for labor, money, or property. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569. See also § 766, *infra*.



notes are not affected by the trustee's knowledge of defenses to the notes, and such a trustee does not represent the noteholders in a foreclosure suit.<sup>1</sup> Where underwriters have agreed to purchase the bonds of the corporation at a certain price with a bonus of seventy-five per cent. in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the seventy-five per cent. in stock for that purpose.<sup>2</sup> A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president.<sup>3</sup> Where the trustee of a mortgage illegally accepts some of the bonds as security for a loan to the secretary of the mortgagor, the statute of limitations does not run against the act until the trust company refuses to turn over the bonds or until it sells the bonds to some one else.<sup>4</sup> A pledgee is not entitled to past-due coupons which were detached from the bonds before they were pledged, even though such coupons are entitled to payment in priority to the bonds themselves.<sup>5</sup> A *bona fide* pledgee of bonds is protected to the same extent that *bona fide* purchasers are protected.<sup>6</sup> The power of a corporate agent to sell

<sup>1</sup> Central Trust Co. v. Cincinnati, etc. Ry., 169 Fed. Rep. 466 (1908). See also § 317, *supra*.

<sup>2</sup> Kirkpatrick v. Eastern, etc. Co., 135 Fed. Rep. 146 (1904); *aff'd*, 137 Fed. Rep. 387.

<sup>3</sup> Hook v. Ayers, 63 Fed. Rep. 347 (1894); *s.c.*, 64 Fed. Rep. 660.

<sup>4</sup> MacDonnell v. Buffalo, etc. Co., 193 N. Y. 92 (1908).

<sup>5</sup> Rhawn v. Edge Hill, etc. Co., 201 Pa. St. 637 (1902).

<sup>6</sup> The pledgee of negotiable bonds before maturity, and without notice to him of any defect of title, as collateral security for the loan of money, is entitled to hold such paper, to the extent of his loan, with the same immunities as an ordinary holder of commercial paper taken by purchase in good faith, for value, and before maturity; and it is not material whether the evidence of the principal debt be in negotiable form or not. Thomson-Houston Elec. Co. v. Capitol Elec. Co., 65 Fed. Rep. 341 (1894). Where the cashier of a bank abstracts bonds held in pledge by the bank, and pledges them for his own purposes, and his administrator pays the

debt in order to redeem the bonds, the bank may claim the bonds without repaying what the administrator has paid out. Rinaker v. Dollar, etc. T. Co., 219 Pa. St. 523 (1908). Where a trust company has orally agreed to hold certain bonds for delivery in accordance with certificates issued by another company, and subsequently the trust company loans money to such other company and takes such bonds as security, the holders of the certificates may hold the trust company liable for not protecting the certificates. Hubbard v. Manhattan Trust Co., 87 Fed. Rep. 51 (1898). The burden is on the company to show bad faith in a purchaser of collateral bonds. McCormick v. Unity Co., 239 Ill. 306 (1909). Where an officer and financial agent of a trust company which is trustee of a mortgage pledges the bonds to the trust company for his own debt without the consent of the mortgagor, the bonds not yet having been delivered to the mortgagor or its order, the mortgagor may compel the trust company to return the bonds. Real Estate Trust Co. v. Washington, etc. Ry., 191 Fed.



bonds does not give him power to pledge them even to secure corporate debts, and holders not *bona fide* are not protected.<sup>1</sup> A pledgee of bonds and coupons may collect the same and apply the proceeds on the debt.<sup>2</sup> A pledgee of bonds has a right to have them registered in his own name.<sup>3</sup> Even though a corporation when it pledges its mortgage bonds gives an option to the mortgagee to purchase the bonds, such option cannot be enforced, because a mortgagee is not allowed at the time of making a loan to contract for the purchase of mortgaged property. The rule is different where a day or more intervenes between the two contracts.<sup>4</sup> And a railroad corporation which has pledged its own bonds may afterwards assign the equity of redemption to the pledgee and this assignment may be authorized by the executive committee.<sup>5</sup> Where one company buys out another which has pledged its bonds, the former may redeem the pledge and sell the bonds.<sup>6</sup>

Where the company pledges its own bonds they may be sold upon notice to pay the debt, the same as shares of stock, even though the bonds are promises to pay and the sale has been enjoined in another state.<sup>7</sup> A holder of collateral may enforce his claim in the ordinary

Rep. 566 (1911), aff'g on this point 177 Fed. Rep. 306. Where the trustee of a mortgage, the day after the mortgage is executed, accepts some of the mortgage bonds from the secretary as collateral security for a personal loan to the secretary, and it transpires that such pledge was in breach of trust by the secretary, the trustee is not protected as a pledgee. *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). A pledge of bonds to secure an antecedent debt does not make the pledgee a *bona fide* holder under the New York decisions. *Duncomb v. New York, etc. R.R.*, 84 N. Y. 190, 204 (1881). Pledgees of bonds from the corporation are not *bona fide* holders where their debts were past due at the time of the pledge. *Moore v. Ensley*, 112 Ala. 228 (1896). This decision is in accordance with the New York decisions, but is not the general law of the land. The right of a corporation mortgagor to pay off its mortgage cannot be defeated by the fact that it has pledged some of the bonds and given to the pledgee an option to purchase all of the bonds, full payment by the pledgor of the amount borrowed with interest being tendered. Any other construction would be an illegal clog on the equity

of redemption. *Jarrah, etc. Corp. v. Samuel*, [1902] 2 Ch. 479, [1903] 2 Ch. 1, [1904] A. C. 323.

<sup>1</sup> *Shaw v. Saranac Horse Nail Co.*, 144 N. Y. 220 (1894). See also § 474, *supra*.

<sup>2</sup> *Ritchie v. McMullen*, 79 Fed. Rep. 522, 551 (1897). A pledgee of bonds secured by a mortgage which is foreclosed may accept the amount going to such bonds and sue the pledgor for the balance. *Warburton v. Trust Co. of America*, 182 Fed. Rep. 769 (1910).

<sup>3</sup> *Ritchie v. Burke*, 109 Fed. Rep. 16 (1901).

<sup>4</sup> *Samuel v. Jarrah, etc. Corp. Ltd.*, [1904] A. C. 323.

<sup>5</sup> *Bibber-White Co. v. White River, etc. Co.*, 175 Fed. Rep. 470 (1909).

<sup>6</sup> *Broomall v. North Am., etc. Co.*, 70 W. Va. 591 (1912).

<sup>7</sup> *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492 (1889), holding, however, that a sale by a pledgee after insolvency proceedings are commenced gives the purchaser none except equitable rights. *Cf. Jerome v. McCarter*, 94 U. S. 734, 739 (1876). A broker in selling his customer's stock to repay the former's advances on default of the customer to pay may sell all the stock and need not confine himself to the amount necessary to



way by judgment and execution against the debtor without any deduction for his collateral.<sup>1</sup> A pledgee of corporate bonds from the corporation itself cannot be enjoined from selling them, even though the company has passed into the hands of the bankruptcy court.<sup>2</sup> The supreme court of Missouri holds, however, that mortgage bonds issued by a corporation as security for its own debt cannot be sold by the pledgee, but can only be held until paid or the mortgage foreclosed.<sup>3</sup> He cannot be enjoined from selling the same, although dissolution proceedings are pending.<sup>4</sup> Parties holding bonds as collateral to corporate debts cannot be enjoined from selling them out during a voluntary dissolution.<sup>5</sup> Where stock-brokers have pledged their customer's securities and become bankrupt, the bankruptcy court may enjoin the pledgees from selling the securities pending an investigation as to the right of the customer to redeem.<sup>6</sup> The appointment of a receiver does not affect the rights of a pledgee from the corporation prior to such appointment. The pledgee may sell.<sup>7</sup> But where corporate bonds not secured by a mortgage are by themselves pledged by the corporation to secure its debt, and the corporation becomes insolvent, the bankruptcy court will enjoin a sale of the pledge because it merely adds to the debt without the sale of any real security. Such a corporate creditor is an un-

repay such advances, there being but one certificate of stock involved. *Stubbs v. Slater*, [1910] 1 Ch. 195.

<sup>1</sup> *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372 (1893); *Lewis v. United States*, 92 U. S. 618 (1875). See also § 476, *supra*.

<sup>2</sup> *Re Ironclad Mfg. Co.*, 192 Fed. Rep. 318 (1912).

<sup>3</sup> Mortgage bonds issued by a corporation as security for its note are not a pledge but merely determine the extent to which the creditor may participate in the proceeds of the mortgage security. Hence, the usual collateral note authorizing a pledgee to sell the collateral at any time at public or private sale or on an exchange, and purchase it himself, does not apply to bonds so issued except where the bonds have passed into outside *bona fide* hands, especially where in a sale on the exchange the nature of the bonds and the name of the seller are not disclosed and the real purpose was for the so-called pledgee to get the title to the bonds. A subsequent foreclosure sale where the former pledgee of the bonds purchased must also be considered, and the so-called

sale on the exchange will be treated as a void sale. *Dibert v. D'Arcy*, 154 S. W. Rep. 1116 (Mo. 1913).

<sup>4</sup> *Matter of Binghamton Gen. El. Co.*, 143 N. Y. 261 (1894).

<sup>5</sup> *Re Binghamton Gen. Elec. Co.*, 143 N. Y. 261 (1894). A corporate creditor who takes negotiable corporate bonds as collateral security, and then sells the bonds to himself for a nominal consideration, cannot, under the Connecticut statutes, file a claim for the par value of the bonds and also for his claim, less the amount realized at the sale, the bonds not being secured by mortgage. *Re Waddell-Entz Co.*, 67 Conn. 324 (1896).

<sup>6</sup> *Re Carothers & Co.*, 192 Fed. Rep. 691 (1912).

<sup>7</sup> *Guaranty Trust Co. v. Galveston City R. R.*, 87 Fed. Rep. 813 (1898); *National, etc. Bank v. Benbrook, etc. Co.*, 27 S. W. Rep. 297 (Tex. 1894). A trust company as pledgee of second-mortgage bonds may sell them on notice, even though it is the trustee of the first mortgage and even though a receiver is in charge. *Guaranty Trust Co. v. Galveston City R. R.*, 87 Fed. Rep. 813 (1898).



secured creditor.<sup>1</sup> Where an Oregon corporation pledges its bonds in California to secure notes payable in California, the law of California applies as to the mode of selling such bonds on default of the pledgor.<sup>2</sup> A pledgee of bonds who buys them in at his own sale as pledgee still holds them in pledge.<sup>3</sup> A pledgor of bonds cannot maintain a bill in equity against a pledgee for fraudulently selling the bonds and buying them himself, inasmuch as the damages can be fixed in a suit at law.<sup>4</sup> Even though the pledgee of bonds purchases the property at foreclosure sale and turns in the bonds in payment, he still holds the property as collateral and not as absolute owner.<sup>5</sup> Where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage.<sup>6</sup> A creditor of a corpora-

<sup>1</sup> *Re Matthews*, 188 Fed. Rep. 445 (1911). Where a corporation pledges as security for its note its unsecured bonds, the latter debt cannot be proved in bankruptcy. *Matthews v. Knickerbocker Trust Co.*, 192 Fed. Rep. 557 (1911).

<sup>2</sup> *Morris, etc. v. East Side Ry.*, 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13.

<sup>3</sup> *Duncomb v. N. Y. etc. R. R.*, 84 N. Y. 190, 204 (1881). Where the trustee of a mortgage loans money to the mortgagor and takes part of the bonds as security, and then at the request of the mortgagor sells the bonds at public sale and buys them in, it cannot enforce the bonds for their full amount, but only to the extent of the debt secured, and upon payment must deliver up the bonds for cancellation. *Knickerbocker, etc. Co. v. Penacook, etc. Co.*, 100 Fed. Rep. 814 (1900). See also § 479, *supra*.

<sup>4</sup> *Dickinson v. Kempner*, 193 Fed. Rep. 204 (1912).

<sup>5</sup> *Greenhall v. Carnegie Trust Co.*, 180 Fed. Rep. 812 (1910).

<sup>6</sup> *Bracken v. Atlantic T. Co.*, 167 N. Y. 510 (1901). Where trustees hold stock as security for various debts of various parties, the stock to be

sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustees to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price for the benefit of himself and the other trustees. The sale will be set aside. *Jenkins v. Hammerschlag*, 38 N. Y. App. Div. 209 (1899). Where a corporation owns all of its bonds excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet if that settlement was caused by misrepresentations as to the value of the securities, he is not bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be



tion who holds collateral security for his debt cannot be compelled to exhaust such security before resorting to the general assets of the corporation for payment.<sup>1</sup> Where a corporate creditor has collateral security he may participate in the corporate assets as though he had no security, and afterwards realize what he can from the security, except that any surplus over and above his claim must, of course, be paid over to the representative of the insolvent corporation.<sup>2</sup>

allowed to participate the same as the bondholder who did not turn in his bonds. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). Where bonds are deposited with the trust company to secure a loan from the latter under an agreement by which the pledgor might sell the bonds and apply the proceeds on the loan, a misrepresentation by a clerk of the trust company to a purchaser that the bonds were first-mortgage bonds may render the trust company liable. *Polhemus v. Holland T. Co.*, 61 N. J. Eq. 654 (1900). See also § 317, *supra*.

<sup>1</sup> *Doe v. Northwestern Coal, etc. Co.*, 78 Fed. Rep. 62 (1896). See also § 476, *supra*. If there are two pledgees of bonds from the corporation, and after one is paid in full from the purchase price on foreclosure sale there remains a surplus, such surplus may be applied to the debt of the other pledgee. *Georgetown Water Co. v. Fidelity, etc. Co.*, 117 Ky. 325 (1904). Under the New Jersey statutes a creditor holding collateral must exhaust his collateral and then prove his claim for the balance. *Butler v. Commonwealth, etc. Co.*, 74 N. J. Eq. 423 (1908).

<sup>2</sup> A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full. *Merrill v. National Bank, etc.*, 173 U. S. 131 (1899). The pledgee is entitled to participate in the distribution of the general assets without his security being taken into consideration, except

that he shall not receive more than what is due him, and if he holds mortgage bonds as security his debt is figured at the amount actually due him and not on the par value of the bonds held as security. *Hitner v. Diamond, etc. Co.*, 176 Fed. Rep. 384 (1910). The pledgee may participate in the general fund as though he had no security. *Harrigan v. Gilchrist*, 121 Wis. 127 (1904). A pledgee of bonds in participating in the distribution of the proceeds realized at foreclosure sale is not limited to an amount of bonds equal to the debt secured, but is entitled to "prove all the bonds and receive a dividend thereon to an amount not exceeding the amount of the debts for which they were held as collateral." *Duncomb v. N. Y., etc. R. R.*, 84 N. Y. 190, 206 (1881); *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893); *rev'd*, on another point in *Marbury v. Kentucky, etc. Co.*, 62 Fed. Rep. 335 (1894). See also § 476, *supra*. A creditor of an insolvent national bank is entitled to prove the whole amount of the claims against it held by him, without reference to the collateral held to secure such claims. *Merrill v. First Nat. Bank*, 75 Fed. Rep. 148 (1896). Although a creditor of a corporation holds collateral security, nevertheless, upon the insolvency of the corporation, he may participate in the assets as though he did not have the collateral security, and may realize and apply the collateral security in addition to his proportionate part of the assets, to the extent, however, only of the full amount of his debt. *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372 (1893). A pledgee of bonds from the corporation is entitled to full dividends upon the foreclosure of the mortgage until the amount due on the pledge has been



A mechanic's lien on the plant of a gas company may be waived by taking bonds of the company as collateral security, where the bonds

fully paid. *Cochran v. Anglo-American, etc. Co.*, 69 Hun. 168 (1893). The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral, since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied. *New York Security, etc. Co. v. Lombard Inv. Co.*, 73 Fed. Rep. 537 (1896). Mortgage bondholders may file their claims as general creditors in addition to realizing what they can from their mortgage. A pledgee of mortgage bonds from the corporation itself, after realizing what he can from the bonds, may file a claim as a general creditor, not as a bondholder, but on his original claim. *Pattberg v. Lewis, etc. Bros.*, 55 N. J. Eq. 604 (1897). Where a corporation has given bonds as collateral security for certain debts, the assets of the corporation upon insolvency should be marshaled, the bonds being estimated at their true value, and the creditor allowed to pro-rate with unsecured creditors upon at least the balance of his claim. *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624 (1893). In Nebraska, the court, after reviewing the conflicting rules in different states, held that, where a creditor held collateral, he must deduct from his claim all that he realizes from the collateral before he can get a dividend, and must also deliver up his collateral to the receiver. *State v. Nebraska Sav. Bank*, 40 Neb. 342 (1894). Under the Connecticut statutes an insolvent corporation is placed in a receiver's hands for the benefit of all creditors, and a person holding security must stand on his security or else come in only for the excess of his claim above the value of the security. *Re Waddell-Entz Co.*, 67 Conn. 324 (1896). Under the statutes of Connecticut a pledgee is limited to a dividend on the unpaid portion of his claim unless he waives

his security altogether. *In re Greeley & Co.*, 70 Conn. 494 (1898). Where a corporation assumes a mortgage and then becomes insolvent, the mortgagor is entitled to a dividend from its assets on the whole mortgage debt existing at the time of such assumption, even though the mortgagor has foreclosed and realized a part of the debt. *Matter of Simpson*, 36 N. Y. App. Div. 562 (1899); *aff'd*, 158 N. Y. 720. A pledgee of bonds from the corporation itself is entitled to full dividends from the general funds of the corporation upon its insolvency in addition to the special dividend upon the bonds so pledged. *Matter of Snyder*, 29 N. Y. Misc. Rep. 1 (1899).

It has been held that where the company pledges its bonds, the pledgee can prove up against general assets his debt only and not the par value of the bonds. *Re Blakely, etc. Co.*, L. R. 8 Eq. 244 (1869); *Newport, etc. Co. v. Douglass*, 12 Bush (Ky.), 673 (1877). The bonds of a corporation not secured by mortgage, when given as collateral security for the debt of the company, do not entitle the creditor to any greater dividend in the assets of the company, upon its insolvency and winding up, than he would have if he did not hold such collateral security. *International Trust Co. v. Union Cattle Co.*, 3 Wyo. 803 (1892). The weight of authority holds, however, that mortgage bonds issued as collateral security have the right to participate in the benefits of the foreclosure to the extent of their par value. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190 (1881); *Peck v. New York, etc. Ry.*, 85 N. Y. 246 (1881); *Re Regents', etc. Co.*, L. R. 3 Ch. D. 411 (1875); *Jerome v. McCarter*, 94 U. S. 734, 740 (1876); *Third Nat. Bank v. Eastern R. R.*, 122 Mass. 240 (1877); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885). In foreclosure the pledgee of bonds from the corporation is the owner to the extent of his loan. *Hayden v. Lincoln City Elect. Ry.*, 43 Neb. 680 (1895). See also § 476, *supra*.



recite that they are a first mortgage.<sup>1</sup> The fact that the bonds pledged by the corporation sell for very little at a pledgee's sale does not invalidate the sale.<sup>2</sup> But any fraud whereby the bonds are purposely sacrificed will invalidate the sale.<sup>3</sup> Purchasers of bonds at a pledgee's sale, though the pledge was by the company itself, and the price at such sale very low, may enforce such bonds at their par value.<sup>4</sup> Where bonds are issued by a corporation to a director or officer for a certain purpose, he cannot retain them on the ground that the company owes him money;<sup>5</sup> and where a corporation delivers bonds to a creditor to sell and apply on his debt, the bonds are good though he fraudulently disposes of them.<sup>6</sup> Where bonds are deposited as collateral security to notes, and before the notes are due the bonds are stamped on their face as subordinate to a junior lien, the indorsers of the notes are released.<sup>7</sup>

A pledge of bonds by one person to another is similar to a pledge of stock, a subject which is fully considered elsewhere.<sup>8</sup> A sale of bonds as collateral security, in violation of an agreement as to the notice to be given, does not release a surety on the note secured by the bonds, but discharges him only to the extent of the actual value of the bonds.<sup>9</sup> Where a pledgee's debt has really been paid and yet he retains the stock,

<sup>1</sup> Bristol, etc. Co. v. Bristol Gas, etc. Co., 99 Tenn. 371 (1897).

<sup>2</sup> Wheelwright v. St. Louis, etc. Transp. Co., 56 Fed. Rep. 164 (1893). See also § 850, *infra*.

<sup>3</sup> James v. Railroad Co., 6 Wall. 752 (1867). See Minneapolis T. Co. v. Menage, 73 Minn. 441 (1898); also § 766, *infra*.

<sup>4</sup> Jerome v. McCarter, 94 U. S. 734 (1876). Where a corporation pledges its bonds and then assigns its equity to another party, and the latter buys the bonds at a sale by the first pledgee, the latter may enforce the bonds and collect unpaid interest. Union Trust Co. v. Electric Park, etc. Co., 163 Mich. 687 (1910). The purchaser of bonds at a pledgee's sale may enforce such bonds for their full par value. Wade v. Chicago, etc. R. R., 149 U. S. 327 (1893). Where the pledgee sells bonds held as collateral and buys them in, he may enforce them for their full par value instead of to the extent of only his claim. Atlantic Trust Co. v. Woodbridge, etc. Co., 86 Fed. Rep. 975 (1897).

<sup>5</sup> Greenville Gas Co. v. Reis, 54 Ohio St. 549 (1896).

<sup>6</sup> Persse v. Atlantic, etc. Tunnel Co., 5 Colo. App. 117 (1894).

<sup>7</sup> Nassau Bank v. Campbell, 74 Hun, 616 (1893); reversed on a question of evidence in 147 N. Y. 694.

<sup>8</sup> See ch. XXVI, *supra*. *Bona fide* pledgees have the same rights as a *bona fide* purchaser to the extent of their pledge. Allen v. Dallas, etc. R. R., 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. Where a bank receives a pledge of bonds in good faith its title is good, although it advanced money on the bonds by certifying checks, contrary to the national banking act. Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240 (1892). A pledgee of bonds from an individual pledgor may prove the entire amount of the collaterals, but can recover no surplus over and above the amount of his debt or advances with proper costs of suit. The pledgor takes the remainder. Morton v. New Orleans, etc. Ry., 79 Ala. 590 (1885).

<sup>9</sup> Vose v. Florida R. R., 50 N. Y. 369 (1872).



and by reason thereof the pledgor is unable to enter a reorganization, the pledgor may recover the actual damages sustained by him, but such value must be shown by him; otherwise it will be inferred that it had little or no value.<sup>1</sup> A pledgee of bonds is bound to exercise due diligence in collecting the same and is entitled to be reimbursed for his expense, including attorney's fees.<sup>2</sup> A pledgee of bonds may agree that upon a reorganization their proportionate part of the expense shall be a lien on such bonds.<sup>3</sup> The question of the ownership of bonds as between a pledgor and pledgee and subsequent holders cannot be contested in the foreclosure of the mortgage securing the same prior to the decree, but on the distribution of the proceeds of the foreclosure sale that question can then be litigated.<sup>4</sup>

§ 764. *Forged bonds — Priorities among bonds — Incomplete bonds — References to the mortgage — Variance between bond and mortgage — Purposes of the issue — Certification and registration of bonds.* — If any material part of a bond is forged the bond is void.<sup>5</sup> An alteration of the number, however, is immaterial and does not affect the bond itself.<sup>6</sup>

Where the treasurer of a charitable corporation forges a resolution

<sup>1</sup> *Griggs v. Day*, 158 N. Y. 1 (1899). The preceding case arose out of a controversy between a contractor and the chief stockholder and promoter who advanced money. As to the rights and duties of a pledgee on a reorganization, see also *Griggs v. Day*, 21 N. Y. App. Div. 442 (1897), reversed in 158 N. Y. 1 (1899); s. c., 136 N. Y. 152, 162 (1892). A pledgor of bonds may take part in the purchase at the reorganization without any obligations towards the pledgee as to such purchase. *Brown v. Anderson*, 104 Ga. 30 (1898). See also *Field v. Sibley*, 74 N. Y. App. Div. 81 (1902); aff'd, 174 N. Y. 514.

<sup>2</sup> *Hanover, etc. Bank v. Brown*, 53 S. W. Rep. 206 (Tenn. 1899).

<sup>3</sup> *Field v. Sibley*, 74 N. Y. App. Div. 81 (1902); aff'd, 174 N. Y. 514.

<sup>4</sup> *Sioux City, etc. Ry. v. Manhattan T. Co.*, 92 Fed. Rep. 428 (1899).

<sup>5</sup> Bonds containing a forged seal of the corporation and a forged certificate by the trustee are invalid and void, and not enforceable. A consolidated road is not liable therefor. *Maas v. Missouri, etc. Ry.*, 83 N. Y. 223 (1880). See also §§ 365-370, *supra*. But it is no defense to an action on

coupons that certain forged bonds are out. *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888).

<sup>6</sup> In *State v. Cobb*, 64 Ala. 127, 158 (1879), the court said: "The change or mutilation of the number would be a mere change or mutilation of a mark, placed upon the bond, it may be, by the maker, or the indorser, or it may be by any holder, for the convenience and protection of the one or the other." The alteration of the number on a bond does not destroy its negotiability, and a *bona fide* purchaser of it from a thief is protected. The number is merely for convenience in identifying the bond, the same as the private mark of the owner upon it would be. *Commonwealth v. Emigrant, etc. Bank*, 98 Mass. 12 (1867), citing *Smith v. Ill. etc. R. R. (N. Y. Super. Ct.)*. To same effect, *Elizabeth v. Force*, 29 N. J. Eq. 587 (1878); *Birdsall v. Russell*, 29 N. Y. 220 (1864). Even though the thief of negotiable railroad bonds changes the numbers on the bonds, yet the *bona fide* purchaser is protected. Such an alteration is an immaterial one. *Wylie v. Missouri Pac. Ry.*, 41 Fed. Rep. 623 (1890).



of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable it has recourse against the broker by reason of the stock exchange rules which renders liable a broker who witnessed signatures to transfers of stock or bonds.<sup>1</sup>

The bonds may be incomplete, in that the payee or place of payment may be omitted. In such cases the validity and enforceability of the bond depend on the extent of the omission and the facts connected with the case.<sup>2</sup> A registered municipal bond with coupons attached is negotiable, where the name of the payee is left blank on the face of the bond, even though in books kept for that purpose the name of the registered owner is entered; hence a purchaser in good faith of such a bond is protected, although the bond was stolen. A *bona fide* pledgee is likewise protected.<sup>3</sup>

Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no *bona fide* purchaser of them.<sup>4</sup> This question, however, as well as that of registration of

<sup>1</sup> Clarkson Home v. Missouri, etc. R. R., 182 N. Y. 47 (1905).

<sup>2</sup> Railroad bonds may be negotiable though payable to a blank person. White v. Vermont, etc. R. R., 21 How. 575 (1858). Although the name of the payee is left blank in a debenture, yet if there is a corporate contract to deliver debentures to the holder of them, they are enforceable. Davis v. Martin, [1894] 3 Ch. 181. A bond incomplete in that the payee is left blank may be filled in by any holder and sued upon by him, where the proceeds from the sale thereof went to the company and the legislature has ratified the bond. Chapin v. Vermont, etc. R. R., 74 Mass. 575 (1857); Hubbard v. New York, etc. R. R., 36 Barb. 286 (1862). Where in a railroad bond the place of payment is left blank, with power to the president to fill it in, until so filled in the bond is not negotiable, and a thief can give no title to a purchaser. Ledwich v. McKim, 53 N. Y. 307 (1873).

Where the place of payment is left blank, with authority to the president to fill it in, but he does not fill it in, and the bonds are stolen from the company, they are not negotiable. Jackson v. Vicksburg, etc. R. R., 2 Woods, 141 (1876); s. c., 13 Fed. Cas. 257. Where the bonds state that the president is authorized to fix the place of payment, and the bonds are stolen from the company before he does so, they are not negotiable nor collectible. Parsons v. Jackson, 99 U. S. 434 (1878). In the case of a note by a firm the date may be filled in by any holder. Michigan Bank v. Eldred, 9 Wall. 544 (1869). Municipal bonds payable "to —, his executors, administrators, and assigns," are negotiable. Dutchess County Ins. Co. v. Hachfield, 1 Hun, 675 (1874).

<sup>3</sup> Manhattan Sav. Inst. v. N. Y., etc. Bank, 170 N. Y. 58 (1902). See also §§ 815, 816, *infra*.

<sup>4</sup> Maas v. Missouri, etc. Ry., 83 N. Y. 223 (1880). Where a certificate



bonds, is considered elsewhere.<sup>1</sup> Where bonds must be approved by a state commissioner before being issued, notes convertible into such bonds upon such approval are not a lien as they would be if the bonds themselves had been issued.<sup>2</sup> Coupons detached from the bond before the bond is certified by the trustee as required by its terms are not entitled to the benefit of the mortgage.<sup>3</sup> Even though the mortgage has been discharged, yet if the trustee of the mortgage still has the bonds and the president certifies and embezzles them, it is liable to the corporation issuing the bonds.<sup>4</sup> Where the trustee of the mortgage is directed by the mortgagor to deliver certain bonds to a certain party and by error he delivers them to an unauthorized agent of the party, he is liable in equity or in law to the real owner and the statute of limitations at law applies but does not begin to run until the real owner has demanded the bonds.<sup>5</sup> The vendor of bonds does not impliedly warrant that they were legally issued,<sup>6</sup> nor does he guarantee payment.<sup>7</sup>

The numbers on the bonds do not give one bond any priority as against other bonds.<sup>8</sup> Even though a mortgage is partly a purchase money

of stock provides on its face that it must be signed by a transfer agent the corporation is not liable on a certificate to which the transfer agent's name had been forged by an employee of the corporation. *Dollar, etc. Co. v. Pittsburg, etc. Co.*, 213 Pa. St. 307 (1906). Municipal bonds stolen and negotiated before they were legally issued by the municipality are void, and even a *bona fide* purchaser cannot enforce them. *Germania Savings Bank v. Suspension Bridge*, 73 Hun, 590 (1893).

<sup>1</sup> §§ 814, 815, *infra*.

<sup>2</sup> *Augusta T. Co. v. Federal T. Co.*, 153 Fed. Rep. 157 (1907).

<sup>3</sup> *Holland T. Co. v. Thomson-Houston El. Co.*, 170 N. Y. 68 (1902), *aff'd* 62 App. Div. 299.

<sup>4</sup> *Washington, etc. Ry. v. Real Estate, etc. Co.*, 177 Fed. Rep. 306 (1910); *s. c.*, 191 Fed. Rep. 566; holding also that where a trust company is trustee of the corporate mortgage and receives the bonds as trustee to be certified as called for, and its president uses them fraudulently upon which to borrow money from the trust company, the trust company is liable to the corporation therefor, and that where the president of a trust company borrows money from it and deposits as security rail-

road bonds which had been deposited with the trust company as trustee by the railroad company, the railroad company may maintain a suit to have such bonds canceled, even though the president of the trust company was also director and secretary of the railroad company. Where an officer and financial agent of a trust company which is trustee of a mortgage pledges them to the trust company for his own debt without the consent of the mortgagor, the bonds not yet having been delivered to the mortgagor or its order, the mortgagor may compel the trust company to return the bonds. *Real Estate Trust Co. v. Washington, etc. Ry.*, 191 Fed. Rep. 566 (1911), *aff'd* on this point 177 Fed. Rep. 306.

<sup>5</sup> *Bowes v. Cannon*, 50 Colo. 262 (1911).

<sup>6</sup> *Otis v. Cullum*, 92 U. S. 447 (1875). See also § 366, *supra*.

<sup>7</sup> *Ketchum v. Duncan*, 96 U. S. 659 (1877).

<sup>8</sup> "The bonds all bear the same date, and fall due on the same day. Bond number one has therefore no advantage over any other bond, and no presumptions are to be indulged in its favor." *Stanton v. Alabama, etc. R. R.*, 2 Woods, 523 (1875); *s. c.*, 22 Fed. Cas. 1070. The fact that bonds are numbered does not give priority



mortgage in that some of the bonds are issued in payment for a railroad which comes under the mortgage, yet the holders of such bonds are not entitled to priority over the other bonds.<sup>1</sup> Nor does the fact that they were issued at different times give any prior right to payment of those first issued.<sup>2</sup> All the bonds are conclusively presumed to have been issued at their date.<sup>3</sup> A mortgage deed of trust is a lien from the date of its record, even though the bonds are not issued until after other liens have attached.<sup>4</sup> All outstanding bonds in *bona fide* hands are

in payment to one bondholder as against another. *Commonwealth v. Susquehanna*, etc. R. R., 122 Pa. St. 306, 321 (1888). As to the numbers of the shares in England, the court said, in *Inds case*, L. R. 7 Ch. 485, "the numbers of the shares are simply directory for the purposes of enabling the title of particular persons to be traced."

<sup>1</sup> *Murray v. Farmville*, etc. R. R., 101 Va. 262 (1903).

<sup>2</sup> There is no priority of one bond over another by reason of some being issued later than others. The lien of the bond dates from the recording of the mortgage. *City of Lincoln v. Lincoln St. Ry.*, 67 Neb. 469 (1903); *Reed's Appeal*, 122 Pa. St. 565 (1888). Each bond shares *pro rata* in the distribution. *Hodge's Appeal*, 84 Pa. St. 359 (1877). See also § 881, *infra*, on the subject of distribution. In Cape Colony, bonds secured by mortgage have preference only from the date when they are issued, and not from the date of the mortgage. *Standard, etc. v. Heydenrych*, [1907] App. Cas. 336.

<sup>3</sup> The purchasers of bonds bearing the same date as the mortgage may rely on the fact that they were made and issued simultaneously, and that there was no intervening time for the liens of material-men to attach. *Nelson v. Iowa*, etc. R. R., 8 Am. Ry. Rep. 82 (Iowa, 1875). In *Reynolds v. Manhattan T. Co.*, 83 Fed. Rep. 593 (1897), the court held that where the mortgage has been delivered to the trustee, but no bonds have yet been issued, a mechanic's lien may be obtained at any time prior to the issue of the bonds. Engraved bonds issued in lieu of temporary lithographed bonds are

legal. *Illinois T. & S. Bank v. Pacific Ry.*, 117 Cal. 332 (1897). In the case *International, etc. Co. v. Davis*, etc. Co., 70 N. H. 118 (1900), it was held that an attachment subsequent to a mortgage, but before all the mortgage bonds had been issued, takes precedence as regards bonds issued after such attachment. Engraved bonds substituted for temporary printed bonds are good. *McKee v. Vernon County*, 3 Dill. 210 (1874); s. c., 16 Fed. Cas. 188. Corporate bonds have the same rights as though issued at the time of the execution of the mortgage. *Roberts v. Hughes Co.*, 83 Atl. Rep. 807 (Vt. 1912).

<sup>4</sup> *Central Trust Co. v. Bartlett*, 57 N. J. L. 206 (1894). A mortgage operates from the time of recording, even though the bonds are issued thereafter, and during the intermediate time other incumbrances are made. This applies to chattels as well as real estate covered by the mortgage. *Camden, etc. Co. v. Burlington, etc. Co.*, 33 Atl. Rep. 479 (N. J. 1895). "It is the rule, as between bondholders and persons acquiring liens on the mortgaged property subsequent to the recording of the mortgage, that the rights of the *bona fide* holders of the bonds are to be determined as if they had been acquired at the date of the recording of the mortgage securing them." *Belden v. Burke*, 72 Hun, 51, 75 (1893), reversed on another point in 147 N. Y. 542. Bonds secured by a mortgage duly recorded have a preference over a subsequent mechanic's lien, even though the bonds were issued after the mechanic's lien accrued. *Rauch v. Island Park Assoc.*, 226 Pa. St. 178 (1910). Where a mortgage is executed and recorded before other liens



conclusively presumed to have been issued on the date of the recording of the mortgage.<sup>1</sup> The bonds should be of the same date as the mortgage, but a variance in their dates may be explained by parol evidence.<sup>2</sup> Even though the entire amount of bonds provided for by the mortgage is never issued, yet the holders of the bonds which are issued are entitled to payment in full before anything is paid to judgment creditors and other creditors.<sup>3</sup> The bond and mortgage may provide for the priority of one of the bonds over another part. Such priorities are matters of contract and are legal.<sup>4</sup>

accrued, the mortgage bonds have precedence, even though they were not issued until after such other liens had accrued. *Central T. Co. v. Bodwell, etc. Co.*, 181 Fed. Rep. 735 (1910). An attachment levied after a mortgage has been recorded has no priority over the mortgage bonds, although the latter were issued after the attachment. *Re Sunflower, etc. Co.*, 183 Fed. Rep. 834 (1911). In Pennsylvania a mechanic's lien is entitled to priority over bonds of a private corporation issued for an antecedent debt after the mechanic's lien although secured by a mortgage executed before. *Re Clark, etc. Co.*, 173 Fed. Rep. 658 (1909). A mechanic's lien may have priority over mortgage bonds previously authorized, but subsequently issued to persons knowing of such mechanic's lien. *Porch v. Agnew Co.*, 70 N. J. 328 (1905).

<sup>1</sup> Quoted and approved in *Broomall v. North Am. etc. Co.*, 70 W. Va. 591 (1912). *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); *aff'd, sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899).

<sup>2</sup> Although the bonds are dated October 1, 1871, yet parol evidence may show that these are the bonds which are secured by the mortgage. *Butler v. Rahm*, 46 Md. 541 (1877). The date of the mortgage is presumed to be the date when it was acknowledged and not the date of the mortgage itself. *Guaranty, etc. Co. v. Galveston, etc. R.R.*, 107 Fed. Rep. 311 (1901). A mortgage is a first lien ahead of a lease, even though they were executed at the same time, it being shown that the mortgage became due ten years before the lease was to expire and that the lease provided for the execution

of the mortgage. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899).

<sup>3</sup> *East Tennessee, etc. Co. v. London, etc. Co.*, 106 Tenn. 41 (1900). In enforcing a liability of directors for debts in excess of the capital stock, mortgage bonds, signed but not actually issued, are not counted. *Webster v. Whitworth*, 63 S. W. Rep. 290 (Tenn. 1901). In the distribution of the assets the unissued bonds of the corporation are not considered. *Badger v. Sutton*, 30 N. Y. App. Div. 294 (1898).

<sup>4</sup> There may be a preference to certain bonds as against others of the same issue, all secured by the same mortgage. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885); *McMurray v. Moran*, 134 U. S. 150 (1890). Although part of the bondholders purchased by reason of fraudulent representations of brokers to whom the other bondholders had sold part of their holdings, this does not give any priority to the former over the latter. *Coe v. East, etc. R.R.*, 52 Fed. Rep. 531 (1892). In *Commonwealth v. Chesapeake, etc. Canal Co.*, 32 Md. 501 (1870), various complicated questions as to the priority of different classes of bonds were passed upon. In Massachusetts a statutory provision forbids the issue of bonds redeemable in their numerical order. See L. 1891, ch. 382. A final decree in a foreclosure suit not appealed from may, so far as it awards priority to some of the bonds as against others, be subsequently modified to conform to a decision of the supreme court of the United States in another case, and holding differently as to such



First-mortgage bonds have priority over second-mortgage bonds, although issued after the latter.<sup>1</sup>

Where the bonds refer to a mortgage securing them, the mortgage becomes thereby a part of the bond and is construed with it.<sup>2</sup> After

priority. The second case was for the sole purpose of determining what bonds were legal. *Moran v. Hagerman*, 64 Fed. Rep. 499 (1894). Where by the charter the stockholders are liable for all debts and they buy some of the company's bonds, the remaining bonds will be paid first out of the proceeds of foreclosure. *Shaw v. Saranac Horse Nail Co.*, 78 Hun, 7 (1894); aff'd, on another point in 144 N. Y. 220. In general, all the bonds share equally in the proceeds of a foreclosure sale; but where the corporation agreed with the first purchasers to issue only \$10,000 per mile, although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers of bonds have been paid. *McMurray v. Moran*, 134 U. S. 150 (1890). The fact that coupons are payable in the order of their numbers and only from money as it comes in, does not render the bonds or coupons illegal, and the officers are not personally liable therefor. *Vokes v. Eaton*, 119 Ky. 913 (1905). Even though the owner of a majority of the bonds agrees that a certain debt shall come in ahead of the mortgage, the person entitled to the benefit of such agreement cannot intervene in a foreclosure suit by minority bonds, inasmuch as they are not bound. *First Nat. Bank v. Wyman*, 16 Colo. App. 468 (1901). See § 766c, *infra*. Even though a majority of debenture holders have the power to modify the agreement they have no power to direct that the mortgaged property be sold and the proceeds applied to a purchase of such of the debentures as are offered at the cheapest price. *Re N. Y. Taxicab Co.*, 107 L. T. Rep. 813 (1912).

<sup>1</sup> *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880). First debentures have priority over second de-

bentures, although some of the first are issued after the second are out. *Lister v. Lister & Son*, 69 L. T. Rep. 826 (1893). A mortgage by a purchasing company takes precedence over an order of the selling company to pay a certain amount of money out of the sale of the bonds of the selling company. *Roberts v. Central T. Co.*, 128 Fed. Rep. 882 (1904).

<sup>2</sup> Bondholders are bound to take notice of what is indorsed and "of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage." *Stanton v. Alabama*, etc. R. R., 2 Woods, 523 (1875); s. c., 22 Fed. Cas. 1070; *Morton v. New Orleans*, etc. R. R., 79 Ala. 590 (1885). Where bonds refer to a mortgage, bondholders must take notice of the terms of the mortgage. *Pennsylvania Steel Co. v. New York City Ry.*, 189 Fed. Rep. 661 (1911); modified, 198 Fed. Rep. 747. The mode of distribution prescribed by the mortgage binds the bondholders. *Low v. Blackford*, 87 Fed. Rep. 392 (1898). A provision in a mortgage for the principal sum becoming due on non-payment of interest applies to the bonds, even though such provision is not contained in the bonds themselves. The two instruments are construed as one. *Security, etc. Co. v. New Jersey, etc. Co.*, 57 N. J. Eq. 603 (1899). The bond is in fact a part of the mortgage and they constitute one transaction, and hence if the bond recites that the trustee has retained certain of the bonds to meet a prior lien, the mortgagor cannot compel the trustee to deliver those bonds to a purchaser from the mortgagor. *Moses v. Philadelphia, etc. Co.*, 127 Ala. 433 (1900). Individual stockholders may intervene in a trustee's foreclosure suit and attack the validity of certain bonds on the ground that such bonds had been issued for construction work which had not been finished, and had



a coupon has been detached it is no longer subject to conditions contained in the bond or mortgage.<sup>1</sup> Statements and representations in the bonds are controlled by explanations contained in the mortgage, but if the terms conflict the bond controls, excepting that the mortgage controls as to the amount of property which is covered by the mortgage.<sup>2</sup>

subsequently been issued in payment for services by officers, the mortgage providing that bonds should be issued only for construction work, and the bonds not being in *bona fide* hands. *Central T. Co. v. California*, etc. R. R., 110 Fed. Rep. 70 (1901); *aff'd*, 128 Fed. Rep. 882. Bondholders are chargeable with notice of the terms of the mortgage securing the bonds. *Grant v. Winona*, etc. Ry., 85 Minn. 422 (1902). A bondholder need not take notice of a provision in the mortgage that he cannot sue at law on his bond unless one fourth of the bondholders assent. *Guilford v. Minneapolis*, etc. Ry., 48 Minn. 560 (1891). Bondholders are bound by recitations in the deed of trust recognizing unrecorded prior liens. *Skiddy v. Atlantic*, etc. R. R., 3 Hughes, 320, 356 (1879); *s. c.*, 22 Fed. Cas. 274. A statute referred to in the bond becomes thereby a part of the bond. *Gilman v. New Orleans*, etc. R. R., 72 Ala. 566 (1882); *Morton v. New Orleans*, etc. Ry., 79 Ala. 590 (1885); *Commonwealth v. Chesapeake*, etc. Co., 32 Md. 501 (1870). Purchasers are bound to know the contents of the mortgage which secures the bond. *Caylus v. New York*, etc. R. R., 10 Hun, 295 (1877); *affirmed*, 76 N. Y. 609. The holders of consolidated bonds are, it has been held, chargeable with notice of the prior bonds and mortgages and of the terms upon which their own bonds were issued. Hence, they cannot impeach the validity of the bonds which were retired. *Coe v. East*, etc. R. R., 52 Fed. Rep. 531 (1892).

<sup>1</sup> *Haskins v. Albany*, etc. Co., 74 N. Y. App. Div. 31 (1902).

<sup>2</sup> If the wording of the bond is different from the wording of the mortgage, the bond controls. *Railway Co. v. Sprague*, 103 U. S. 756 (1880). Although a bond purports to be secured by more than the mortgage specifies,

yet, if the mortgage does not cover the lands in controversy, the bondholder cannot subject such lands to the mortgage that actually is given. *New Orleans*, etc. Ry. *v. Parker*, 143 U. S. 42 (1892). In *Van Weel v. Winston*, 115 U. S. 228, 242 (1885), the court said that if the mortgage differed from the circulars of the company, the mortgage "must be looked to as the security on which the bondholders alone had a right to rely." *Cf. O'Beirne v. Bullis*, 158 N. Y. 466 (1899). Even though the bonds recite that the mortgage covers all after-acquired property, yet if the mortgage itself covers only such after-acquired property as is connected with the railroad, the mortgage does not cover a hotel property not connected with the operation of the railroad, but does cover stock in another railroad subsequently purchased by the mortgagor, a lease of the railroad itself being taken at the same time. *Guaranty T. Co. v. Atlantic*, etc. R. R., 132 Fed. Rep. 68 (1904); modified in 138 Fed. Rep. 517. Where a bond on its face recites that it is secured by all the assets of the company, while in fact it is not secured at all, the purchaser thereof may hold the president personally liable, the latter having taken part in the issue of the bonds. *Stickel v. Atwood*, 25 R. I. 456 (1903). See also § 765, *infra*. In the case *Yazoo*, etc. R. R. *v. Martin*, 94 Miss. 700 (1908) where income bonds were executed and issued, the income to be ascertained after paying the interest on all other bonds, a suit had been started by income bondholders to modify the bonds so that they should be subject only to the first mortgage bonds, and that suit was compromised by a supplemental mortgage being executed to the effect that the income bonds were subject only to the first mortgage bonds, but the supplemental mortgage did not change the phrase-



The purchasers of railroad bonds cannot rescind on the ground that the railroad has used the proceeds for purposes other than those stated in its prospectus.<sup>1</sup>

ology of the income bonds and the court held that the income bonds did not become second only to the first mortgage bonds, even though there was stamped on the income mortgage bonds a statement that they were secured by such supplemental mortgage.

<sup>1</sup> *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162, 196 (1888); *Van Weel v. Winston*, 115 U. S. 228 (1885). Although bonds and a mortgage are authorized to pay debts, but are partially used to carry on the business, *bona fide* purchasers of the bonds are protected. *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). After the purpose of the issue is fulfilled, the remaining bonds may be issued for other purposes. *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880). A mortgage reciting that it is made for the purpose of borrowing money to carry on the operations of the company is valid, although the bonds are issued in payment for the plant. *Davidson v. Westchester, etc. Co.*, 99 N. Y. 558 (1885). Although bonds are issued expressly according to their terms to take up outstanding bonds, yet a *bona fide* purchaser is not bound to ascertain whether the bonds were used for that purpose. *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870). But where by statute new mortgage bonds are issued to take up old bonds, purchasers of such new bonds must see to it that the old bonds are taken up, even though the new bonds are stated to be first-mortgage bonds. *Spence v. Mobile, etc. Ry.*, 79 Ala. 576 (1885). Even though a mortgage provides that the trustee shall certify and deliver the bonds or the proceeds thereof, only upon a written statement by the mortgagor declaring the purposes for which said bonds or proceeds are to be used, the trustee is not liable for failure to require such written statement, where the trustee has not expressly agreed to carry out that provision. Moreover, a suit by a bondholder

against the trustee for failure to carry out that provision must be commenced within ten years from the time of the breach thereof. *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), aff'g *Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App. Div. 473; s. c., *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169. The lower federal court held that a bondholder may hold the trustee liable for certifying to bonds and delivering them to the mortgagor, where the mortgage restricted the purposes for which the mortgagor was to use such bonds, and the trustee knew that the mortgagor had not complied with this provision in regard to a part of the bonds already issued; also that the general provision exempting the trust company from liability and also releasing it from any obligation to inquire into the application of the bonds is no defense, inasmuch as the mortgage provided that the trustee should issue the bonds only on orders declaring the purposes for which the mortgagor proposed to use them; also that the trustee must use such care as a mortgagee would use in making such advances; also that a mortgagee is not a necessary party to such a suit, but the suit must be brought by a bondholder, not for himself alone, but in behalf of all bondholders; also that the statute of limitations was a bar. *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5 (1899). The understanding of a bondholder as to the use of the funds does not bind the corporation. *Ives v. Smith*, 3 N. Y. Supp. 645 (1888). An action to rescind the purchase of stock lies where the money paid therefor was to be applied to a certain purpose, but was not applied, but the receiver will not be directed to give up the money. *Moore v. Robertson*, 25 Abb. N. C. 173 (1890). See also *Belden v. Burke*, in § 766, *infra*, and see §§ 830, 831, *infra*.



Although the statute restricts the mortgage to certain purposes, yet if the bonds are used for other purposes, *bona fide* purchasers are protected.<sup>1</sup> A bondholder cannot attack other bonds on the ground that the money received therefor was not used for the purposes authorized by the mortgage.<sup>2</sup> But a bondholder may insist that unissued bonds shall be issued only in accordance with the conditions specified in the mortgage.<sup>3</sup> A provision in a mortgage that certain bonds shall be reserved for refunding does not allow the directors to use them for other purposes, even though another provision allows the directors to dispose of such bonds as in their opinion are not required for refunding.<sup>4</sup> A mortgage covering stock in a terminal company and providing for a further issue of bonds upon the acquisition of additional mileage does not authorize such additional bonds on the consolidation of the terminal company with the main company.<sup>5</sup> When part of the bonds are issued the corporation may agree not to issue the others except on certain conditions.<sup>6</sup> Bonds are sometimes issued convertible into stock, and sometimes stock is issued convertible into bonds. The questions connected with such issues are considered elsewhere.<sup>7</sup>

§ 765. *Attachments levied on bonds — Form of bonds — Gold clause — Seal — Payment; substitution, cancellation and subrogation — Consolidated bonds — Bonds issued after consoli-*

<sup>1</sup> Where bonds and a mortgage are prohibited except to pay debts, but instead of that are partially used to carry on the business, *bona fide* purchasers of the latter are protected. *Carpenter v. Black Hawk*, etc. Min. Co., 65 N. Y. 43 (1875); *Lord v. Yonkers, etc. Co.*, 99 N. Y. 547 (1885). Where a company has power to mortgage but not to give bills of exchange, a mortgage securing bills of exchange is good as security for the money represented by the bills of exchange. *Scott v. Colburn*, 26 Beav. 276 (1858).

<sup>2</sup> *Camden, etc. Co. v. Citizens', etc. Co.*, 69 N. J. Eq. 718 (1905).

<sup>3</sup> *Diggs v. Fidelity, etc. Co.*, 112 Md. 50 (1910). 156 N. Y. App. Div. 182.

<sup>4</sup> *St. Louis, etc. R. R. v. Guaranty T. Co.*, 144 N. Y. App. Div. 440 (1911); *aff'd*, 205 N. Y. 609.

<sup>5</sup> *Lehigh, etc. R. v. Central Trust Co.*, 133 N. Y. App. Div. 304 (1909). See also § 765, *infra*.

<sup>6</sup> In general, all the bonds share equally in the proceeds of a foreclosure sale; but where the corporation agreed with the first purchasers to

issue only \$10,000 per mile although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers' bonds have been paid. *McMurray v. Moran*, 134 U. S. 150 (1890), the court stating also that the mortgage might have provided for priority among the bonds if it had been so drawn. A creditor who takes bonds in a reorganized company for his debt on a plan by which \$50,000 from other bonds should be invested, can collect damages from the reorganized company if such additional money is not invested, the damage to be the difference between the market value of his bonds as they are and as they probably would have been if the investment had been made. *South Texas Tel. Co. v. Huntington*, 138 S. W. Rep. 381 (Tex. 1911) setting aside the former decision in 136 S. W. Rep. 1053.

<sup>7</sup> See § 283, *supra*.



*dition.* — The unissued bonds of a corporation cannot be attached for corporate debts.<sup>1</sup> But bonds after issue may be taxed,<sup>2</sup> and an attachment may be levied on them at the place where they actually are, although not at the place where the corporation is and they are not.<sup>3</sup> There can be no attachment of bonds which are issued to a trustee to pay a certain debt.<sup>4</sup>

A suit at law will lie for the conversion of bonds,<sup>5</sup> or a suit in equity by their equitable owner for their value;<sup>6</sup> but an equitable suit does not lie to rescind a sale of worthless bonds. A suit at law for damages is the proper remedy.<sup>7</sup>

There is no particular form in which the bonds of a corporation must be drawn. In order to be negotiable they of course must contain the essential features of negotiable paper.<sup>8</sup>

Where a bond provides that it may be registered and the coupons surrendered, and that thereafter the interest will be paid by check, a bondholder may, by an action for specific performance, compel the carrying out of this contract on the part of the corporation issuing the bonds.<sup>9</sup>

The bonds may be payable to the bearer.<sup>10</sup> If the payee of the bond

<sup>1</sup> An attachment of unissued bonds is not good. *Richardson v. Green*, 133 U. S. 30, 47 (1890); *Coddington v. Gilbert*, 17 N. Y. 489 (1858); *Barnes v. Mobile*, etc. R. R., 12 Hun, 126 (1877); *Siekles v. Richardson*, 23 Hun, 559 (1881). Unissued bonds are not personal property subject to a statutory lien for supplies. *Millhiser, etc. Co. v. Gallego, etc. Co.*, 101 Va. 579 (1903).

<sup>2</sup> See § 572a, *supra*.

<sup>3</sup> Negotiable bonds held outside of the jurisdiction of the court cannot be attached by serving the attachment on the corporation which issued the bonds. *Von Hesse v. Mackaye*, 55 Hun, 365 (1890); *aff'd*, 121 N. Y. 694. Garnishee process does not lie against a non-resident company on bonds, since the debtor may have sold them. *Junction R. R. v. Cleaney*, 13 Ind. 161 (1859).

<sup>4</sup> *Alabama, etc. Co. v. Chattanooga, etc. Co.*, 37 S. W. Rep. 1004 (Tenn. 1896).

<sup>5</sup> For the allegations in an action for the conversion of a bond, see *Saratoga, etc. Co. v. Hazard*, 55 Hun, 251 (1889); *aff'd*, 121 N. Y. 677. Where bonds are loaned to use temporarily,

upon an agreement to return them when called for, and the member of the firm to whom they are delivered uses them for his own purposes, he converts them. *Birdsall v. Davenport*, 43 Hun, 552 (1887).

<sup>6</sup> A suit by an equitable owner of bonds to recover the bonds, or their value, is properly brought in equity. *Phelps v. Elliott*, 29 Fed. Rep. 53 (1886).

<sup>7</sup> *U. S. Bank v. Lyon County*, 46 Fed. Rep. 514 (1891). See also §§ 155, 156, 356, *supra*. Concerning fraud inducing the purchase of bonds, see §§ 140, 157, *supra*. A bill in equity is proper to rescind when third parties with notice are to be reached. *Banque, etc. v. Brown*, 34 Fed. Rep. 162 (1888).

<sup>8</sup> See § 411, *supra*, concerning these requisites; also § 767, *infra*, concerning the various decisions on the negotiability of corporate bonds. For forms of coupon bonds and registered bonds, see Vol. V, *infra*.

<sup>9</sup> *Benwell v. Mayor*, 55 N. J. Eq. 260 (1897). On this subject of registration, see also § 815, *infra*.

<sup>10</sup> *Kneeland v. Lawrence*, 140 U. S. 209 (1891); *Mercer County v. Hackett*,



is left blank, the holder may fill in his name;<sup>1</sup> but if it is payable only to a specified person, a written assignment is necessary.<sup>2</sup> If payable to a certain person, he may indorse them in blank and then they pass by delivery.<sup>3</sup> A bondholder is a payee and not an assignee.<sup>4</sup>

The bonds should not be described as first-mortgage bonds if there are underlying mortgages on divisions of the property.<sup>5</sup> A purchaser of bonds and stock may rescind on the ground that the vendor falsely represented that there was but one mortgage on the property. It is immaterial that the vendor paid off the other mortgage after suit was brought.<sup>6</sup> Where a corporation issues bonds having the words printed on their face "first-mortgage bonds," when, as a matter of fact, there was an underlying mortgage which the party to whom the bonds were sold agreed to pay, but did not pay except in part, the officers and the directors who took part in the issue of the bonds are liable to an innocent purchaser who relied on the statement contained on the face of the bonds. His measure of damages is the difference between the value of the bonds as first-mortgage bonds and second-mortgage bonds.<sup>7</sup> The usual indorsement of a trust company on the back of bonds that "This bond is one of a series of bonds mentioned and described in the mortgage within referred to" does not render the trust company liable on

1 Wall. 83 (1863); Savannah, etc. R. R. v. Lancaster, 62 Ala. 555 (1878). Railway bonds may be payable to the trustees in the mortgage or bearer, or may be payable to bearer alone. *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). The bearer may sue on them in his own name. *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). Bonds are often drawn payable to the trustee or bearer.

<sup>1</sup> See § 764, *supra*.

<sup>2</sup> The assignee of a bond payable to a certain person or assigns cannot sue thereon where the assignment to him is not in writing. *Bunting v. Camden, etc. R. R.*, 81 Pa. St. 254 (1876).

<sup>3</sup> *Brainerd v. New York, etc. R. R.*, 10 Bosw. 332 (1863).

<sup>4</sup> *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883).

<sup>5</sup> It is fraudulent to deliver as first-mortgage bonds, bonds which are denominated "first-mortgage consolidated bonds" which are not secured by a first mortgage, but are second to underlying mortgages on divisions of the property. *Williamson v. New Jersey Southern R. R.*, 29 N. J. Eq. 311, 318 (1878), affirming on this point 28

N. J. Eq. 277. Although the bonds bear upon their face the words "consolidated first-mortgage bonds," yet, if they refer to a mortgage, and the mortgage shows that there were underlying first-mortgage bonds which were to be exchanged or taken up if possible by the consolidated bonds, the directors and the trustee are not liable for fraud in issuing the consolidated bonds, a part of the bonds having been used for new construction. *Caylus v. New York, etc. R. R.*, 10 Hun, 295 (1877); *aff'd*, 76 N. Y. 609.

<sup>6</sup> *Stevenson v. Marble*, 84 Fed. Rep. 23 (1897). The contract of a corporation to sell first-mortgage bonds on a certain date cannot be rescinded by the vendee on the ground that the previous first mortgage had not been released, it appearing that all but a few of the bonds secured by the previous mortgage had been paid and that these few could not be traced, but a fund had been set apart for their payment. *Nes v. Union Trust Co.*, 104 Md. 15 (1906).

<sup>7</sup> *Bank v. Byers*, 139 Mo. 627 (1897). *Cf.* § 764, *supra*, and § 814. *infra*.



account of the mortgage securing the bond not being a first mortgage, even though the bond itself stated that it was secured by a first mortgage.<sup>1</sup> The vice-president of a trust company which is trustee of the sixth mortgage on a property cannot bind the trust company by a representation to a purchaser of the bonds that the mortgage was a first mortgage, the trust company having no interest in the property or the sale of the bonds and no authority to make representations.<sup>2</sup> Even though the mortgagor denominates third-mortgage bonds as first-mortgage bonds and makes misrepresentations, yet this does not affect the real first-mortgage bonds.<sup>3</sup> A person having a prior lien may waive it by taking from the corporation, as security, bonds which purport to be first-mortgage bonds.<sup>4</sup> Even though a mortgage purports to cover land when in fact it merely covers the coal underlying the land, yet the president who executes the mortgage and the stockholders who authorize it are not liable for deceit to a bondholder, although they knew the facts when they acted; neither can they be held liable in equity to make the representations good or on the ground of rescission, inasmuch as they are not parties to the transaction as individuals and did not receive the consideration paid for the bonds.<sup>5</sup>

The seal of the corporation is attached to the bond.<sup>6</sup> This seal may be considered as merely the signature of the company, thereby rendering the "bond" merely a promissory note and subject to the short statute of limitations,<sup>7</sup> or it may be considered a seal the same as an individual's seal, making the instrument a sealed instrument.<sup>8</sup> The execution of the bonds should be regularly and formally authorized by the proper corporate authorities.<sup>9</sup> A mortgage and bonds secured thereby may be authorized by the board of directors, and no action or authorization by the stockholders is necessary.<sup>10</sup> Bonds and mort-

<sup>1</sup> Tschetianian v. City Trust Co., 186 N. Y. 432 (1906).

<sup>2</sup> Davidge v. Guardian T. Co., 203 N. Y. 331 (1911).

<sup>3</sup> Ventnor Investment, etc. Co. v. Record Development Co., 79 N. J. Eq. 103 (1911).

<sup>4</sup> Bristol, etc. Co. v. Bristol Gas, etc. Co., 99 Tenn. 371 (1897).

<sup>5</sup> Slater Trust Co. v. Gardiner, 183 Fed. Rep. 268 (1910). See also §§ 830, 831, *infra*.

<sup>6</sup> An official may, while out of the state, cause a new seal to be made and attach it to the bonds of the corporation out of the state. Lynde v. Winnebago County, 16 Wall. 6 (1872). See also § 722, *supra*.

<sup>7</sup> See §§ 770, 772, *infra*.

<sup>8</sup> See §§ 770, 772, *infra*.

<sup>9</sup> Where the stockholders build the road with their own money and take the mortgage bonds of the company as security without formal action of the corporation authorizing it, the bonds are not good in their hands and an execution sale of the property comes in ahead of the mortgage. McKee v. Grand Rapids, etc. Ry., 41 Mich. 274 (1879). See §§ 721-725, *supra*. As to notice of a meeting to authorize bonds, see § 599, *supra*. As to ratification of an unauthorized mortgage, see § 809, *infra*.

<sup>10</sup> Hodder v. Kentucky, etc. Ry., 7 Fed. Rep. 793 (1881). See also § 808, *infra*.



gages may be executed outside of the state incorporating the company.<sup>1</sup> If no date of payment of the principal is specified it may be collected at any time.<sup>2</sup> The various questions arising concerning the interest on and coupons of bonds are considered elsewhere.<sup>3</sup> A bond by its terms may be made payable in gold coin of or equal to the present standard of weight and fineness.<sup>4</sup> But the court cannot change the payments of interest from currency to gold.<sup>5</sup>

A railroad has no right to pay off bonds before they are due, nor to pay the money to the trustee and have the mortgage canceled.<sup>6</sup> Upon a sale of the assets and the winding up of the company bonds not yet due may be paid at par and accrued interest.<sup>7</sup> But where a mortgaged water-works plant is taken over by the state as allowed by its original contract with the water-works company, and the bonds secured by the mortgage have to be paid first, they may be paid at the redemption price specified in the mortgage, but cannot be called in merely at par and accrued interest.<sup>8</sup>

Where the owner of bonds delivers them up to the company in exchange for other bonds or securities, the courts are inclined to hold that he does not thereby waive the security of the mortgage that secured the bonds, but that the new bonds are subrogated to such security.<sup>9</sup>

<sup>1</sup> *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884).

<sup>2</sup> *Hopkins v. Worcester, etc. Canal*, L. R. 6 Eq. 437 (1868).

<sup>3</sup> See §§ 771, 772, *infra*.

<sup>4</sup> For various decisions on the gold clause in obligations, see 7 Wait, Act. & Def., p. 586; 2 Dan. Neg. Inst., 4th ed., § 1247; *Bronson v. Rodes*, 7 Wall. 229 (1868). Where the contract calls for gold coin, the judgment for damages for failure to pay should be for coin for the amount specified in the contract. *Butler v. Horwitz*, 7 Wall. 258 (1868); *Trebilcock v. Wilson*, 12 Wall. 687 (1871). An agreement to pay in gold may be implied, but the implication must be found in the language of the contract. *Maryland v. Railroad Co.*, 22 Wall. 105 (1874). Coupons may by their terms be made payable in gold coin. *Pollard v. Pleasant Hill*, 3 Dill. 195; s. c., 19 Fed. Cas. 944 (1873). Where a statute authorizes the governor to sign bonds bearing eight per cent. interest, he may sign bonds bearing eight per cent. payable in gold. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606; s. c., 30 Fed. Cas. 850 (1875). Where

bonds are payable in gold and silver coin the government has no right to pay them in legal-tender currency. *State v. Hays*, 50 Mo. 34 (1872). As to a gold clause, see also *Blanck v. Sadlier*, 153 N. Y. 551 (1897); *Dennis v. Moses*, 18 Wash. 537 (1898); *Carpentier v. Atherton*, 25 Cal. 564 (1864).

<sup>5</sup> *Taylor v. Atlantic, etc. Ry.*, 55 How. Pr. 275 (1877).

<sup>6</sup> *Missouri, etc. Ry. v. Union Trust Co.*, 156 N. Y. 592 (1898), aff'g 87 Hun, 377 (1895). See also §§ 811, 816, *infra*.

<sup>7</sup> *Re Southern, etc. Ry. Co., Ltd.*, [1905] 2 Ch. 78. See also § 642, *supra*.

<sup>8</sup> *Harnickell v. Omaha Water Co.*, 146 N. Y. App. Div. 693 (1911).

<sup>9</sup> Although bonds are taken in payment of past-due coupons, yet those who take such bonds are subrogated to and may enforce the coupons. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586, 596 (1880). But in *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 86 Va. 1 (1889), the same court held that where coupons are exchanged for income bonds at sixty cents on the dollar, and the clear intent was to satisfy, discharge, and can-



Thus where a reorganized company issues its bonds in exchange for bonds of the old company, such bonds of the old company are not thereby canceled so as to give a junior mortgage of the old company priority over the bonds so received in exchange.<sup>1</sup> Where a part of mortgage bonds which are in default, are, under a reorganization agreement, returned to the corporation and placed under a new mortgage, securing

cel the coupons, there is no subrogation. Second-mortgage bonds taken in exchange for coupons on first-mortgage bonds share in the proceeds as though they were such coupons. *Farmers' L. & T. Co. v. Green Bay*, etc. R. R., 6 Fed. Rep. 100 (1881). Interest released by first-mortgage security-holders may be expressly made payable to holders of other securities, and yet the latter are not subrogated to the mortgage to that extent. *Sullivan v. Portland*, etc. R. R., 94 U. S. 806 (1876). Bondholders taking certificates of indebtedness do not thereby waive their mortgage security. *Skiddy v. Atlantic*, etc. R. R., 3 Hughes, 320, 357 (1879); s. c., 22 Fed. Cas. 274. See also *Memphis*, etc. R. R. v. *Dow*, 120 U. S. 287 (1887), where a trustee for the second-mortgage bondholders bought for them the property at a foreclosure sale under the first mortgage. Cf. *Railroad v. Soutter*, 13 Wall. 517 (1871), where the sale was fraudulent. See also, in general, *Gibbes v. Greenville*, etc. R. R., 13 S. C. 228 (1879); *Newbold v. Peoria*, etc. R. R., 5 Ill. App. 367 (1879); *Blair v. St. Louis*, etc. R. R., 23 Fed. Rep. 524 (1885); *Ames v. New Orleans*, etc. R. R., 2 Woods, 206 (1876); s. c., 1 Fed. Cas. 760. But a person advancing interest is not entitled to be equitably subrogated. *Newport*, etc. Co. v. *Douglass*, 12 Bush (Ky.), 673 (1877). See also §§ 772, 860, *infra*; *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889); *Ex parte White*, 2 S. C. 469 (1871). Where the mortgage bondholders agree to waive their lien and take new second-mortgage bonds, and the trustee does discharge the mortgage, a failure of the company to issue the new second-mortgage bonds in accordance with the contract does not entitle the old bondholders to be restored to their posi-

tion as first-mortgage bondholders. They may, however, have their bonds allowed as second-mortgage bonds upon foreclosure. *Fidelity*, etc. Co. v. *Shenandoah*, etc. R. R., 33 W. Va. 761 (1890). In the case *Maxwell*, etc. Co. v. *Henderson*, 12 Colo. App. 425 (1899), where the lessee of land had issued bonds based on such lease and most of the holders thereof had transferred their bonds to a mortgagee of the lessor in exchange for bonds of the lessor, the court held that these bonds of the lessee which had been so exchanged could not participate in the proceeds from the foreclosure of the mortgage given by the lessee.

<sup>1</sup> *Columbus*, etc. R. R. Appeals, 109 Fed. Rep. 177 (1901). Where the bonds of a lessor railroad are about to become due and the lessee executes a refunding mortgage securing bonds to be issued to the lessor for cash, and the cash to be used by the trustee to take up the maturing bonds, such maturing bonds are not canceled thereby. *Farmers' Loan*, etc. Co. v. *Central Park*, etc. R. R., 181 Fed. Rep. 595 (1910); *aff'd*, 193 Fed. Rep. 963. Where in a consolidation new bonds are issued in exchange for old bonds, and some of the old bonds are not sent in, and those which are sent in are not canceled, it is a question of intent as to whether they are to be considered canceled. *Burlington*, etc. Co. v. *Princeton*, etc. Co., 72 N. J. Eq. 891 (1907). Where a new mortgage is executed to secure bonds to be issued in exchange for old mortgage bonds, and an attachment is levied on the property before the recording of the new mortgage, the court will preserve the lien of the pre-existing mortgage as against such attachment. *Griffin v. International T. Co.*, 161 Fed. Rep. 48 (1908).



bonds which are issued to the persons who so turned in the first-mentioned bonds, the holders of the remaining old bonds cannot claim that the bonds so turned in have been canceled, thereby reducing the first-mortgage issue by that amount.<sup>1</sup> Yet, where consolidated mortgage bonds are issued in exchange for bonds secured by prior lien, but all of the prior bonds are not so turned in, and a foreclosure takes place, such of the prior bonds as were not turned in must be paid in full.<sup>2</sup> A committee of the bondholders may enforce them against the mortgagor, even though the committee have turned the bonds over to a new corporation, and the latter has issued its own stock and bonds therefor to the former bondholders.<sup>3</sup> Where a holder of bonds exchanges them for new bonds, the agreement being that the old bonds should be canceled when all of them have been exchanged, such owner cannot rescind even though all of the bondholders do not come in and consequently the cancellation does not take place.<sup>4</sup> But where a portion of the bondholders deposit their bonds with the company under an agreement to accept in exchange bonds of a larger issue secured in the same manner, they may reclaim their old bonds if the substitution is not complete, inasmuch as they are entitled to a first mortgage as security.<sup>5</sup> If a mortgage provides for a portion of the bonds secured, thereby to be issued to retire certain other bonds, the mortgagor is entitled to the issue on presenting such other bonds, irrespective of whether it purchased them from the sinking fund, or from surplus earnings, or from the sale of the new issue of bonds.<sup>6</sup>

<sup>1</sup> *Mowry v. Farmers' L. & T. Co.*, 76 Fed. Rep. 38 (1886).

<sup>2</sup> *Bound v. South Carolina R. R.*, 78 Fed. Rep. 49 (1897). Where the outstanding bondholders join in a request for a foreclosure of the mortgage bonds of the reorganized company, they are deemed to have waived their rights in the old bonds. *First Nat. Bank v. Radford Trust Co.*, 80 Fed. Rep. 569 (1897). Where a consolidated mortgage provides for the issue of its bonds in exchange for prior bonds and some of the prior bonds are so exchanged, the bonds so turned in are considered as surrendered and paid, especially where the company subsequently represented that they were paid. *New York, etc. T. Co. v. Louisville, etc. R. R.*, 102 Fed. Rep. 382 (1900).

<sup>3</sup> *Re Medina, etc. Co.*, 179 Fed. Rep. 929 (1910); s. c., 182 Fed. Rep. 508.

<sup>4</sup> *Central Trust Co. v. Marietta, etc. Ry.*, 73 Fed. Rep. 589 (1896).

<sup>5</sup> *Re Times Pub. Co.*, 183 Fed. Rep. 603 (1910).

<sup>6</sup> *Beech Creek, etc. Co. v. Knickerbocker Trust Co.*, 127 N. Y. App. Div. 540 (1908). Where a portion of second-mortgage bonds are by the terms of the mortgage deposited with the trustee to be delivered to the company in exchange for prior bonds when purchased by the company, the company may cancel such prior bonds before delivering them to the trustee. The "funding" of the debts of a company is the substitution of a single long-time debt for short-time debts. *Twin State, etc. Co. v. Knickerbocker T. Co.*, 135 N. Y. App. Div. 467 (1909). Under the terms of a second mortgage setting aside a part of the bonds to be delivered to the mortgagor upon the mortgagor delivering in exchange prior bonds, the trustee of



Where without foreclosure the bondholders purchase the property at an assignee's sale subject to the mortgage, and pay the price by turning in bonds, the bonds cannot be enforced against the stockholders of the mortgagor company.<sup>1</sup> Where mortgage bonds are deposited with the trustee to be issued in exchange for outstanding bonds, the right of a holder of outstanding bonds to make the exchange cannot be defeated by the mortgagor after such holder has actually deposited his bonds and asked for the new bonds.<sup>2</sup>

The holder of bonds, issued by a corporation, which is afterwards consolidated with another corporation, cannot claim the right to exchange his bonds for bonds of the consolidated company, even though the mortgage of the consolidated company provides for such exchange, especially where the party has delayed for nine years in claiming the right.<sup>3</sup> The right of a mortgagor to acquire and present to the trustee prior lien bonds and obtain in exchange consolidated bonds passes to a purchaser of the property from the mortgagor.<sup>4</sup> Where a company executes a mortgage and bonds to take up in part preëxisting bonds and in part to pay for improvements, and then it consolidates with another company and the consolidated company claims the right to continue to issue such new bonds, the trustee may apply to the court for instructions, all necessary parties being brought in. The court will not allow a further issue of bonds for property acquired by the consolidated company but will allow issues to take up previous existing bonds.<sup>5</sup>

a mortgage must issue new bonds to the mortgagor upon the latter paying the underlying bonds on maturity and canceling them and delivering them to the trustee. All the underlying bonds being so delivered, it is unnecessary for the trustee to keep the bonds alive, as would be the case if only part were delivered. *Charleston, etc. Co. v. Knickerbocker T. Co.*, 138 N. Y. App. Div. 107 (1910); *aff'd*, 203 N. Y. 529.

<sup>1</sup> *Cock v. Bailey*, 146 Pa. St. 328 (1892).

<sup>2</sup> *Wakefield, etc. Co. v. New England T. Co.*, 175 Mass. 478 (1900).

<sup>3</sup> *New York, etc. Trust Co. v. Louisville, etc. R. R.*, 97 Fed. Rep. 226 (1899). Even though on the consolidation of several railroads provision is made for issuing consolidated bonds to take up existing bonds of the constituent companies, yet after seven years' delay a holder of the latter bonds cannot compel the con-

solidated company to make the exchange, there being no definite contract on the part of the consolidated company so to do, and there being a provision as to the consolidated bonds in case the bondholders in the constituent companies refused or neglected to exchange. *Mott v. N. Y., etc. Co.*, 29 N. Y. Misc. Rep. 39 (1899); *aff'd*, 52 N. Y. App. Div. 623. The holders of mortgage bonds cannot claim the right to exchange the same for new bonds, even though the mortgage securing the new bonds provides for such exchange. *Morse v. Chicago, etc. R. R.*, 84 N. Y. App. Div. 406 (1903).

<sup>4</sup> *Diggs v. Fidelity, etc. Co.*, 112 Md. 50 (1910).

<sup>5</sup> *Orrick v. Fidelity, etc. Co.*, 113 Md. 239 (1910). Where a mortgage provides that bonds may be issued for newly acquired property, and the mortgagor then consolidates with another company, the consoli-



First-mortgage bondholders do not waive their priority by extending the time of payment.<sup>1</sup>

The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a party defendant and resides in the same state as the complaining corporation. The trustee in such a suit is merely a formal party.<sup>2</sup>

Where a corporation buys its unmatured bonds and causes the mortgage securing them to be canceled, but neglects to cancel the bonds, a *bona fide* pledgee of such bonds from the treasurer, who fraudulently abstracted them, is protected.<sup>3</sup> A *bona fide* pledgee of bonds which have been paid, but which have been fraudulently re-issued by the trustee of a mortgage, may enforce them against the railroad mortgagor, even though the pledgee knew that the trustee was borrowing money on his own account.<sup>4</sup> Even though a railroad mortgage is being foreclosed in the federal court on the supposition that a prior mortgage had been fully paid, yet a *bona fide* purchaser of bonds secured by such prior mortgage may bring a foreclosure suit thereon in the state court after the foreclosure suit in the federal court has been completed, even though such purchaser purchased during the foreclosure of the subsequent mortgage and was aware of the default on such second mortgage.<sup>5</sup> In construing a provision in a bond for a sinking fund, the prospectus is not admissible in evidence. The term "sinking fund" does not necessarily imply accumulation.<sup>6</sup> A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of a *bona fide* mortgagee without notice of such debentures and such contract.<sup>7</sup>

dated company cannot execute the bonds for property newly acquired by it. *Diggs v. Fidelity, etc. Co.*, 112 Md. 50 (1910). A mortgage covering stock in a terminal company and providing for a further issue of bonds upon the acquisition of additional mileage does not authorize such additional bonds on the consolidation of the terminal company with the main company. *Lehigh, etc. R. R. v. Central Trust Co.*, 133 N. Y. App. Div. 304 (1909); *aff'd*, 199 N. Y. 599. Where a company has issued \$112,000 of \$200,000 mortgage bonds and then sells its property, the vendee assuming the mortgage cannot issue the remaining bonds and make them equal in right to the \$112,000 of bonds. *Security, etc. Co. v. St. Louis, etc. Co.*, 137 N. W. Rep. 807 (Mich. 1912).

<sup>1</sup> *Ventnor Investment, etc. Co. v. Record Development Co.*, 79 N. J. Eq. 103 (1911).

<sup>2</sup> *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 115 (1900).

<sup>3</sup> *Rockville, etc. Bank v. Citizens', etc. Co.*, 72 Conn. 576 (1900).

<sup>4</sup> *Real Estate Trust Co. v. Washington, etc. Ry.*, 191 Fed. Rep. 566 (1911), *rev'g* on this point 177 Fed. Rep. 306.

<sup>5</sup> *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); same case *aff'd*, *sub nom.* *Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899).

<sup>6</sup> *Morrison v. Chicago, etc. Co.*, 77 L. T. Rep. 677 (1897).

<sup>7</sup> *Re Castell, etc. Co.*, [1898] 1 Ch. 315.



The question of whether a provision that bonds may be issued by vote of the stockholders only, and whether a statutory notice may be waived, is considered elsewhere.<sup>1</sup>

§ 766. *Bonds issued below par for cash, property, or construction work — Dividend of bonds — Bonds, notes, or mortgages given without consideration — Statutory and constitutional prohibitions relative to issues of bonds — Fraudulent issues of bonds — Bona fide purchasers of bonds issued at less than their par value are protected — Fraudulent issues of bonds to the directors, or through directors who are "dummies," or to construction companies in which the directors are interested.* — It is clear that at common law a corporation may issue its bonds at less than their par value.<sup>2</sup>

<sup>1</sup> § 725, *supra*, and § 808, *infra*.

<sup>2</sup> *Gamble v. Queens County Water Co.*, 123 N. Y. 91 (1890), where the court, after speaking with reference to the stock of the company, proceeded to say: "A different rule, however, prevails in regard to the bonds of a corporation. An extended discussion of the question is not needful. We think a corporation has the power to issue its bonds at less than par. So far as this point is concerned, it is not restricted to an issue only upon payment to the company of the par value of the bonds, either in money or property for its use." To same effect, *Lyceum v. Ellis*, 57 N. Y. Super. Ct. 532 (1890); *Farmers' L. & T. Co. v. Rockaway*, etc. R. R., 69 Fed. Rep. 9 (1895). The holder of a majority of the stock of a railroad company may legally cause its bonds to be issued to himself at ninety cents on the dollar in payment of a debt due him. *Gloninger v. Pittsburgh*, etc. R. R., 139 Pa. St. 13 (1891). A corporation may issue bonds at eighty cents on the dollar. *The Vigilancia*, 68 Fed. Rep. 781 (1895). In the case *Duncomb v. N. Y. etc. R. R.*, 84 N. Y. 190 (1881), bonds were sold by the corporation at fifty-one cents on the dollar, and the court sustained the sale. It is no defense to a foreclosure suit that the bonds were issued at two thirds of their par value. *Central Trust Co. v. Washington*, etc. R. R., 124 Fed. Rep. 813 (1903). Bonds sold by the corporation at eighty cents on the dollar were sus-

tained in *Lembeck v. Jarvis*, etc. Co., 70 N. J. Eq. 757 (1906), aff'g 69 N. J. Eq. 450. Where mortgage bonds are issued without any consideration the burden of proof is shifted on to the holders of the bonds to prove that they are *bona fide* holders. *McVicar*, etc. Co. v. *Union Ry.*, etc. Co., 136 Fed. Rep. 678 (1905). A New York corporation cannot under the New York statute receive a note in payment for its bonds, especially where it was a note of the president, unless such note is actually collected. *In re Waterloo*, etc. Co., 134 Fed. Rep. 341 (1904). A corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of twenty-five per cent. *Bank of Toronto v. Cobourg*, etc. Ry., 10 Ont. (Can.) 376 (1885). Debentures may be issued at a discount, even sixty per cent. discount being upheld in *Webb v. Shropshire Ry.*, [1893] 3 Ch. 307. See also *Handley v. Stutz*, 139 U. S. 417 (1891); *Christensen v. Illinois*, etc. Co., 52 Hun, 478 (1889). But an agreement of a corporation to issue bonds to a subscriber as a "bonus" was held to be void, and the subscription was enforced, in *Morrow v. Nashville*, etc. Co., 87 Tenn. 262 (1889). In *Clafin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880), bonds were issued at the rate of eighty cents on the dollar, and no question was raised as to the validity of the issue. In England debentures may be issued at a discount in cash. *Campbell's Case*, L. R. 4 Ch. D. 470



A person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par by the corporation to the person taking the bonus.<sup>1</sup> A person who buys mortgage bonds with stock as a bonus, from a party to whom the stock and bonds were originally issued, cannot be held liable on the stock at the instance of other stockholders, who did not object at the time of the issue, but who come into the foreclosure suit and attempt to defeat the bonds on the ground that the amount due thereon is not more than the unpaid par value of the stock, the bonds and stock having originally been issued in payment for property.<sup>2</sup> Where underwriters

(1876), where the issue was to a director; *Re Regents', etc. Co.*, L. R. 3 Ch. D. 43 (1876), where pledgees of debentures shared equally with purchasers, on winding up, to the extent of the pledge; *Re Anglo-Danubian, etc. Co.*, L. R. 20 Eq. 339 (1875); *Re Inns, etc. Co.*, L. R. 6 Eq. 82 (1868). Where railroad bonds are issued and paid for in Confederate currency, they can be enforced only to the extent of the purchasing value of the currency thus paid, at the time of the purchase, with interest upon that value. *Spence v. Mobile, etc. Ry.*, 79 Ala. 576 (1885). See also, on the subject of issuing stock and bonds at less than their par value, ch. III, *supra*. It is illegal to issue municipal bonds at a discount. See § 98, *supra*. In *Sherlock v. Winnetka*, 68 Ill. 530 (1873), the court held a sale of municipal bonds below par to be unlawful. A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of stock which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899). See also *Collins v. Penn.-Wyoming, etc. Co.*, 203 Fed. Rep. 726 (1913).

<sup>1</sup> *Davis v. Montgomery, etc. Co.*, 101 Ala. 127 (1890). See also § 42, *supra*.

<sup>2</sup> *Northern, etc. Co. v. Columbia,*

*etc. Co.*, 75 Fed. Rep. 936 (1896); *Dickerman v. Northern T. Co.*, 80 Fed. Rep. 450 (1897); *aff'd*, 176 U. S. 181. But see §§ 46, 47, *supra*. Even though \$40,000 of bonds and \$122,500 of stock are issued for property having a much less value, yet a stockholder who subscribed for stock knowing of the facts cannot complain, neither can his transferee. *O'Dea v. Hollywood, etc. Ass'n*, 154 Cal. 53 (1908). A stockholder in an underground railroad in New York City may file a bill to set aside a sale by the other stockholders of their stock to a holding company, which holding company has acquired a majority of the capital stocks of such underground road and of the surface railways (the elevated railways being already leased to the underground railway), thereby suppressing competition and creating a combination of competing railroads, the plaintiff alleging also that the holding company has issued ninety million dollars of watered stock and two hundred million dollars of bonds without proper payment therefor. Even though the surface roads have passed into a receiver's hands, such receiver need not be made a party defendant, although a proper party defendant with the consent of the court which appointed him. *Continental Securities Co. v. Interborough, etc. Co.*, 165 Fed. Rep. 945 (1908); *s. c.*, 183 Fed. Rep. 132, and 203 Fed. Rep. 521 (1913). Dismissed June 3, 1913. Even though a corporation sells \$161,500 of bonds and \$130,000 of its stock for \$145,350, yet the remaining bondholders cannot complain on the foreclosure, and even if there was any



have agreed to purchase the bonds of the corporation at a certain price with a bonus of seventy-five per cent. in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the seventy-five per cent. in stock for that purpose.<sup>1</sup> The bonds of a failing corporation and the mortgage securing them are valid although when the bonds were issued a large amount of increased capital stock was given by the corporation as a bonus with the bonds. The giving of the bonus is no defense to a foreclosure of the mortgage, it being shown that the corporation was nearly insolvent at the time such increased capital stock was issued.<sup>2</sup> But bond purchasers who receive an equal amount of stock, the entire price being the par value of the bonds only, are liable on the stock if

liability on the stock as an unpaid subscription the statute of limitations may be a bar, and the same is true as to any forfeiture for usury. *Weed v. Gainesville, etc. R. R.*, 119 Ga. 576 (1904).

<sup>1</sup> *Kirkpatrick v. Eastern, etc. Co.* 135 Fed. Rep. 146 (1904); *aff'd*, 137, Fed. Rep. 387. In the case *Hudson, etc. Ry. v. O'Connor*, 95 N. Y. App. Div. 6 (1904), an underwriting syndicate agreement was construed where bonds were sold at eighty cents on the dollar with a stock bonus, and it was held that coupons attached to the bonds belonged to the underwriters, even though the bonds were not delivered for some time after the coupons became due. Where a consolidated railroad company of Ohio, Indiana, Illinois, Michigan, and Missouri requires large sums of money for improvements and the payment of floating debts, and agrees with its income bondholders that \$26,500,000 of income bonds shall be canceled in exchange for \$700 new bonds, \$500 preferred stock, and \$500 common stock for each \$1,000 of income bonds, it is not illegal to issue such stock, even under the constitution of Missouri which prohibits the issue of fictitious stock or bonds. *Pollitz v. Wabash, etc. Co.*, 167 Fed. Rep. 145 (1909); *s. c.*, 176 Fed. Rep. 333. A stockholder may maintain a suit to adjudge illegal a plan of issuing bonds and stock in exchange for debentures on the basis of about two for one, and the complaint is not

multifarious, even though the transaction is attacked as *ultra vires* and also because the directors were personally interested, nor because different defendants will be affected differently, nor because the plaintiff asks more relief than he is entitled to. It is not necessary to join as parties defendant persons who have already made the exchange, inasmuch as the defendant directors may be liable to them. The depository of the bonds and the registrar of the stock are not necessary parties defendant. *Pollitz v. Wabash R. R.*, 142 N. Y. App. Div. 755 (1911); *s. c.*, 207 N. Y. 113.

<sup>2</sup> *Dummer v. Smedley*, 110 Mich. 466 (1896), the court relying on the authority of *Handley v. Stutz*, 139 U. S. 417 (1891). See also § 42, *supra*. Where a corporation cannot find a purchaser for its bonds at sixty cents on the dollar it may sell them together with a bonus of stock equal to fifty per cent. of the par value of the bonds for eighty-five cents on the dollar for the bonds, and such transaction is legal, even though one half of the stock was contributed by the stockholders who were reimbursed by a stock dividend to that amount. Neither the corporation nor its receiver can complain of the transaction, and creditors who were not deceived and fraudulently induced to purchase the stock or bonds cannot complain. *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561.



they had notice of the fact that it had been issued for worthless property, and it is immaterial that some of them after signing the contract accepted the bonds without taking the certificate of stock.<sup>1</sup> In New York it has been held that unissued shares of stock may be issued gratuitously to stockholders; also bonds of the company; and they are not liable for the par value or any part thereof to the corporation or corporate creditors, unless they agreed to pay therefor or the statute requires payment. Even though the stockholder has sold such stock and bonds, he is not liable to corporate creditors for the amount received from the sale.<sup>2</sup> And although bonds are issued as a bonus to stockholders, yet a *bona fide* holder of such bonds may enforce them.<sup>3</sup> Questions relative to a waiver of liability on watered stock are considered elsewhere.<sup>4</sup>

Generally a large amount of stock is issued together with a quantity of bonds in payment for property or construction work. Upon

<sup>1</sup> *Gillet v. Chicago Title & T. Co.*, 230 Ill. 373 (1907), holding also that where bonds were sold with a bonus of stock, and the purchasers were held liable on the stock, they were entitled to participate as bondholders in the fund which the court compelled them to pay in on their stock.

<sup>2</sup> *Christensen v. Eno*, 106 N. Y. 97 (1887), the court refusing to follow *Skrainka v. Allen*, 7 Mo. App. 434 (1879); s. c., 76 Mo. 384. "Stock issued as a bonus with the sale of bonds, or stock issued through the means of overvaluation of property, cannot properly be regarded as necessarily issued fraudulently. In the absence of intervening rights of creditors, such transactions appear to have been generally supported by the courts, unless positive fraud has been clearly established, notwithstanding the constitutional and statutory provisions of many of the states designed to secure a proper relationship between the capital stock and the assets of corporations." *Arnold v. Searing*, 73 N. J. Eq. 262 (1907). See also § 42, *supra*.

<sup>3</sup> *Thomson-Houston Elec. Co. v. Capitol Elec. Co.*, 65 Fed. Rep. 341 (1894), holding also that where an agent received the bonds with notice, but tried to cheat his principal, the latter is not chargeable with notice.

<sup>4</sup> See §§ 210, 216, *supra*. A mortgage deed of trust cannot relieve the bondholders from a statutory liability to corporate creditors on bonus stock received by the bondholders. *French v. Busch*, 189 Fed. Rep. 480 (1911); s. c., 194 Fed. Rep. 574. Where \$1,700,000 of stock is issued for property and cash amounting to no more than \$850,000, parties receiving the stock are liable to corporate creditors for the difference, each one for his own stock, and a bondholder may enforce this liability, even though the bond contains a provision that the holder shall not have any remedy or enforce payment thereof from the stockholders. Suit may be commenced at any time within six years after the corporate creditor has discovered or should have discovered the facts. *Downer v. Union Land Co.*, 113 Minn. 410 (1911). A purchaser of bonds secured by a mortgage which fraudulently represents the amount of land covered by it, may hold personally liable corporate officers who took part in the fraud. Such a suit may be brought by one bondholder in behalf of all the bondholders, and a provision in the mortgage against bondholders bringing a suit does not apply. The mortgagor is not a necessary party defendant. *Slater T. Co. v. Randolph, etc. Co.*, 166 Fed. Rep. 171 (1908).



the insolvency of the company, the bonds having passed into the hands of *bona fide* holders, an attempt is made to hold the contractors liable for the par value of the stock on the theory that it has never been paid for. The great weight of authority, however, holds that the contractors are not liable on the stock, whether they have disposed of it or not.<sup>1</sup>

<sup>1</sup> Where all the stock and a large quantity of bonds are issued by a railroad corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value. "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." Even the Missouri constitution and statutes do not change this rule. *Fogg v. Blair*, 139 U. S. 118 (1891); *Van Cott v. Van Brunt*, 82 N. Y. 535 (1880). The doctrine laid down in *Van Cott v. Van Brunt* was approved in *Coe v. East*, etc. R. R., 52 Fed. Rep. 531 (1892). It is legal for a railroad company to issue bonds and stock in payment for the construction of its road. If all the parties assent no one can complain. "As the stock was issued as a part of the consideration for construction, it cannot be said that it was taken without value given." The par value is immaterial. "The fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all." *Barr v. New York*, etc. R. R., 125 N. Y. 263 (1891). A railroad construction contract by which the work is paid for by stock and bonds is not a stock subscription nor a sale of the stock, but is merely a contract, and the receiver of the railroad cannot hold a contractor liable for the alleged value of the stock and bonds, he being estopped the same as the corporation itself, there being no promise to pay the par value of the stock. *Bostwick v. Young*, 118 N. Y. App. Div. 490 (1907); *aff'd*, 194 N. Y. 516. In

New York the court of appeals has recently declared clearly and plainly that at common law a corporation may issue its stock for cash at less than par, and that not even corporate creditors upon corporate insolvency can collect any more than the price agreed upon and that the decree of a bankruptcy court that the stockholders are liable to corporate creditors for the difference between the price paid and the par value is not binding in a suit brought to collect such difference, and further that the trust fund theory does not change these principles of the common law, and that in a suit in the New York courts to collect on such a subscription to a New Jersey corporation where the subscription agreement provided that the subscriber was to pay only \$25 on each \$100 share, the New Jersey law would be presumed to be the same as the common law. *Southworth v. Morgan*, 205 N. Y. 293 (1912). The mere fact that \$5,000 par value of stock is issued for \$2,000 cash does not obligate the person receiving the same for the remaining \$3,000 even to corporate creditors. *Milliken v. Caruso*, 205 N. Y. 559 (1912). Where a corporation fails in its suit to have bonds canceled on the ground that they were not issued for value, it cannot afterwards defend against such bonds on the ground of payment and estoppel. *Ruckman v. Union Ry.*, 45 Oreg. 578 (1904). At common law, even though a railroad corporation issues to its president nearly \$1,400,000 of mortgage bonds and \$700,000 of stock for construction work which costs only about \$700,000, nevertheless the purchasers of such stock and bonds cannot cause suit to be brought by the corporation, after the foreclosure of its property, and hold him liable. The court held that inasmuch as the



The issue of the bonds of a corporation in payment for property or construction work is the favorite mode of issuing bonds at less than

stock had no market value no harm was done. The court said: "Nor is it true that those who took the stock and bonds and paid money for them were cheated by Kase, in any real sense of the word. Is any man of ordinary judgment cheated when he pays seventy-five or eighty cents on the dollar for a seven or eight per cent. railroad bond, receiving with the bond a gift of the stock in many cases almost equaling the face value of the bond? Such a purchaser knew, just as Kase knew, that the value of the paper was speculative. If Kase lived, if he expended the money in construction, if he completed the road, if the event then proved it to be a meritorious enterprise (that is, if it received and developed traffic sufficient to pay operating expenses, fixed charges, and reasonable dividends), the speculative buyer would probably more than double his money. If any one of the contingencies did not happen, the buyer lost; but he was not cheated, except in the sense that all who bet on the happening of an uncertain event, and lose, are cheated." *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa. 1898). In this case stock and bonds had been issued by the corporation for land, but the stock had no market value, and an effort was made to hold the vendor of the land liable for the par value of the stock and the actual value of the bonds less the actual value of the land. The court refused, and said: "We do not concur with the master in his conclusion that Kase should refund to the company a large sum of money in excess of the profit, because of the stock received by him in the transaction. He finds as a fact that the stock was then, and is now, worthless. A court of equity does not perform the duties of a court, of quarter sessions; does not order restitution of that which is valuable, and also impose a heavy fine on the guilty. The company has the land, Kase has a profit of \$111,000 bonds, and no profit in the worthless stock.

He should account for the bonds alone." Inasmuch, however, as the president secretly owned land in the name of another person and caused the corporation to purchase it and issue stock and bonds in payment, without disclosing his interest in the land, he was held liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land. *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa. 1898). Even though \$150,000 of bonds and a large amount of the capital stock are issued to a contractor for construction of a railroad worth only a little over \$100,000, this does not make them usurious or fraudulent. *Real Estate, etc. Co. v. Wilmington, etc. Ry.*, 77 Atl. Rep. 756 (Del. 1910). Although \$1,500,000 of stock, issued as fully paid, and \$1,500,000 in bonds, are issued for the construction of a work which costs less than \$1,500,000, yet an attorney who took part in the transaction cannot, as a creditor of the corporation, claim that the stock was not fully paid. *Ten Eyck v. Pontiac, etc. R. R.*, 114 Mich. 494 (1897). In *Northwestern, etc. Ins. Co. v. Cotton, etc. Co.*, 46 Fed. Rep. 22 (1891), however, the court held that where property worth \$157,000 is turned in to a corporation for \$200,000, payable in \$125,000 of stock and \$75,000 of bonds, the creditors of the company might hold the parties liable on the stock as though it were unpaid stock, and the creditor is presumed not to have known of the transaction when he contracted the debt. Where a railroad worth \$112,000 is sold to a new corporation for \$1,120,000 of bonds and all its capital stock, the transaction is fraudulent. The bondholders may obtain judgment against the company on their bonds, and then compel the stockholders to pay the full par value of their stock. *Preston v. Cincinnati, etc. R. R.*, 36 Fed. Rep. 54 (1888). This decision was affirmed in *Lloyd v. Preston*, 146 U. S. 630 (1892), where the court held that



their par value. The real value of the property or construction work being uncertain, it is difficult to detect the real price at which the bonds are issued; and when it is borne in mind that bonds may be issued below par, even when issued for cash, the safety of issuing bonds at a price greatly below par in payment for property or construction work becomes apparent. The courts sustain such issues of bonds, even though the value of the property or construction work is far less than the par value of the bonds.<sup>1</sup> Thus, a purchaser of bonds, who purchases

where the owner of a railroad sold it to a newly organized corporation for stock and bonds, the par value of which was fifty times the real value of the railroad, the bondholders and other creditors who had obtained judgment against the corporation, the execution being returned unsatisfied, may hold the party receiving the stock liable thereon, on the ground that the subscription price of such stock has never been paid. The court said: "The entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature." The court also said: "It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up." Persons purchasing the bonds of a railroad corporation and taking a bonus of stock, which bonus had first been issued to the contractor for construction of the road, are liable to corporate creditors on the stock under the Michigan statute relative to railroads. *Union City, etc. Co. v. Traverse, etc. Ry.*, 136 N. W. Rep. 463 (Mich. 1912).

<sup>1</sup> In *Stewart v. St. Louis, etc. R. R.*, 41 Fed. Rep. 736 (1887), where a railroad road-bed worth \$2,000 was turned in to a corporation for \$200,000 of its notes and \$3,600,000 of its stock, the court held that the notes were good and could be collected. In passing upon the validity of a rail-

road construction contract whereby bonds and preferred stock and common stock were issued for construction work, the court in figuring the actual value received by the railroad for these securities figured the common stock at fifteen cents on the dollar and the bonds at seventy-six cents on the dollar, and held that this was legal, even under the Ohio statutes. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). In a suit by the receiver of an insolvent street railway company to hold a construction company liable on stock which, together with bonds, was issued for the construction of a street railway, the claim being that there was no consideration received for the stock, the bill in equity must allege that the construction company had power to acquire such stock. If such stock was issued and received as full-paid stock the construction company is not liable thereon, even though \$63,750 of stock and \$95,000 in notes secured by bonds were issued for construction work costing but \$95,000, there being no proof that the stock ever had any value. *Doak v. Stahlman*, 58 S. W. Rep. 741 (Tenn. 1899). The statute of New York prohibiting the issue of stock at less than par and of bonds at less than their fair market value does not prohibit the issue of stock and bonds by a gas company in payment for the stock and bonds of a competing gas company, even though a high value is placed upon the franchise of such competing company as a part of the purchase price. Such a transaction is not illegal on the ground of creating a monopoly, nor is it *ultra vires*, provided the charter of the first company allowed it to purchase stock and



with notice that an alleged covenant in the mortgage securing the bonds, to devote the proceeds of the bonds to the improvement of the property,

bonds, as provided in the New York statutes. *Rafferty v. Buffalo, etc. Co.*, 37 N. Y. App. Div. 618 (1899). The New York statute against the issue of stock below par and the issue of bonds below their fair market value does not prevent the issue of stock and bonds by a railroad company for construction work, and such stock and bonds may be delivered in advance of the work being done. *Hudson River, etc. R. R. v. Hanfield*, 36 N. Y. App. Div. 605 (1899). Mortgage bonds issued in exchange for notes held by a former company must be clearly and fully explained in a foreclosure suit based thereon. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 90 Fed. Rep. 584 (1898). In *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858), the court held that bonds issued in payment for the completion of a canal were legal, although the sum for which they were issued was largely greater than the estimated cost of the work. In that case the bonds were issued at about fifty cents on the dollar. Railroad bonds issued to pay for the construction of the road are not rendered invalid by proof that the road could have been, or was, constructed for less than the amount of such bonds, if the contract for its construction was fairly made and carried out, and called for the amount of bonds actually issued, and no fraud is charged in the inception or execution of such contract. Such a question, however, may be raised before the master upon the distribution of the fund realized upon foreclosure. *Farmers' L. & T. Co. v. Rockaway Valley R. R.*, 69 Fed. Rep. 9 (1895). Even though a party acquires all the stock of a corporation, amounting to \$1,500,000, and then through dummy directors issues \$3,500,000 additional stock and \$4,000,000 of mortgage bonds to himself, and then proceeds to sell the stock and bonds to the public, yet a person who purchases some of the stock cannot file a bill in equity against the corporation to set aside the transaction and

to ascertain what part of his stock is legal. His remedy is at law for damages, or he may repudiate and recover back his money. "It is elementary that the court is possessed of no power to make a new contract between parties entirely distinct and different from the contract that they have entered into." *Church v. Citizens' Street Ry.*, 78 Fed. Rep. 526 (1897). A delivery of bonds as payment in advance for services to be rendered in selling other bonds cannot be rescinded, where by subsequent agreement a loan with the bonds as collateral was negotiated, the bonds to be subsequently sold. *American L. & T. Co. v. Toledo, etc. Ry.*, 47 Fed. Rep. 343 (1890); *aff'd, Burke v. American L. & T. Co.*, 155 U. S. 534 (1895). The plan of issuing large quantities of stock and bonds of a railroad company to a contractor, the bonds being all "water," is declared illegal in *Central Trust Co. v. New York, etc. R. R.*, 18 Abb. N. Cas. 381, 395 (1887), holding also that the full amount of the bonds can be claimed only by *bona fide* holders without notice, and that the other bonds will be paid only in proportion to the actual value of the property given to the company for them. The celebrated *Burke* litigation is in point here. It appears that in July, 1881, *Burke* purchased the entire capital stock (except seven shares which seem to have been lost) of three coal-carrying railroad companies in Ohio and consolidated them. He owned also the stock of another coal and railroad company. Accordingly he caused the consolidated company to issue \$8,000,000 of its mortgage bonds in purchase of and payment for the stock of the coal and railroad company, which was worth less than \$1,500,000. He then sold the bonds and kept the proceeds. The bonds recited on their face that they were for double tracking, equipment, and improvement purposes. The bonds passed into *bona fide* hands. The consolidated company also passed into other hands. In



has been broken, cannot complain of such breach of covenant, even though the entire proceeds of the bonds were, through the medium of sales of property, diverted to the personal benefit of stockholders.<sup>1</sup> Even though bonds are issued by a company in payment for property at an excessive overvaluation, yet subsequent creditors of the corporation cannot attack the bonds on that ground.<sup>2</sup> But actual fraud changes

1887, or thereabouts, the company commenced suit against Burke and others to compel an accounting and to reach the stock of the company which Burke had paid for out of the proceeds of the \$8,000,000 of bonds. A preliminary injunction against his transferring the stock was obtained, and his motion to dissolve this injunction was denied. *Columbus, etc. Ry. v. Burke*, 19 Week. L. Bull. 27 (Ohio, 1887). Subsequently the case was withdrawn from the courts and submitted to three arbitrators. These arbitrators decided in 1888 that the company had no remedy. *Columbus, etc. Ry. v. Burke*, 20 Week. L. Bull. 287. Then a *bona fide* holder of some of the bonds brought a suit in equity in the New York courts to compel Burke to account to the corporation for the value of the bonds so taken by him. A demurrer to the bill was overruled. *Belden v. Burke*, N. Y. L. J., Nov. 3, 1890. Upon the trial of this case, however, the suit was dismissed, chiefly on the ground that the plaintiff bondholder was estopped by the fact that the chain of title of his bonds ran through the guilty parties themselves. *Belden v. Burke*, 20 N. Y. Supp. 320 (1892). This decision was reversed by the General Term, 72 Hun, 51 (1893). The case then went to the New York court of appeals (147 N. Y. 542—1895), and the case was dismissed on the ground that the plaintiff had not proved any injury and had purchased with notice. In a suit at law by the company to compel the associates of Burke—the parties to whom he sold the bonds—to pay over the proceeds of the bonds, the court directed a verdict for the defendants chiefly on the ground that all the stockholders had assented to the transaction. *Columbus, etc. Ry. v. Lanier*, N. Y. L. J., Feb. 4, 1893.

In 1898 the mortgage mentioned above was foreclosed and an attack upon it by the second mortgagee failed. *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898).

<sup>1</sup> *Belden v. Burke*, 147 N. Y. 542 (1895). The court said (p. 551), as to the action of the stockholders: "They had raised a vast sum of money by placing a mortgage upon their own property, and had expended and disbursed the money as they thought would best promote their own interests. There is no one who, in this action, has any right to complain of this, unless the bondholders, from whom they borrowed the money, were intentionally deceived to their loss or injury, for which they have no adequate redress at law." The court also said that neither on the ground of a breach of covenant—the covenant being a covenant of the corporation only—nor on the ground of fraud could the action be maintained. The court referred to the fact that the plaintiff had not paid more for his bonds than they were actually worth, the interest having been promptly paid and the bonds having appreciated in market value.

<sup>2</sup> *Central T. Co. v. Worcester, etc. Co.*, 110 Fed. Rep. 491 (1901). "A subsequent creditor of the corporation has no right to complain of a fraud upon his debtor which the debtor has waived or refuses to litigate," and hence creditors of an insolvent railroad corporation cannot attack the validity of an alleged issue of stock and bonds for less than their par value in payment for construction work. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). See also § 46, *supra*, and § 848*k*, *infra*. A creditor of an Arizona corporation who became such knowing that stock had been issued



this rule. Thus where a corporation issues several million dollars of bonds, secured by a mortgage that represents that it covers many thousand acres of land, although, in fact, the company owned but a few hundred acres of land, a purchaser of such bonds may maintain a bill in equity in behalf of himself and other bondholders to hold the directors liable for false representations, and the corporation itself is not a necessary party defendant, a request to the trustee of the mortgage having first been made to bring suit.<sup>1</sup> Bonds issued to promoters in payment for options on the property of competing companies of small and uncertain prospective value are void under the Pennsylvania constitution, and cannot be turned in to apply on the purchase price at a bankrupt sale.<sup>2</sup> A corporation will not be allowed to repudiate its consent to an issue of stock for property and to charge a single stockholder therefor, when thirteen fifteenths of its stock were parties receiving the benefit of the transaction, especially where any such repudiation would be for the guilty and innocent alike.<sup>3</sup>

Parties owning real estate may convey it to a corporation formed

for property at an overvaluation cannot complain thereof. *Johnson v. Tennessee Oil Co.*, 74 N. J. Eq. 32 (1908). Speaking of the statutory and charter right of a corporation to redeem its preferred stock at par, the court in the case *Mannington v. Hocking Valley Ry.*, 183 Fed. Rep. 133 (1910), said (p. 146): "The controversy in this case is wholly between the corporation and four of its stockholders. No creditor is complaining, and no one can complain, because the recitals in the articles of incorporation were notice to him of the reserved right to redeem. Future creditors cannot complain, because they will be held to have given credit upon the amount of the stock then outstanding. They cannot even claim that the repurchase was irregularly made."

<sup>1</sup>A provision in the mortgage against individual bondholders maintaining a suit before offering indemnity to the trustee is no bar to such a suit, that provision being applicable to remedies under the mortgage only. The suit may be maintained in the United States circuit court in New York, even though the corporation was organized in Missouri, it appearing that the directors reside in New York. *Slater T. Co. v. Randolph*, etc.

*Co.*, 166 Fed. Rep. 171 (1908). See also §§ 830, 831, *infra*.

<sup>2</sup>*Wiegand v. Lewis, etc. Co.*, 158 Fed. Rep. 608 (1908), *aff'g In re Wyoming, etc. Co.*, 153 Fed. Rep. 787.

<sup>3</sup>*Old Dominion, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908). A promoter, who is being sued in Massachusetts by a New Jersey corporation for alleged illegal profits, cannot by a suit in equity in New Jersey enjoin the corporation from prosecuting such suit in Massachusetts even though he has been held liable by the Massachusetts court and he alleges that the decision is erroneous, and even though the New Jersey courts might not have held him liable originally, and even though the United States court in the same transaction held that the parties were not liable, especially where he has delayed five years before he has commenced suit in New Jersey. Where a promoter has been held liable for illegal profits the court will not compel another promoter equally guilty to pay a part of the judgment, even though the judgment is for more than the profit received by the defendant promoter. The liability of a promoter is to be determined by the law of the state where the transaction occurred or where the action is tried, rather than of the state



for that purpose and take bonds in payment. The New York court of appeals says: "No just criticism is possible either upon the legality or morality of the transaction. Evidence was given to show that the land conveyed was not worth the sum secured, but that is a totally immaterial fact. Whatever the price, it wronged no one, and could wrong no one."<sup>1</sup>

Where a corporation has used its surplus earnings to improve its property, it may issue bonds to its stockholders as a dividend in lieu of a cash dividend.<sup>2</sup> The law goes still further and holds that where

where the corporation was organized. *Bigelow v. Old Dominion, etc. Co.*, 74 N. J. Eq. 457 (1908). The line between liability as promoters, and freedom from liability as vendors of property, to a corporation for stock, is somewhat vague and indefinite, and in fact courts differ even where exactly the same state of facts exists. For instance, in the above case a New York man Lewisohn and a Boston man Bigelow, acting together, transferred mining properties to a New Jersey corporation in payment for stock, the supreme court of the United States held that Lewisohn was not liable, while the supreme court of Massachusetts held that Bigelow was liable to the corporation for his profit as a promoter. Judge Hough has well said in regard to that particular case that it has "a history writ very large in the reports, and not calculated to encourage any one who hopes to look upon the law as a science." *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911). An interesting history of the Lewisohn and Bigelow litigation in New York and Massachusetts with an analysis of the various decisions is found in *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911), where the United States Court in New York refused to hold the Lewisohn estate liable. If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the allegations in the first suit. *Old Dominion, etc. Co. v. Lewisohn*, 202 Fed. Rep. 178 (1913). After paying interest for over four years, a corporation cannot deny the legality of an

issue of bonds. *McCormick v. Unity Co.*, 239 Ill. 306 (1909). See 205 Fed. Rep. 1.

<sup>1</sup> *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333 (1895); s. c., 157 N. Y. 697.

<sup>2</sup> In *Wood v. Lary*, 124 N. Y. 83 (1891), the court sustained the court below in refusing to cancel a mortgage and bonds, the bonds having been issued as a bond dividend to preferred stockholders; s. c., 47 Hun, 550. *State v. Baltimore, etc. Co.*, 6 Gill (Md.), 363 (1847); *Frank v. Edison, etc. Co.*, N. Y. L. J., Jan. 12, and Jan. 16, 1892. Where a joint-stock association, having \$12,000,000 surplus invested in securities, issues its bonds to the amount of \$12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. *D'Ooge v. Leeds*, 176 Mass. 558 (1900). A division of corporate property among the stockholders is not good as against existing creditors. *Singer, etc. Co. v. Barnard, etc. Co.*, 113 Iowa, 664 (1900). A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained what seemed to be sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were not sufficient to pay all liabilities,



all the stockholders assent and corporate creditors are not injured, a private corporation may issue its bonds, notes, and mortgage for the personal benefit of any stockholder, officer, or even outsider,<sup>1</sup> unless,

no bad faith being involved. *Lawrence v. Greenup*, 97 Fed. Rep. 906 (1899). See also §§ 535, 546, *supra*.

A stock dividend is not in itself injurious to the corporation or its creditors, and the creditors cannot complain of it and hold the stockholders liable thereon. Hence an issue of stock to stockholders, a part of which they then contribute to go with a sale of bonds by the corporation, a portion of the price therefor to be paid to the stockholders, may be legal. *Great Western, etc. Co. v. Harris' Estate*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561. In *Merz v. Interior Conduit, etc. Co.*, 87 Hun, 430 (1895), the issue of bonds to pay scrip which had been issued as a dividend was enjoined. The dissenting opinion in this case seems the better view. See s. c., 46 N. Y. Supp. 243 (1897). Where scrip dividends convertible into bonds run to the holder, the holder may sue upon them in his own name. *Chaffee v. Rutland R. R.*, 55 Vt. 110, 139 (1882). A railroad corporation may issue certificates of indebtedness, which the company agrees to redeem in money or bonds. Where the president causes the board to order a gratuitous distribution of bonds among the stockholders, though they hold five sixths of the stock, there being dissenting stockholders, the company may enjoin foreclosure. *Virginia, etc. Co. v. Mercantile Trust Co.*, 12 N. Y. Supp. 529 (1890). Where a lessor railroad issues mortgage bonds to the lessee and the lessee uses them to buy a majority of the stock of the lessor, the creditors of the lessor, if it becomes insolvent, may hold liable the lessee guaranteeing the bonds to the extent of his debt to the extent of the value of such bonds, even though a larger sum has been expended on the leased road. *Northern Pac. Ry. v. Boyd*, 177 Fed. Rep. 804 (1910); *aff'd*, 228 U. S. 482.

<sup>1</sup> Where three persons own all the

stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. *Schilling, etc. Co. v. Schneider*, 110 Mo. 83 (1892). While generally a person owning the entire capital stock may use his assets as he sees fit, subject to creditors' rights, yet if he causes to be issued a fictitious debt to himself and then sells his stock, he may be compelled to account to the corporation, especially where the act was not properly authorized by the corporate meeting and an outsider held one share of stock. *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494 (1910). A corporation cannot have its mortgage and bonds declared void on the ground that they were issued to its stockholders, and were mostly "water," in violation of a constitutional provision. *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887); s. c., to same effect, 19 Fed. Rep. 388. Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockholders and officers. *Leigh v. Kewanee, etc. Co.*, 127 Fed. Rep. 990 (1904). Where there are but two stockholders in a corporation one may contract with the other that certain profits of the corporation shall belong to the latter. *Given v. Gans*, 91 N. Y. App. Div. 37 (1904); *aff'd*, 181 N. Y. 538. A creditor of a corporation may object to a mortgage given to secure the individual debts of its



of course, there is some statute to the contrary, as there generally is. Where bonds are issued to the stockholders for their stock, such bonds

stockholders incurred in purchasing stock in the corporation, even though the creditor became such after the transaction. *In re Haas Co.*, 131 Fed. Rep. 232 (1904). A mortgage given by a corporation to secure the debts of its principal stockholder and manager is void as against corporate creditors. *American, etc. Co. v. Norment*, 157 Fed. Rep. 801 (1907). As to stock dividends see §§ 51a, 535, 536, *supra*. See also § 3, *supra*, showing to what length the courts have gone in this direction.

Where all the stockholders assent, and corporate creditors existing at the time of the transaction are protected, a corporation may legally issue its bonds, notes, or mortgage for the personal benefit of an individual stockholder. The case *Swift v. Smith*, 65 Md. 428 (1886), is in point. In that case a person had purchased all the stock of a corporation and paid for it by notes secured by a mortgage of the corporation on all of its property. The corporation became insolvent. A general creditor of the corporation attacked the mortgage, but the court held that it was legal and could be enforced by the person to whom the notes were given. The court said: "A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby." In the case *First Nat. Bank, etc. v. Winchester*, 119 Ala. 168 (1898), where a private corporation had but four stockholders and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation, and secured by mortgage on the corporate property, the court held that the note was not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving *Swift v. Smith*, 65 Md. 428

(1886). So long as a corporation is solvent it may, with the consent of its stockholders, dispose of property at such price as it sees fit, and may even make a gift of property, and, present creditors being protected, future creditors cannot complain. *Hamilton v. Menominee, etc. Co.*, 106 Wis. 352 (1900). Where an individual who owes a debt transfers property to a corporation, and later the corporation, with the consent of all the stockholders and creditors, gives a bill of sale of certain property to pay such debt, the corporation itself cannot subsequently complain. *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87 (1900). Where the president owns all or nearly all of the stock and mingles his business with that of the company, and causes a debtor of the company to make a payment on his individual debt to the bank, the payment is legal. *Brunswick, etc. Co. v. National Bank, etc.*, 99 Fed. Rep. 635 (1900); s. c., 192 U. S. 386. The assent of a few minor stockholders whose stock was given to them may be presumed, in case they have not objected to an agreement whereby some of the stockholders sell their stock to the others and take their pay from the corporation itself and resign their offices and substitute new parties as directors. *Raymond v. Colton*, 104 Fed. Rep. 219 (1900). The fact that a corporation by unanimous consent pays the premium on life insurance of one of its directors does not enable subsequent corporate creditors to claim the insurance. *Little v. Garabrant*, 90 Hun, 404 (1895); *aff'd*, 153 N. Y. 661. An improvement corporation may legally give a mortgage to secure the personal debt of its president, if none of the stockholders or their existing creditors object. *Osborn v. Montelae Park*, 89 Hun, 167 (1895); *aff'd*, 153 N. Y. 672. Even though an officer pledges corporate bonds for his own debt, yet if he owns the whole capital stock of the corporation, the company cannot for that reason defeat the



will be paid only after other creditors have been paid.<sup>1</sup> Hence where a majority stockholder in a railroad company causes it to issue mort-

mortgage given to secure the bonds. *Buffalo Loan, etc. Co. v. Medina Gas, etc. Co.*, 12 N. Y. App. Div. 199 (1896); *aff'd*, 162 N. Y. 67. Where the sole owner of the stock of a corporation executes the note of the corporation for his individual indebtedness, no one but the creditors of the corporation can complain. *Millsaps v. Merchants', etc. Bank*, 71 Miss. 361 (1893). Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. *Solomon Co. v. Barber*, 58 Kan. 419 (1897). See also *Pusey v. New Jersey R. R.*, 14 Abb. Pr. (N. S.) 434 (1873). A *bona fide* purchaser of negotiable railroad bonds may enforce them, even though the president issued them for his own use. *Long Island L. & T. Co. v. Columbus, etc. Ry.*, 65 Fed. Rep. 455 (1895). See also *s. c.*, 55 Ohio St. 23 (1896); *aff'd, sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). In *Farmers' L. & T. Co. v. Forest Park, etc. R. R.*, 65 Fed. Rep. 882 (1895) a mortgagee who had not been made a party defendant in the foreclosure of mechanics' liens attempted to foreclose its mortgage and claim that the mechanics' lien foreclosure sale was subject to the mortgage. The mortgage was illegal when issued because it exceeded the amount of the capital stock, in violation of the statute. Resolutions to increase the capital stock had been passed, but the papers had not been filed, nor the statutory fees to the state paid, until after the foreclosure of the mechanics' liens. The company had received nothing from the bonds. The pur-

chasers at the first foreclosure sale had expended large sums of money. Speculators who long afterwards bought the bonds with knowledge of the facts bought them for a small sum in order to bring this suit. The suit failed. In *Germania, etc. Co. v. Boynton*, 71 Fed. Rep. 797 (1896), it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them. Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself which he and other stockholders had purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re Brockway Mfg. Co.*, 89 Me. 121 (1896). A mortgage given by a corporation to secure a debt due to a third person by one of its stockholders is illegal as against corporate creditors. *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165 (1898). See § 774, *infra*. Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. *Saranac, etc. R. R. v. Arnold*, 167 N. Y. 368 (1901). Even though a person owns all but two shares of the capital stock, yet a transfer of corporate property by him is ineffective to convey title. *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). See

<sup>1</sup> *In re Estate, etc.*, 202 Pa. St. 589 (1902). So far as dissenting minority stockholders are concerned "a corporation, in the absence of constitutional or statutory prohibition, has in general an inherent right, for

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a *bona fide* purpose, to retire by purchase its capital stock," and may issue its mortgage bonds in exchange for its own capital stock so purchased. *Allen v. Francisco, etc. Co.*, 193 Fed. Rep. 825, 831 (1912).



gage bonds to another railroad company, which then guarantees them and takes a lease of the first-named railroad, and also purchases the stock, a part of the bonds being used to pay such stockholder for the stock, an unsecured creditor of the first-named railroad may hold the second railroad liable on its claim to the extent of the bonds issued in payment for the stock.<sup>1</sup> But under the reserved right to amend charters, the legislature may authorize a corporation to reduce its capital stock and issue bonds in exchange for such part of the capital stock as is retired, especially where the original charter authorized the corporation to decrease its capital stock by purchasing its own stock.<sup>2</sup>

also § 709, *supra*. Where the chief stockholder has paid a corporate debt by giving his own notes therefor, and subsequently the corporation again assumes the debt, the transaction is legal as against subsequent creditors of the corporation. *Fernald v. Highland Hall Co.*, 59 Kan. 534 (1898). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. *Chattanooga, etc. R. R. v. Evans*, 66 Fed. Rep. 809 (1895). When one telegraph company agrees to extend the lines of another telegraph company and to take pay therefor in advance in bonds of the latter company, and then exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and the mortgage on the property of the second corporation. *Boston, etc. Co. v. Bankers', etc. Co.*, 36 Fed. Rep. 288 (1888). This case was affirmed *sub nom.* *United Lines Tel. Co. v. Boston, etc. Co.*, 147 U. S. 431 (1893). The court said in regard to the method of issuing the stocks and bonds: "It violated no principle of law and no rule of good morals." In *Home, etc. Co. v. Barber*, 67 Neb. 644 (1903), the purchaser of stock sued to hold former stockholders liable for corporate assets appropriated by them. The court found that such use of assets had been taken into consideration in fixing the price at which the stock had been sold, and

hence refused to hold the parties liable. Where a person, in selling all the capital stock of a brick company, takes a mortgage on the corporate property in partial payment, he may cancel the mortgage and collect from the vendee the amount thereof. *Hess v. Reick*, 76 N. J. L. 417 (1908).

<sup>1</sup> *Northern Pacific Ry. v. Boyd*, 228 U. S. 482 (1913).

<sup>2</sup> *C. H. Venner Co. v. United States, etc. Corp.*, 116 Fed. Rep. 1012 (1902). By its certificate of incorporation a New Jersey corporation may have power to purchase and retire part or all of its preferred stock, and to issue in payment therefor its bonds, or to sell its bonds and use the proceeds to retire such preferred stock, or it may purchase and hold such stock for reissue. The offer to purchase must be made *pro rata* to all the preferred stockholders. Under the reserved rights to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interest; but while it is true that the charter constitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on



It has been held in England that although none of the stockholders and creditors of a company, which is in difficulties, object to a new issue of bonds and stock for contract work, a part of the bonds and stock being given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company, the scheme is illegal and the directors are liable.<sup>1</sup>

the corporation. *Berger v. United States Steel Corp.*, 63 N. J. Eq. 809 (1902).

<sup>1</sup> *London Trust Co. v. Mackenzie*, 68 L. T. Rep. 380 (1893). Even though the vendors of property to a newly formed corporation receive an excessive price therefor in fully paid stock, yet if it is a closed transaction the corporation cannot thereafter hold them liable for the overvaluation, notwithstanding the corporation thereafter sells other stock to the public at par for cash without disclosing the transaction. *Old Dominion Copper, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908), the court saying: "At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land." The court said also that under the decisions a purchaser of stock from the vendors would have no claim excepting, of course, for actual fraud, and that the theory that the corporation is not bound until an independent board of directors passes upon the transaction has no basis in the decisions, and the court distinguished *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, aff'g 5 Ch. D. 73, on the ground that in the latter case the purchase was not completed until the stock had been taken by the public in ignorance of the facts. A promoter, who is being sued in Massachusetts by a New Jersey corporation for alleged illegal profits, cannot by a suit in equity in New Jersey enjoin the corporation from prosecuting such suit in Massachusetts, even though he has been held liable by the Massachusetts court and he alleges that the

decision is erroneous, and even though the New Jersey courts might not have held him liable originally, and even though the United States court in the same transaction held that the parties were not liable, especially where he has delayed five years before he has commenced suit in New Jersey. Where a promoter has been held liable for illegal profits the court will not compel another promoter equally guilty to pay a part of the judgment, even though the judgment is for more than the profit received by the defendant promoter. The liability of a promoter is to be determined by the law of the state where the transaction occurred or where the action is tried, rather than of the state where the corporation was organized. *Bigelow v. Old Dominion, etc. Co.*, 74 N. J. Eq. 457 (1908). The line between liability as promoters, and freedom from liability as vendors of property, to a corporation for stock, is somewhat vague and indefinite, and in fact courts differ even where exactly the same state of facts exists. For instance, where a New York man named Lewisohn and a Boston man named Bigelow, acting together, transferred mining properties to a New Jersey corporation in payment for stock, the supreme court of the United States held that Lewisohn was not liable, while the supreme court of Massachusetts held that Bigelow was liable to the corporation for his profit as a promoter. Judge Hough has well said in regard to that particular case that it has "a history writ very large in the reports, and not calculated to encourage any one who hopes to look upon the law as a science." *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911). An interesting history of the Lewisohn and Bigelow litigation in New York



Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* purpose, yet he may enforce the same.<sup>1</sup> A bondholder cannot cause to be canceled bonds issued to stockholders on the ground of no consideration, where the bonds are not yet due, and there has been no default, and the plaintiff has no control over the management or the earnings or the money of the corporation.<sup>2</sup> The issue of bonds for cash at less than their par value is sometimes allowed by statute or by charter.<sup>3</sup> The legislature may delegate to a commission the power to determine whether stock or bonds shall be issued, and whether they are properly paid for in property, labor, or money.<sup>4</sup> Even though a statute delegates to a commission the power to pass upon issues of stock and bonds by quasi-public corporations, before such stock and bonds are actually issued, yet this does not authorize the commission to refuse approval on the ground that the original debt which is to be liquidated was an unfortunate investment. The commission's duties are to determine whether the stock and bonds are legally issued for actual debts or corporate purposes and not for the inflation of stocks and bonds. The statute did not intend to substitute their judgment for that of the board of directors or stockholders as to the wisdom of the issue or the security

and Massachusetts with an analysis of the various decisions is found in *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911), where the United States court in New York refused to hold the Lewisohn estate liable. If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the allegations in the first suit. *Old Dominion, etc. Co. v. Lewisohn*, 202 Fed. Rep. 178 (1913).

<sup>1</sup> *Wright v. Hughes*, 119 Ind. 324 (1889). See also § 760, *supra*. It is no defense to foreclosure that the mortgagor misapplied the proceeds from the bonds. *Farmers' L. & T. Co. v. New York, etc. R. R.*, 78 Hun, 213 (1894), reversed on another point in 150 N. Y. 410.

<sup>2</sup> *Bibb v. Montgomery Iron Works*, 101 Ala. 103 (1893). See also § 735, *supra*.

<sup>3</sup> See § 47, *supra*. Under a charter power to sell bonds at such a rate as the directors think best, the bonds may be issued below par and may be issued to pay for iron at less than

par value. *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372 (1859). Where the charter allows the directors to borrow money on such terms as they deem best, they may issue and sell mortgage bonds at sixty-six and two thirds cents on the dollar. *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298 (1887). In *Junction Railroad v. Bank of Ashland*, 12 Wall. 226 (1870), the court held a sale of bonds below par to be valid because the statute expressly authorized it. In *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858), the court held a sale of bonds below par to be valid because the legislature had expressly approved the particular transaction. Under a power to borrow at such rate of interest and upon such terms as the directors should think fit, the directors may sell £250 debentures for £95 each. *Re Regents', etc. Co.*, L. R. 3 Ch. D. 43 (1876). The power to make the issue in this case was given by the "articles of association," i.e. the by-laws.

<sup>4</sup> *Matter of Watertown, etc. Co.*, 127 N. Y. App. Div. 462 (1908).



to be given.<sup>1</sup> Where a public service commission cannot authorize the issue of bonds, inasmuch as the issue would be in contravention of the statute, it cannot bring about the same thing by authorizing the issue if the stockholders voluntarily give up a part of their stock for cancellation.<sup>2</sup> It is no defense to bonds that they were issued without authority of the public service commission as required by statute.<sup>3</sup> Under the New York statute the bondholders purchasing a railroad on foreclosure, may reorganize and issue as many securities as the original company had, and the Public Service Commission cannot prevent it.<sup>4</sup> Notwithstanding the fact that public service commissions are "practically complainant, prosecutor, judge, jury and sheriff" as characterized by a United States court,<sup>5</sup> yet they do important and necessary work and undoubtedly are a permanent institution.<sup>6</sup>

In several of the states there are constitutional and statutory provisions to the effect that fictitious bonds and stock shall be void. The purpose of these provisions was to prevent the issue of bonds and stock at a price far below par. The courts, however, have practically construed such provisions as not invalidating bonds and stock issued for property or construction work.<sup>7</sup> They are so disastrous in their effect on innocent holders, the courts have construed them away.

<sup>1</sup> *People v. Stevens*, 197 N. Y. 1 (1909).

<sup>2</sup> *People v. Stevens*, 203 N. Y. 7 (1911).

<sup>3</sup> *Goldan v. Delaware, etc. Ry.*, 144 N. Y. App. Div. 78 (1911). As to decisions relative to powers of Public Service Commissions, see also § 870, *infra*.

<sup>4</sup> *People v. Public Service Commission*, 203 N. Y. 299 (1911).

<sup>5</sup> *Re Metropolitan Street Ry.*, 166 Fed. Rep. 1006 (1909).

<sup>6</sup> See § 47, *supra*, relative to the Massachusetts Commission.

<sup>7</sup> See ch. III, § 47, *supra*; also cases in note 1, p. 2856, giving the common-law decisions on this subject. Thus, although the constitution of Arkansas prohibits the issue of stock and bonds except for value, and declares void all fictitious stock and bonds, the supreme court of the United States held that although property worth only \$1,300,000 was turned into a corporation for \$1,300,000 of stock and \$2,600,000 of bonds, yet that the bonds were valid. *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887). The court said: "Recurring

to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations — at least when acting with the approval of their stockholders — in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the state con-



The supreme courts of Alabama and Missouri have zealously en-

stitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders." The Illinois constitutional provision does not render invalid the issue of \$9,000,000 of bonds and \$18,000,000 of stock for property purchased at foreclosure sale for \$1,500,000, there having been added to the property \$6,000,000 worth of improvements. The court pointed out that the issue of the stock did not interfere with creditors collecting their claims, inasmuch as their claims were ahead of the stock, and the bonds by themselves were not in excess of the value of the property itself. *Continental T. Co. v. Toledo*, etc. R. R., 82 Fed. Rep. 642 (1897); also 86 Fed. Rep. 929; aff'd, in *Toledo*, etc. R. R. v. *Continental T. Co.*, 95 Fed. Rep. 497 (1899).

Stockholders have a right to intervene in a foreclosure suit and set up defenses against an illegal claim where by a fraud and collusion the directors fail to do so; but a mere allegation by the stockholders that the bonds were issued at a large discount is no defense, unless it is shown that the bonds were sold for less than their value, and are still held by original holders or purchasers with notice. *Gunderson v. Illinois*, etc. Bank, 199 Ill. 422 (1902). See also the important case *Peoria*, etc. R. R. v. *Thompson*, 103 Ill. 187 (1882), where a very large amount of bonds and cash was given to a contractor for construction work, and the bonds were upheld by the court, although prohibited by a constitutional provision, similar to that in Arkansas, passed upon in the case cited *supra*. In *Coleman v. Howe*, 154 Ill. 458 (1895), the court held that, where property of known value, and worth but \$75,000, is sold to a corporation for \$150,000 capital stock and a mortgage for \$70,000, fraud is presumed, and the stockholders are liable for the par value of the stock less the \$5,000. The court said: "Some of the cases hold that overvaluation will not render the stockholder liable for

the difference between the actual and accepted values unless there is an affirmative proof of fraud *aliunde*. But other cases hold, what we regard as the better view, namely, that where property whose value is well known, or can be easily learned, is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith, and is made for a fraudulent purpose. This presumption will be conclusive unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as matter of law." Even though bonds and stock are issued for the construction of a road, the face value of which is twice the cost of the road, yet if all the stockholders consented and none of the creditors then existing are injured, transferees of such stock cannot complain on the foreclosure of the mortgage securing the bonds. *Wells v. Northern T. Co.*, 195 Ill. 288 (1902). A stockholder's liability on stock may be offset against bonds held by the stockholder, even though he has transferred them to another who had knowledge of the facts. *Hynes v. Illinois*, etc. Bank, 226 Ill. 95 (1907). In the case *Lake*, etc. R. R. v. *Ziegler*, 99 Fed. Rep. 114 (1900), where an Illinois corporation issued \$6,500,000 of stock and \$5,150,000 in bonds for the construction of an elevated road of about seven miles in length, the cost of which was about \$3,500,000, the court held that the constitution of Illinois did not invalidate such issue, and furthermore, that the corporation itself could not hold liable the contractor to whom the issue was made, inasmuch as the stock and bonds if invalid were void. The court said (p. 128): "It must not be forgotten that men will not invest large capital in speculative and hazardous enterprises without being assured that, in case of success, they shall receive a profit corresponding relatively to the risk assumed. Whatever may be the



deavored to carry out the purpose of these laws and have sought

correct solution of the problem, the law does not require payment of subscription of stock to be in cash. It may be paid for in work, labor, material, or service rendered. We sit to declare, not to make, the law, and are unable to condemn the transaction in question as within the ban of the constitutional provision. But if this were otherwise, and the constitutional provision denounces this issue of stock, the act was *ultra vires* the corporation, and the stock was void, not merely voidable. It had no validity in the hands of a *bona fide* purchaser for value without notice. The complainant has not suffered pecuniary injury by its issue, and cannot call upon Ziegler to account for what he received upon its sale, for that would be to affirm a void transaction; to both reprobate and approve." Where a consolidated railroad company of Ohio, Indiana, Illinois, Michigan, and Missouri requires large sums of money for improvements and the payment of floating debts, and agrees with its income bondholders that \$26,500,000 of income bonds shall be canceled in exchange for \$700 new bonds, \$500 preferred stock, and \$500 common stock for each \$1,000 of income bonds, it is not illegal to issue such stock, even under the constitution of Missouri which prohibits the issue of fictitious stock or bonds. Pollitz v. Wabash, etc. Co., 167 Fed. Rep. 145 (1909); rev'd on another point in 176 Fed. Rep. 333. A stockholder may maintain a suit to adjudge illegal a plan of issuing bonds and stock in exchange for debentures on the basis of about two for one, and the complaint is not multifarious, even though the transaction is attacked as *ultra vires* and also because the directors were personally interested, nor because different defendants will be affected differently, nor because the plaintiff asks more relief than he is entitled to. It is not necessary to join as parties defendant persons who have already made the exchange, inasmuch as the defendant directors may be liable to them. The depository of the bonds

and the registrar of the stock are not necessary parties defendant. Pollitz v. Wabash R. R., 142 N. Y. App. Div. 755 (1911), s. c., 207 N. Y. 113. It is for the jury to decide whether bonds are legally issued under the constitution of Pennsylvania in a foreclosure suit where \$156,000 of bonds and \$156,000 of stock were issued for real estate worth \$156,000, and later \$144,000 of bonds and \$144,000 of stock were issued for \$144,000 cash, the bonds being still in the hands, of the original holders. Guarantee, etc. Co. v. Dilworth Coal Co., 235 Pa. St. 594 (1912).

In New Castle, etc. Ry. v. Simpson, 21 Fed. Rep. 533 (1884), the court, in passing on the provision in the Pennsylvania constitution, held that a contract giving a construction company \$300,000 of stock and \$300,000 of bonds for work worth but \$180,000 would be set aside, although \$40,000 of work had been done; but that the construction company should be repaid the \$40,000 in cash. See s. c., 23 Fed. Rep. 214 (1885), holding that the contractor may recover back not only this, but also a reasonable compensation and interest. The Texas prohibition is not applicable to a contract of a land improvement company to issue bonds to aid in building a bridge. Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294 (1894). The constitutional provision that bonds shall be issued only for money paid does not prevent the bonds being pledged, and such pledgee on foreclosure may prove up to the par value thereof, the amount to be paid in, however, not to exceed the debt. Western, etc. Co. v. United States, etc. Co., 41 Tex. Civ. App. 478 (1906). A corporation may pledge its unissued bonds, even though the statute prohibits the issue of bonds except for labor, money, or property actually received. William Firth Co. v. South Carolina, etc. Co., 122 Fed. Rep. 569 (1903). Where a promoter purchases all the stock of a corporation for \$75,000, and then purchases and transfers to it options on the business and property of other companies at a cost to him of about \$17,500 and



to enforce these constitutional provisions in those states. In doing

receives therefor \$90,000 of bonds, and \$200,000 of stock in the first-named company, which then becomes insolvent, the bonds are illegal under the Pennsylvania statute that mortgage bonds shall not exceed one half the capital stock, the issue of the stock itself being illegal, the court refusing to allow anything for a prospective and problematical removal of competition, the basis of the decision being that the value of the property was so slight compared with the par value of the stock and bonds, that the bonds and stocks were void, under the constitution of Pennsylvania. Creditors may object to such bonds in the hands of original holders, except to the extent that the money was actually advanced thereon, and hence such bonds cannot be turned in in part payment of the purchase price on the foreclosure sale. *In re Wyoming, etc. Co.*, 153 Fed. Rep. 787 (1907); *aff'd*, 158 Id. 608.

Where a railroad purchases another railroad subject to a mortgage which it agrees to pay, it cannot afterwards attack that mortgage on the ground that it was fictitious and fraudulent. *Old Colony, etc. Co. v. Allentown, etc. Co.*, 192 Pa. St. 596 (1899). A contractor who receives bonds in payment for construction work, and sells them, cannot claim that they are void as contrary to the statute prohibiting "watered" bonds. *Reed's Appeal*, 122 Pa. St. 565 (1888). Where a consolidated company of New York and Pennsylvania issues bonds in New York, fictitiously, such bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void so far as the Pennsylvania part of the property was concerned. *Pittsburgh, etc. R. R. v. Rothschild*, 4 Cent. Rep. 107, decided by the supreme court of Pennsylvania in 1886. Although watered stock and bonds are issued in Pennsylvania, yet a *bona fide* purchaser of the bonds may foreclose the mortgage securing them in order to

obtain payment. *Woodbury v. Allegheny, etc. R. R.*, 72 Fed. Rep. 371 (1895). Even though a person who has a contract with a street railway company that the latter will lease its street railway on certain terms, turns over such contract to a new corporation for \$900,000 of stock of the latter, and the latter then assumes the lease, and even though such stock is illegal under the constitution and statutes of Pennsylvania, yet where the state delays three years in filing a bill to declare it void, and meanwhile the stock has passed into *bona fide* hands, and not until five years thereafter are the real owners of the stock made parties defendant, the bill will be dismissed. *Commonwealth v. Reading, etc. Co.*, 204 Pa. St. 151 (1902).

A water-works company's charter will not be forfeited because another company has purchased a majority of its stock and illegally placed a mortgage upon its property. *Commonwealth v. Punxsutawney, etc. Co.*, 197 Pa. St. 569 (1901). A party who has invested \$15,000 in obtaining a bridge franchise and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former \$15,000 out of \$80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue \$95,000 in bonds, \$80,000 in preferred stock, and \$60,000 in common stock for building the bridge at a cost of \$71,000, but if the former takes his \$15,000 preferred stock and keeps it for six years, he cannot then complain. *Jutte v. Hutchinson*, 189 Pa. St. 218 (1899). Where \$100,000 of bonds and \$125,000 of stock are issued in payment of construction work of the value of \$121,000, the bonds are valid and may be enforced by *bona fide* purchasers. *Wood v. Corry, etc. Co.*, 44 Fed. Rep. 146 (1890). This last case held, also, that only the state could object to an issue of "watered" stock and bonds as



so they uphold the bonds, but in many instances, especially where there is an element of fraud, hold the stockholders liable on the

being in violation of this constitutional provision. A purchaser of stock that was voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state — Pennsylvania. See also, to same effect, §§ 735, *supra*, 848, *infra*. It is legal for a company to issue \$67,000 of bonds and \$67,000 of full-paid stock, even to one of its directors, for \$67,000 in cash, if this was all that the whole \$134,000 of securities were worth, and if all the directors and stockholders knew of it and agreed to it. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892).

In *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892), the court held that the provision in Alabama against watered stock and bonds did not invalidate bonds, although \$10,000 of bonds and \$10,000 of stock were issued for every mile of road constructed, even though it cost much less than \$20,000 cash per mile.

The constitutional provision in Alabama forbidding the issue of stock or bonds except for value, and the statutory provision requiring subscriptions to railroad stock to be paid in money, labor, or property at their money value, does not prevent one railroad company selling its property to another railroad company for bonds and stock of the latter, and the value placed upon the property may be its net earning power and the cost of rebuilding it. It is immaterial that the original cost was much less. *Grant v. East, etc. R. R.*, 54 Fed. Rep. 569 (1893).

Where bonds have been given to the stockholders for nothing, the issue being in payment for construction work, which, however, at the time of the contract, had already been completed and delivered, the corporation may enjoin against the foreclosure of a mortgage securing such bonds, the bonds being still in the stockholders' hands, and may cause the bonds themselves to be canceled under the Colorado constitutional prohibition against such an issue. *Gunnison, etc. Co. v.*

*Whitaker*, 91 Fed. Rep. 191 (1898). Where for six years an issue of stock for services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto, and the party receiving the stock used a large portion of it to interest other persons in the company, and even though the stock so issued to him was \$125,000, being one half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the company. *Calivada, etc. Co. v. Hays*, 119 Fed. Rep. 202 (1902). The Nebraska prohibition does not render void an issue of \$5,940,000 stock and bonds for a railroad purchased at a foreclosure sale, where the old corporation had over \$5,000,000 stock and bonds outstanding, even though it is claimed that the property did not cost over \$2,000,000. The court held that the transaction was valid although "the cash value of the physical property and franchises which were acquired by the reorganized company was not fully equal to the par value of its securities." *Sioux City, etc. Ry. v. Manhattan T. Co.*, 92 Fed. Rep. 428 (1899). In *Brown v. Duluth, etc. Ry.*, 53 Fed. Rep. 889 (1893), the court refused to enjoin an issue of stock, and refused to cancel stock already issued, although \$900,000 of bonds and \$945,000 of stock were issued for construction work which cost \$580,000. The court so held, although the statute required the stock to be fully paid, and prohibited issues except for property actually received. The plaintiff, however, was a holder who purchased with full knowledge of the facts. The court said: "This statute was not intended to prevent or interfere with the usual method of raising money to build railroads, or for any legitimate corporate purpose. It is not to be construed as obstructive to the extent of restricting and ham-



stock, as not having been paid for as required by statutory

perings corporations in their internal management, and embarrass them in procuring means to carry out the legitimate purposes of the corporation; and unless it appears that, under the guise of building its road, bonds and stock of the defendant company are to be issued and put upon the market fraudulently, that do not and are not intended to represent money and property, this corporation is not prohibited from entering into a real transaction, based upon a present consideration, and having reference to legitimate corporate purposes." The court also said that "such a provision does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued."

The California constitutional prohibition against the issue of fictitious bonds or stock does not prevent the company pledging its bonds for a debt less than the par value of such bonds. *Atlantic Trust Co. v. Woodbridge Canal, etc. Co.*, 79 Fed. Rep. 842 (1897). The provision in the California constitution relative to fictitious stock and bonds does not invalidate them. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). A failing Arizona hotel corporation which has not completed a hotel in California may issue \$260,000 of new stock at par and give as a bonus \$275,000 mortgage bonds and \$15,000 of stock, and the assignee of the corporation cannot maintain a suit to have such mortgage bonds declared void, even under the California statute against the issue of fictitious bonds and stock. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206 (1911).

A sale of bonds at ninety-five is legal, even under the Texas constitution. *Northside Ry. v. Worthington*, 88 Tex. 562 (1895). Where railroad constructors pay themselves in stock and then issue bonds without any consideration whatsoever, and pledge them to a bank, which knows all the facts, the bank is not protected.

*Farmers', etc. Bank v. Waco, etc. Ry.*, 36 S. W. Rep. 131 (Tex. 1896).

In *Manhattan Trust Co. v. Seattle Coal, etc. Co.*, 16 Wash. 499 (1897), a person bought coal mines for \$70,000 and then organized a corporation and sold them to the corporation for \$5,000,000 full-paid stock and \$320,000 mortgage bonds. The company did not pay the interest on the bonds and incurred a floating debt of \$135,000. The bonds were still held by the original parties, and the trustee of the mortgage took possession under the mortgage and filed a bill in equity to protect the possession and to obtain a receiver. The court held that the transaction was fraudulent, but subsequently, in the same case, the court practically overruled this decision and held that the bonds were legal. *Manhattan Trust Co. v. Seattle, etc. Co.*, 19 Wash. 493 (1898), holding that although coal land which is purchased for \$100,000 is immediately turned in to a corporation for \$5,000,000 of stock and \$320,000 of mortgage bonds, yet the transaction is not fraudulent *per se*, and the stockholders are not liable to corporate creditors; also that the issue of stock and bonds for property is not necessarily fraudulent, even though \$2,000,000 of the \$5,000,000 of stock is turned back into the treasury to be sold for the benefit of the corporation; also that where a suit is brought by creditors to invalidate mortgage bonds and such suit fails, but an appeal is taken by a part of such creditors and the decision reversed, only those creditors who appealed are entitled to have their claims paid in priority to the bonds; also that a decree adjudging a mortgage and bonds to be fraudulent and allowing certain general creditors to obtain payment in priority to such bonds is binding on the bondholders where the trustee was a party to the suit. Under the statutes of Washington prohibiting stockholders from withdrawing any of the capital stock, a note signed by the corporation, but really given in payment for the stock of the corporation which the former stockholders had transferred to new



law.<sup>1</sup> In Ohio the issue of bonds at less than par to a director is parties, is not enforceable, the transaction being really one where the owner of all the stock sold the same to another person, and the note being practically an accommodation note, and it being shown that the parties who signed the company name to the note were not even officers of the company. *Gilbert v. Seateo, etc. Co.*, 98 Fed. Rep. 208 (1899). See *Coler v. Tacoma, etc. Co.*, 65 N. J. Eq. 347 (1903). Where bonds are given as a bonus to subscribers for stock, the bonds are void except in *bona fide* hands under the constitutional prohibition of Utah. *Rolapp v. Ogden, etc. R. R.*, 37 Utah, 540 (1910).

A provision in a charter of an Illinois and Indiana railroad company that its bonds shall not be sold at less than par does not invalidate the bonds of the company issued and sold in New York at ninety cents on the dollar. *Elsworth v. St. Louis, etc. R. R.*, 33 Hun, 7 (1884); *aff'd*, 98 N. Y. 553. A stockholder cannot, after ten years' delay, maintain a suit to cancel stock issued for patents, and to compel the holder of such stock to refund dividends thereon, the transaction having been spread on the records of the company and open to the stockholders. An allegation that the patents were of no value is insufficient, even though the constitution of the state (Missouri) required that stock be issued only for "money paid, labor done, or money or property actually received," there being no allegation that the patents were known to be valueless at the time. *Kimbell v. Chicago, etc. Co.*, 119 Fed. Rep. 102 (1902).

<sup>1</sup> See § 47, *supra*, giving the Alabama and Missouri decisions on this subject. A stockholder may enjoin the company from issuing \$50,000 of bonds to the stockholders as a bonus, the same being in violation of the constitution, there being no proof of undivided profits to that amount. *American, etc. Co. v. Crane*, 142 Ala. 620 (1905). In regard to the constitutional provision against the issue of fictitious bonds and stock, the supreme

court of Alabama has said: "The constitutional provision, standing by itself, does not require that the amount of money, or the value of the labor or property, for which stock or bonds are issued, shall correspond with the face value of the stock or bonds for which it is issued." Hence the court held that bonds might be issued at less than their par value, provided that some substantial value was paid for them, such value to be fair and reasonable and "not a mere trick or device to evade the law." *Nelson v. Hubbard*, 96 Ala. 238 (1892). In the case *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892), the court held that the above provision in Alabama against watered stock and bonds did not invalidate bonds, although \$10,000 of bonds and \$10,000 of stock were issued for every mile of road constructed, even though it cost much less than \$20,000 cash per mile.

Although \$50,000 of stock, issued as full-paid, and \$25,000 of mortgage bonds are issued for \$2,500 worth of property, yet the parties receiving the same are not liable to corporate creditors for the value of the bonds, the bonds still being in the possession of the parties receiving the same. The parties receiving the stock, however, are liable to corporate creditors on the stock as being unpaid. *Roman v. Dimmick*, 115 Ala. 233 (1896). In *McCaleb v. Goodwin*, 114 Ala. 615 (1897), one street railway purchased all the stock of another street railway, and paid the stockholders therefor by issuing the mortgage bonds of the latter street railway company. The former then placed the stock under its own mortgage, and, this mortgage having been foreclosed, the purchaser attacked the validity of the first-mentioned mortgage. The court sustained the mortgage, however, on the ground that all the stock had voted therefor. The fact that a corporation issued \$18,000 of bonds to its president for \$16,500 does not render such bonds illegal, and a subsequent creditor cannot attack them. *Anderson v. Bullock, etc. Bank*, 122



made illegal.<sup>1</sup> The statutes of Ohio regulating the price at which

Ala. 275 (1899). Where persons buy a property for \$50,000 and make some improvements, and then convey it to a corporation for \$50,000 of stock and \$25,000 of bonds, the stock is full paid, and a creditor cannot reach the bonds by garnishee process, inasmuch as there was no promise to pay for the bonds, and if they are invalid they cannot be enforced. *Roman v. Dimmick*, 123 Ala. 366 (1899). A minority stockholder in a street railway cannot cause to be set aside a sale of its property to another company for stock of the latter, where such sale is authorized by statute, even though the statute was passed

subsequently to the incorporation of the street railway, and even though the purchasing company had issued bonds and stocks to the amount of \$90,000,000 in payment for street railways, the capital stock and bonded indebtedness of which was only \$33,255,000, and even though in making the sale the majority stockholders voted that the stock was worth \$170 a share, and that that price should be paid to minority stockholders, and the vendee company thereupon agreed to pay the same. The remedy of the dissenting stockholder, if any, is at law for the market value of the stock or a proportionate share of the proceeds.

<sup>1</sup> Section 3313 of the Revised Statutes of Ohio sets forth that "all capital stocks, bonds, notes, or other securities of a company purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." In *Zabriskie v. Cleveland*, etc. R. R., 23 How. 381 (1859), this provision was held not to affect the liability of a guarantor of such bonds. But in *Union Trust Co. v. New York*, etc. R. R., 17 Weekly Law Bull. 176 (Ohio, 1887), the court applied the statute and held that where \$50,000,000 of paid-up stock and \$15,000,000 of bonds were issued to a syndicate, of which a director was a member, for \$18,000,000, the stocks, bonds, and mortgages were void. The bondholders became unsecured creditors, the *bona fide* holders being unsecured creditors to the amount of the par value of their bonds and interest, and the other holders being unsecured creditors to the amount actually invested by them. The Ohio statute prohibiting the sale of corporate bonds to a director at less than par, does not apply where the purchaser is merely a director in a corporation which guarantees the bonds. *Cincinnati, etc. Ry. v. Kleybolte*, 80 Ohio St. 311, (1909). The statute of Ohio rendering void bonds which are issued to a director at less than par affects only the bonds issued to him. *Continental*

*T. Co. v. Toledo*, etc. R. R., 82 Fed. Rep. 642 (1897). The Ohio statute against a director purchasing bonds at less than par does not apply to bonds purchased by the directors from *bona fide* holders. *Continental T. Co. v. Toledo*, etc. R. R., 86 Fed. Rep. 929 (1898), holding also that where the president by secret agreement is to participate in a construction contract, he cannot enforce such contract; and hence bonds issued to the contractor are not affected by the Ohio statute prohibiting the sale, directly or indirectly, of bonds to an officer at less than par. *Continental T. Co. v. Toledo*, etc. R. R., 86 Fed. Rep. 929 (1898). The Ohio statute prohibiting a director being interested in the purchase of bonds from his corporation at less than par does not apply to an issue of bonds to an outsider who subsequently admits a director as a partner in the transaction. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). Creditors of an insolvent railroad corporation who become creditors after the mortgage bonds have been issued cannot attack such bonds as having been issued in violation of the statute prohibiting the issue of bonds to directors at less than the par value thereof. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899).



bonds may be issued do not affect bonds issued to a contractor for construction work, unless it is shown that the price was palpably in violation of the statute and that the parties knew it so to be.<sup>1</sup>

*Tanner v. Lindell Ry.*, 180 Mo. 1 (1904). A person who buys bonds knowing that preferred stock had been issued with common stock as a bonus, cannot enforce his bonds by compelling the stockholders to pay for such common stock. *Biggs v. Westen*, 154 S. W. Rep. 708 (Mo. 1913). A reorganization plan by which outstanding income bonds of the Wabash Railroad were to be taken up by an issue of newly authorized mortgage bonds with a bonus of preferred and common stock, was involved in the case *State v. Barnett*, 149 S. W. Rep. 311 (Mo. 1912), and the court held that a suit could not be maintained by other security holders to adjudge the whole plan void where it appeared that the plaintiffs and the trustee of the new mortgage and most of the interested parties lived in New York and had not been personally served in the proceeding and that there were many unknown holders of the securities, and especially where suit had already been commenced in the United States court by the New York trustee for accounting in connection with the income bonds. Where a consolidated railroad company of Ohio, Indiana, Illinois, Michigan, and Missouri requires large sums of money for improvements and the payment of floating debts, and agrees with its income bondholders that \$26,500,000 of income bonds shall be canceled in exchange for \$700 new bonds, \$500 preferred stock, and \$500 common stock for each \$1,000 of income bonds, it is not illegal to issue such stock, even under the constitution of Missouri which prohibits the issue of fictitious stock or bonds. *Pollitz v. Wabash, etc. Co.*, 167 Fed. Rep. 145 (1909), reversed on another point in 176 Fed. Rep. 333. A stockholder may maintain a suit to adjudge illegal a plan of issuing bonds and stock in exchange for debentures on the basis of about two for one, and the complaint is not multifarious, even though

the transaction is attacked as *ultra vires* and also because the directors were personally interested, nor because different defendants will be affected differently, nor because the plaintiff asks more relief than he is entitled to. It is not necessary to join as parties defendant persons who have already made the exchange, inasmuch as the defendant directors may be liable to them. The depository of the bonds and the registrar of the stock are not necessary parties defendant. *Pollitz v. Wabash R. R.*, 142 N. Y. App. Div. 755 (1911); s. c., 207 N. Y. 113. Mortgage bonds issued by a corporation as security for its note are not a pledge but merely determine the extent to which the creditor may participate in the proceeds of the mortgage security. Hence, the usual collateral note authorizing a pledgee to sell the collateral at any time at public or private sale or on an exchange, and purchase it himself, does not apply to bonds so issued except where the bonds have passed into outside *bona fide* hands, especially where in a sale on the exchange the nature of the bonds and the name of the seller are not disclosed and the real purpose was for the so-called pledgee to get the title to the bonds. A subsequent foreclosure sale where the former pledgee of the bonds purchased must also be considered, and the so-called sale on the exchange will be treated as a void sale. *Dibert v. D'Arcy*, 154 S. W. Rep. 1116 (Mo. 1913). See 158 S. W. Rep. 359.

<sup>1</sup>*Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897). The Ohio statute prohibiting the issue of bonds at less than seventy-five cents on the dollar does not render invalid \$9,000,000 of bonds issued to a contractor, even though he received also \$12,250,000 of stock, all for construction and work which cost him, including ten per cent. profit, \$10,300,000, the proof showing, however, that the \$12,250,000 of stock was worth not more than \$3,400,000. *Continental T.*



In Wisconsin bonds issued by a corporation as a pledge will not be ordered to be canceled, because issued in violation of a state statute, requiring payment in money or property of a certain per cent. of their face value, unless the money received by the company upon the pledge of the bonds has been repaid or otherwise secured.<sup>1</sup>

*Co. v. Toledo, etc. R. R.*, 86 Fed. Rep. 929 (1898). In this case on appeal, *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899), the court in sustaining the validity of a large issue of bonds and stock by a reorganized railroad corporation, the common stock being issued at fifteen and the preferred about thirty, said that the Ohio statute does not forbid the sale or exchange of stock at its market value, the court holding also that in passing upon the validity of a railroad construction contract whereby bonds and preferred stock and common stock were issued for construction work, the actual value only of the bonds and stock would be considered. The court, in ascertaining the actual value received by the railroad for these securities, figured the common stock at fifteen cents on the dollar and the preferred stock at thirty cents on the dollar, and the bonds at seventy-six cents on the dollar, and held that this was legal, even under the Ohio statutes. It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. *Farmers' L. & T. Co. v. Toledo, etc. Ry.*, 67 Fed. Rep. 49 (1895). Where a consolidated railroad company of Ohio, Indiana, Illinois, Michigan, and Missouri requires large sums of money for improvements and the payment of floating debts, and agrees with its income bondholders that \$26,500,000 of income bonds shall be canceled in exchange for \$700 new bonds, \$500 preferred stock, and \$500 common stock for each \$1,000 of income bonds, it is not illegal to issue such stock, even under the constitution of Missouri which prohibits the

issue of fictitious stock or bonds. *Pollitz v. Wabash, etc. Co.*, 167 Fed. Rep. 145 (1909). This same matter came up before the New York Court of Appeals in *Polhemus v. Wabash R. R.*, 207 N. Y. 113 (1913), and the court there held that a minority stockholder in a railroad company may hold the directors personally responsible to the corporation for issuing increased capital stock in exchange for the stock of a terminal company which has little or no value, it being shown that the terminal company was to transfer the stock without consideration to a syndicate in which the directors were personally interested. The court said (p. 122): "The pith of the action is that the defendant directors caused the company to donate to themselves \$10,000,000 or thereabouts of its stock."

<sup>1</sup> *Andrews v. National, etc. Works*, 76 Fed. Rep. 166 (1896). The Wisconsin statute that bonds should not be issued for less than seventy-five per cent. of their par value does not apply to a transaction where old bonds are placed under a new mortgage, and the holders of the old bonds receive new bonds in lieu thereof. *Mowry v. Farmers' L. & T. Co.*, 76 Fed. Rep. 38 (1896). Where a statute forbids the issue of bonds at less than seventy-five cents on the dollar, and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. *National, etc. Works v. Oconto Water Co.*, 52 Fed. Rep. 29 (1892). Although the statutes in Wisconsin render stock void if its par value has not been paid for in money or its equivalent, yet this does not render the stock void absolutely but such stock may be validated by holding the stockholder liable for the unpaid part of the par value. The same applies to bonds which under the Wisconsin statute cannot legally be issued under seventy-



Under the New Jersey statutes it is dangerous to issue bonds and stock for property and construction work at a large overvaluation, inasmuch as the courts of that state hold that the bonds are illegal, and that the stockholders are liable on the stock.<sup>1</sup> In Indiana, also,

five cents on the dollar. *Haynes v. Kenosha, etc. Ry.*, 119 N. W. Rep. 568 (Wis. 1909). A contract between a stockholder and the corporation that stock not paid for shall be considered as paid in full is voidable as to corporate creditors, but does not prevent the stockholder maintaining a suit to protect his rights as a stockholder. *Shaw v. Staight*, 107 Minn. 152 (1909). The Wisconsin statute that bonds shall be issued at not less than seventy-five per cent. of their par value, renders void a contract by which a person was to sell the bonds of an Arizona corporation and from the receipts of the business itself was to pay to himself an amount equal to the amount at which the bonds were sold. *Pozorski v. Gold Range, etc. Corporation*, 142 Wis. 595 (1910). See also, as to pledges, § 763, *supra*.

<sup>1</sup> Under the New Jersey statute a corporation cannot issue debentures at ninety-three cents on the dollar convertible into preferred stock at seventy cents on the dollar. A dissenting stockholder may enjoin the issue. *Carver v. Southern, etc. Co.*, 78 N. J. Eq. 81 (1910). Bonds issued by a street railway before the capital stock is paid in are illegal under the New Jersey statute, except those which are in *bona fide* hands, and these latter are entitled to the amount actually received therefor by the corporation. *Vanderveer v. Asbury Park, etc. Ry.*, 82 Fed. Rep. 355 (1897). A dissenting stockholder may enjoin a New Jersey street railway company from selling its property to another street railway company in exchange for stock of the latter, unless such sale is made in connection with dissolution proceedings. He may enjoin a sale of the property to a Washington street railway company for twenty thousand shares of the full-paid stock of the latter, where dissenting stockholders of the former are to be paid only \$35 cash in lieu of each

share of the Washington corporation which he would be entitled to. On its face this is an issue of the Washington stock at \$35 per share, and is in violation of the Washington statutes. The court said: "To the extent of sixty-five per cent. of the issue the increase of capital stock will be, therefore, 'fictitious,' and, according to the constitution, 'void.' Such a scheme ought not to be forced upon an unwilling stockholder of the New Jersey company." Moreover, it being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. *Coler v. Tacoma Ry. etc.*, 65 N. J. Eq. 347 (1903), *rev'g* 64 N. J. Eq. 117. A railroad mortgage in New Jersey is not valid if it exceeds the amount of cash paid in on its capital stock. The mortgage, however, may be made in advance of construction. Where \$900,000 of bonds and \$900,000 of stock are issued to a contractor for work costing only \$900,000, the bonds are invalid, except in *bona fide* hands. On a bill filed by the receiver to cancel the mortgage, the court so decreed, upon condition, however, that *bona fide* holders were first paid the amounts they paid for their bonds. Various parties' rights were passed on by the court. Directors and other participating parties do not participate in the mortgage. *Baker v. Guarantee, etc. Co.*, 31 Atl. Rep. 174 (N. J. 1895). On appeal the court held that where the statutes prohibit debts in excess of the capital stock actually paid in, the excessive bonds in the hands of a director cannot be enforced. *Steelman v. Baker*, 53 N. J. Eq. 672 (1896). But where one issue of bonds was legal and a second issue was illegal, a director holding bonds of the first issue may enforce them. *Physick v. Baker*, 53 N. J. Eq. 673 (1896). Even though it is clear that



there is a statute on this subject.<sup>1</sup> The invalidity of some of the bonds

property was transferred to a corporation for stock and bonds, the par value of which is much greater than the actual value of the property, yet a dividend on the stock cannot be enjoined by a stockholder on the ground that the profits should be used to add to the actual value of the assets sufficient to make them equal to the par value of the stock and bonds so issued, even though the amount of "water" is \$11,000,000, it appearing that there were no floating debts and it not appearing that any one was defrauded. *Goodnow v. American, etc. Co.*, 72 N. J. Eq. 645 (1907). A state may obtain an injunction against a gas company issuing stock for property at an overvaluation of the latter, but if the transaction has been completed fraud in the overvaluation must be proved before the issue will be set aside, and the fact that \$300,000 in bonds and stock were issued for property worth but \$75,000 at the time of the suit is insufficient, as is also the fact that the officers were personally interested in the

transaction. A foreign trustee of the mortgage securing the bonds may be made a party by publication. *McCarter v. Pitman, etc. Gas Co.*, 74 N. J. Eq. 255 (1908). A bill in equity is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock, and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See *v. Heppenheimer*, 55 N. J. Eq.

<sup>1</sup> Where a water-works company issues \$197,000 of stock as full paid and \$150,000 of mortgage bonds to a contractor for construction work, the work actually costing less than \$150,000, and the contractor pays to one of the directors \$6,000 in cash, and gives to the two others \$20,000 each of the stock, such directors are liable to corporate creditors for the debts due to the latter, under the Indiana statute rendering the directors liable where the provisions of the statute have been violated. *Clow v. Brown*, 150 Ind. 185 (1898). Where a consolidated railroad company of Ohio, Indiana, Illinois, Michigan, and Missouri requires large sums of money for improvements and the payment of floating debts, and agrees with its income bondholders that \$26,500,000 of income bonds shall be canceled in exchange for \$700 new bonds, \$500 preferred stock, and \$500 common stock for each \$1,000 of income bonds, it is not illegal to issue such

stock, even under the constitution of Missouri which prohibits the issue of fictitious stock or bonds. *Pollitz v. Wabash, etc. Co.*, 167 Fed. Rep. 145 (1900). *Cp. s. c.*, 176 Fed. Rep. 333. A stockholder may maintain a suit to adjudge illegal a plan of issuing bonds and stock in exchange for debentures on the basis of about two for one, and the complaint is not multifarious, even though the transaction is attacked as *ultra vires* and also because the directors were personally interested, nor because different defendants will be affected differently, nor because the plaintiff asks more relief than he is entitled to. It is not necessary to join as parties defendant persons who have already made the exchange, inasmuch as the defendant directors may be liable to them. The depository of the bonds and the registrar of the stock are not necessary parties defendant. *Pollitz v. Wabash R. R.*, 142 N. Y. App. Div. 755 (1911); *s. c.*, 207 N. Y. 113.



does not render invalid the mortgage securing the bonds.<sup>1</sup> Thus, even though a large number of owners of paper mills are induced to turn their

240 (1897); aff'd, 56 N. J. Eq. 453. This same transaction was involved in the case *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900), and the court there held that the mortgage was legal and could be enforced, yet the court intimated that the promoters could be held personally liable. A decision on the merits was rendered in 1905 in *See v. Heppenheimer*, 69 N. J. Eq. 36 (1905). "Stock issued as a bonus with the sale of bonds, or stock issued through the means of overvaluation of property, cannot properly be regarded as necessarily issued fraudulently. In the absence of intervening rights of creditors, such transactions appear to have been generally supported by the courts, unless positive fraud has been clearly established, notwithstanding the constitutional and statutory provisions of many of the states designed to secure a proper relationship between the capital stock and the assets of corporations." *Arnold v. Searing*, 73 N. J. Eq. 262 (1907). Where a corporation which has no profits on hand issues its bonds in payment for its stock, the party so receiving the bonds cannot enforce them, but on the contrary remains liable for the unpaid subscription price of the stock, it not having been properly issued as paid-up stock, and he not being a *bona fide* holder. *Hebberd v. Southwestern, etc. Co.*, 55 N. J. Eq. 18 (1896). In this case it was held that *bona fide* holders of bonds illegally issued could enforce them only for the amount paid therefor by such *bona fide* holders; and where bonds with a bonus of stock had been issued, that, as against the parties receiving

the bonds, the liability on the stock could be offset against the amount due on the bonds, the company having become insolvent. Even though property is purchased at sheriff's sale for \$17,000, and is then resold to the reorganized corporation for \$38,000 in mortgage bonds, this is no proof of fraud. *Pomeroy v. New York, etc. Co.*, 48 Atl. Rep. 395 (N. J. 1901).

Where property mortgaged to secure bonds is of doubtful value and there is a financial stringency in the market, a corporation may sell \$40,000 of its mortgage bonds and \$5,000 of its stock for \$33,000, and a subsequent purchaser of stock of the company with notice of the facts cannot attack the validity of the mortgage. The defense of usury is not good where the issue was made in New York state, although the corporation was organized in New Jersey. *Franklin T. Co. v. Rutherford, etc. Co.*, 57 N. J. Eq. 42 (1898). In the case *Short v. Post*, 58 N. J. Eq. 130 (1899), where two mortgages and a large amount of stock were issued by a corporation for property worth no more than the first mortgage, and the receiver of the corporation defended against such first mortgage on the ground that the mortgage was usurious because some of the stock had been given to the mortgagee without consideration, the court held the defense not good under the facts in that case.

A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of stock

<sup>1</sup> *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886). Even though only \$2,788,000 is paid for thirty-nine paper mills, and the purchaser then turned the property over to a corporation for \$5,000,000, payable partly in bonds and partly in stock, yet this does not affect the validity of the mortgage securing the bonds, and

even though the purchasers of the bonds received therewith a bonus of stock, yet their claims based on the bonds cannot be decreased by the par value of the stock so received by them, they being innocent purchasers. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). See also § 762, *supra*.



property in to a single corporation in exchange for bonds and stock of the latter, and the promoters secretly receive a large quantity of additional profit, and even though the total amount of bonds and stock issued is about twice the price actually paid to the owners for the properties, yet this does not invalidate the mortgage securing the bonds, and the remedy of the parties who so turned in their properties is against the promoters and not in defense of a suit to foreclose the mortgage.<sup>1</sup>

Where bonds have been illegally or fraudulently issued, the court will allow those which are in the hands of the guilty parties, or persons taking with notice, to be collected only for such amounts as were actually received therefrom by the corporation.<sup>2</sup>

The courts go very far in protecting *bona fide* holders of corporation bonds, and will uphold and enforce such bonds under nearly all circumstances. The defense that bonds were issued below par does not avail as against *bona fide* holders. They may collect the

which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899). The New York courts will, at the instance of a New York stockholder in a New Jersey corporation, enjoin the latter from issuing stock as a bonus with bonds in violation of the New Jersey statute requiring stock to be issued for money or property, even though the actual value of the stock and bonds so issued does not exceed the par value of the bonds and the amount received by the corporation is the par value of the bonds. The fact that the company is in a failing condition does not change the effect of the statute. *Kraft v. Griffin Co.*, 82 N. Y. App. Div. 29 (1903). Where a person, in selling all the capital stock of a brick company, takes a mortgage on the corporate property in partial payment, he may cancel the mortgage and collect from the vendee the amount thereof. *Hess v. Reick*, 76 N. J. L. 417 (1908).

<sup>1</sup> *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). In the foreclosure of a mortgage the corporation cannot

set up that the value of the property received by it for bonds and stock was grossly overvalued. *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904).

<sup>2</sup> *Thomas v. Brownville, etc. R. R.*, 109 U. S. 522 (1883); *Central Trust Co. v. New York, etc. R. R.*, 18 Abb. N. Cas. 381, 403 (1886). See also § 770, *infra*, and § 762, *supra*, and *Union Trust Co. v. New York, etc., R. R.*, 17 Weekly L. Bull. 176 (Ohio, 1887). The courts will require substantial equity to be done to the persons receiving "watered" bonds before requiring them to account for the bonds. Thus, although bonds are irregularly issued to a contractor, yet his contract is not held invalid unless he is repaid the sums actually expended in good faith by him under the contract. *Porter v. Pittsburg, etc. Co.*, 120 U. S. 649, 672 (1887). See also § 744, and ch. XXXIX, *supra*; *Kappner v. St. Louis, etc. R. R.*, 3 Dill. 228 (1875); s. c., 14 Fed. Cas. 132. Where the holder is not a *bona fide* purchaser, he stands in the shoes of his vendor, and where the officers use the corporate bonds to pay the debts of other corporations illegally, the court will order the bonds and mortgage canceled, there being no *bona fide* holders of the bonds. *Chicago v. Cameron*, 120 Ill. 447 (1887).



full face value of their bonds.<sup>1</sup> The question of what constitutes *bona fide* holdership is largely a question of fact in cases where bonds have

<sup>1</sup> *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886); *Cromwell v. County of Sac*, 96 U. S. 51 (1877). A *bona fide* purchaser of railroad bonds may enforce them at their par value, irrespective of what he paid for them. *Wade v. Chicago, etc. R. R.*, 149 U. S. 327 (1893). In the case *Railroad Companies v. Schutte*, 103 U. S. 118, 144 (1880), the court said: "It is next contended that as the bonds were fraudulently put out by the officers of the companies, and are unconstitutional, the recovery must be confined to the amount actually paid for the bonds to the agents of the companies. . . . In commerce, commercial paper means what on its face it represents, regardless of what its maker or promoter may have got for it. The bonds of the state in the open market purported to be what they called for. The companies put them out, and in legal effect, as we think, indorsed them. A *bona fide* holder can now require the indorser to respond to his indorsement commercially; that is to say, by paying what he in effect agreed the maker must pay."

Where the foreclosure of a mortgage is contested on the ground that bonds and stock were issued largely in excess of the value of the property, and on the ground that the parties who turned in their property for stock were defrauded by the promoters, the court said in regard to the bonds: "We are clearly of opinion that so far as they were purchased for a valuable consideration by innocent holders they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, where the bonds must be treated as an entirety, but is a defense applicable to each individual bondholder." *Dickerman v. Northern T. Co.*, 176 U. S. 181, 206 (1900). In this last case parties receiving stock and bonds from the corporation in payment for property sold the bonds with a bonus of

stock. The court held that the purchasers were not necessarily purchasers with notice.

In *Dickerman v. Northern T. Co.*, 176 U. S. 181, 202 (1900), the court said: "It is true that these parties in disposing of the bonds allowed to each purchaser of a one thousand dollar bond two hundred dollars of preferred and four hundred of common stock, but they did not seem to have profited by this themselves. And if it were necessary to the negotiation of the bonds to give a bonus in stock, it cannot be considered in the light of a mere donation. Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders. Certainly, if this bonus were received in ignorance of the fraud practiced upon the original mill-owners, and simply as an inducement to take the bonds, the dissenting stockholders could not compel the bondholders to submit to a deduction from their bonds of the par value of the stock received as a bonus, particularly in view of the fact that the stock might turn out to be worthless." Where mortgage bonds are issued without any consideration the burden of proof is shifted on to the holders of the bonds to prove that they are *bona fide* holders. *McVicar, etc. Co. v. Union Ry. etc. Co.*, 136 Fed. Rep. 678 (1905). Where a New Jersey corporation having power to purchase its own stock and issue its bonds in payment therefor has made such an issue, the bonds may be enforced in *bona fide* hands, even though the stock so purchased was worthless. *Hoskins v. Seaside, etc. Co.*, 68 N. J. Eq. 476 (1905).

In a foreclosure suit the holders of bonds are presumed to be *bona fide* holders, and, if the corporation claims that the bonds were issued without consideration, it must prove that the holders are not *bona fide* holders. *Atlantic T. Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539 (1902), holding also that where the trustee of a mortgage in foreclosing proves the issue



been fraudulently issued, and each case is determined on its own peculiar circumstances.<sup>1</sup> Moreover, the *bona fide* holdership may be de-

of the bonds and that it is the holder thereof, this raises a presumption that the owners of the bonds are *bona fide* holders for value, and, if the corporation claims that the bonds were issued without consideration, it must prove that the holders are not *bona fide* holders. Coupon bonds of a railroad company "payable to bearer pass by delivery; and a *bona fide* purchaser of them before maturity takes them freed from any equities that might have been set up against the original holders of them. The burden of proof is on him who assails the *bona fides* of such purchase." *Kneeland v. Lawrence*, 140 U. S. 209 (1891); *Elsworth v. St. Louis*, etc. R. R., 33 Hun, 7; *aff'd*, 98 N. Y. 553 (1885), where the issue below par was even prohibited by statute. Though the directors fraudulently issue bonds to another railroad to build the latter, and the latter uses the proceeds to purchase control of the former, the *bona fide* holders of the bonds are protected. *State v. Brown*, 64 Md. 199 (1885). Bonds issued below par or without consideration are nevertheless valid in *bona fide* hands. *Ex parte Chorley*, L. R. 11 Eq. 157 (1870); *Philadelphia*, etc. R. R. v. *Lewis*, 33 Pa. St. 33 (1859) — two cases in which the corporation received nothing for the bonds; *Woods v. Lawrence County*, 1 Black, 386 (1861); *Mercer County v. Hackett*, 1 Wall. 83 (1863); *Whitney v. Peay*, 24 Ark. 22 (1862), a case of pledge of bonds. A bond like a note purchased by a *bona fide* party may be enforced at its par value although purchased at less than the par value. *Cromwell v. Sac County*, 96 U. S. 51 (1877); *Bronson v. La Crosse*, etc. R. R., 2 Wall. 283 (1863); *Alexander v. Atlantic*, etc. R. R., 67 N. C. 198 (1872); *Railway Co. v. Sprague*, 103 U. S. 756 (1880), where nothing was received by the corporation for the bonds; *Grand Rapids*, etc. R. R. v. *Sanders*, 17 Hun, 552 (1879), *rev'g* 54 How. Pr. 214. *Bona fide* purchasers of bonds from a contractor are not affected by the

fact that he did not complete the work according to contract, for which he received the bonds in payment. *McElrath v. Pittsburg*, etc. R. R., 55 Pa. St. 189 (1867). The fact that the proceeds received from the sale of the bonds are misappropriated by the stockholders does not affect the validity of the bonds in *bona fide* hands. *Western*, etc. R. R. v. *Drew*, 3 Woods, 692 (1879); s. c., 29 Fed. Cas. 747. The *bona fide* purchaser is not affected by the fact that the president sold the bonds and used all the proceeds for his individual purposes. *Philadelphia*, etc. R. R. v. *Lewis*, 33 Pa. St. 33 (1859). The *bona fide* purchaser of municipal bonds may enforce them, although the railroad to which they were issued sold them at a discount of twenty-five per cent., contrary to the charter. *Woods v. Lawrence County*, 1 Black. 386 (1861).

<sup>1</sup> After many years' delay in foreclosing the mortgage, the court will scrutinize closely the validity of the bonds. A purchaser of the bonds at from three to twenty cents on the dollar, after an ineffectual foreclosure, and after the unpaid accrued interest nearly equals the principal, is not a *bona fide* purchaser, and if the original issue was for no consideration he cannot enforce them. But a *bona fide* purchaser from him, and any subsequent purchaser from such *bona fide* purchaser, may enforce the bonds. *Bona fides* must be proved in such a case. *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889); *rev'd* on other points, *sub nom.* *Simmons v. Burlington*, etc. Ry., 159 U. S. 278 (1895). A purchaser may be *bona fide* although he took the bonds in exchange for other bonds worth only ten cents on the dollar. *Morton v. New Orleans*, etc. Ry., 79 Ala. 590 (1885). *Bona fides* is not presumed where the fraudulent issue has been proved. *Gilman v. New Orleans*, etc. R. R., 72 Ala. 566 (1882). Where overdue railroad mortgage bonds, which belong to the railroad company, are bought



stroyed by the fact that the bond itself may not be drawn in negotiable form.<sup>1</sup>

If the holder of the bonds purchased them from an officer of the corporation, and such officer made the sale, not for the corporation, but as the holder and owner of the bonds himself, this in itself may destroy the *bona fides* of the purchaser, if it turn out that the officer was committing a breach of trust.<sup>2</sup>

The danger, incident to an issue of mortgage bonds at less than their par value, is generally added to by the fact that the directors of the corporation are usually personally interested in the issue. It is an old and well-established principle of law that a director is disqualified from contracting with his corporation. He is acting as a trustee, and as trustee cannot contract with himself as an individual.<sup>3</sup> It is undoubtedly true that a director may buy bonds at less than par if the transaction is fair, and if no stockholder objects.<sup>4</sup> But any stockholder may object to bonds, issued for construction work in which the directors were interested. Upon such objection, the mortgage securing the bonds being under foreclosure, the court will allow the bondholders taking with notice to prove only such part of the bonds as represent

at forty cents on the dollar from the vice-president of the company after suit to foreclose has been begun, and a receiver has taken possession of the mortgaged property, the purchasers of such bonds are not *bona fide* holders where inquiry on their part would have shown that the vice-president had no authority to sell the bonds. *American, etc. Co. v. St. Louis, etc. Co.*, 42 Fed. Rep. 819 (1890). A person who purchases four bonds of \$1,000 each for \$150 is bound to inquire into the legality of the issue. *Riggs v. Pennsylvania, etc. R. R.*, 16 Fed. Rep. 804 (1883). Where a purchaser of bonds knows that he is purchasing from an agent of the corporation, and that the agent intends to use the proceeds for his private purposes, he is not a *bona fide* purchaser. *Chew v. Henrietta, etc. Co.*, 2 Fed. Rep. 5 (1880). A partner of one of the contractors who is a party to a fraudulent issue of bonds was held not to be a *bona fide* purchaser under the facts in the case. *Smith v. Florida, etc. R. R.*, 43 Fed. Rep. 731 (1890), a case involving the bonds which were passed upon in *Railroad Cos. v. Schutte*, 103 U. S. 118 (1880),

and *Trask v. Jacksonville, etc. R. R.*, 124 U. S. 515 (1888).

<sup>1</sup> See § 767, *infra*.

<sup>2</sup> See §§ 293, 727, *supra*. A purchaser of a note of a corporation payable to an officer of the corporation is not a *bona fide* purchaser. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (1898). A purchaser or pledgee of bonds from a director may be a *bona fide* holder, even though he knew that he was dealing with a director, inasmuch as a director may be a lawful holder of such bonds. *Duncomb v. N. Y., etc. R. R.*, 84 N. Y. 190 (1881).

<sup>3</sup> See §§ 649, 653, 662, *supra*.

<sup>4</sup> A purchaser at ninety cents on the dollar of bonds issued to a director at seventy cents is protected, even though he was informed of the facts. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892); *Re Compagnie Bellegarde*, L. R. 4 Ch. D. 470 (1876); *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883); *Bank of Toronto v. Cobourg, etc. Ry.*, 10 Ont. Rep. (Can.) 376 (1885). See also § 692, *supra*. As to the purchase of bonds by the directors from outsiders at less than par, see § 660, *supra*.



actual value received by the corporation,<sup>1</sup> while *bona fide* holders may enforce their bonds at par.<sup>2</sup> Moreover, if all the stockholders assent, and the general creditors of the corporation are not injured, the issue is legal.<sup>3</sup> Inasmuch as in New York an agreement of a contractor to divide with the officers of the company profits made in the construction of the railroad is legal, unless avoided by the corporation, and is not subject to collateral attack, such a contract will be sustained in Pennsylvania if the contract was made in New York and pertained to a New York corporation, even though such corporation was thereafter consolidated with a Pennsylvania corporation.<sup>4</sup> Where a director is secretly interested with a contractor in bonds issued for construction, a contract by which the director sells his interest to the contractor cannot be enforced by the director, the issue having been illegal.<sup>5</sup> In Ohio this disqualification of directors from purchasing from the corporation its bonds at a discount is embodied in the statutes, and the bonds are declared not merely voidable, but absolutely void.<sup>6</sup> It is of course legal for the company to sell its bonds to stockholders.<sup>7</sup>

<sup>1</sup> Thomas v. Brownville, etc. R. R., 109 U. S. 522 (1883). See also Wardell v. Union, etc. R. R., 103 U. S. 651 (1880); s. c., 4 Dill. 330; s. c., 29 Fed. Cas. 211. Where the incorporating act requires all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of \$500,000 in bonds, of which bonds \$480,000 are turned back by the vendor to the directors, who divide them among themselves, the bonds are void in the hands of directors. The directors in this instance had erected over the entrance to the cemetery a statue of Immortality, and had done so "with great pomp and solemnity." Campbell v. Cypress, etc. Cemetery, 41 N. Y. 34 (1869). Bonds may be issued by a corporation to a director as security for a debt from it to him. A director cannot buy bonds from the corporation at less than par, except at the risk that the company will undo the transaction. A director must give up bonds which he takes as a bonus on his subscription. But the *bona fide* purchasers may enforce them. Duncomb v. New York, etc. R. R., 84 N. Y. 190 (1881). Fraud in issuing them to a director does not

affect a *bona fide* purchaser. Hulett's Case, 2 J. & H. 306 (1862). For a case that carefully considers the facts which render certain bonds legal and others fraudulent, see Bronson v. La Crosse R. R., 2 Wall. 283 (1863). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. Burgess v. St. Louis County R. R., 99 Mo. 496 (1890). On this subject of laches see also ch. XLIV, *supra*.

<sup>2</sup> See note 2, p. 2630, *supra*.

<sup>3</sup> Bonds issued at their full value to the president in payment for work done by him under a contract between himself and his company are valid and enforceable, where all the stockholders assented to such contract. Arkansas, etc. Co. v. Farmers', etc. Co., 13 Colo. 587 (1889). See also ch. XLIV, *supra*, and §§ 649, 730, *supra*.

<sup>4</sup> Rumsey v. New York, etc. R. R., 64 N. J. Eq. 807 (1902).

<sup>5</sup> Cobb v. Crittenden, 161 Fed. Rep. 510 (1908).

<sup>6</sup> See note 1, p. 2876, *supra*.

<sup>7</sup> The holder of a majority of the stock of a railroad company may legally cause its bonds to be issued



A more difficult question arises when bonds are issued to persons who control the directors of the company, such directors being mere "dummies" of the persons to whom the bonds are issued. There have been decisions to the effect that bonds issued below par to the persons, who have put in their "dummies" as directors of the company, are invalid and may be attacked by stockholders or corporate creditors, or by the corporation itself.<sup>1</sup> If, however, all the stockholders assent, the contract and issue are legal.<sup>2</sup>

It may be illegal for the directors to vote to issue a large amount of bonds at less than their real value to a construction company in which they have stock or in which they are directors.<sup>3</sup> It is fraudulent to issue bonds at less than their actual value in order to defraud other

to himself at ninety cents on the dollar in payment of a debt due him. *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). A stockholder may of course purchase bonds upon their original issue by the corporation. *Bergen v. Porpoise Fishing Co.*, 42 N. J. Eq. 397 (1886).

<sup>1</sup> In *Central Trust Co. v. New York, etc. R. R.*, 18 Abb. N. Cas. 381 (1887), the foreclosure of a railroad mortgage was sought. The corporation defended against the bonds on the ground that they were issued below par to persons who controlled the board of directors by means of "dummies." The court sustained the contention and held that the bonds still in the hands of the guilty parties must be reduced in amount to the amount actually paid therefor. In *Cleveland Rolling M. Co. v. Crawford*, 9 Ry. & Corp. L. J. 172 (Ill. Cir. Ct. 1891), corporate creditors sought to hold the defendant liable for corporate debts, by reason of the fact that bonds and stocks, whose par value was four times greater than the value of construction work done by defendant, had been issued to defendant for construction work, and that the corporation was controlled by defendant through "dummies." A demurrer was overruled, the court saying: "He could no more shield himself behind the nominal action of the corporation by its 'dummy' board of directors than a guardian or executor *de son tort* could shield himself behind the accounts of the legal guardian or ex-

ecutor procured to be made in the name of such legal guardian or executor." Where two persons organize a railroad corporation by means of "dummy" stockholders, their clerks and employees, and put their clerks, etc., in as "dummy" directors, and these "dummies" issue all the stock and a large mortgage on the corporate property to the two promoters for construction work, one of the promoters cannot call the other to an account. The court will not aid the parties. *Jackson v. McLean*, 100 Mo. 130 (1890). And where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two by means of "dummy" intermediaries at an improvident price, one of the contractors cannot compel the other to divide the profits. *Jackson v. McLean*, 36 Fed. Rep. 213 (1888). See also §§ 663, 664, *supra*.

<sup>2</sup> *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892), and §§ 649, 662, 730.

<sup>3</sup> See §§ 649, 662, 663, *supra*. Where with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays



creditors and the stockholders, and to buy in the property cheaply at foreclosure sale.<sup>1</sup>

Promoters are somewhat similar to directors in their fiduciary relationship towards the corporation, its stockholders, bondholders, and creditors. Hence a promoter may be liable where he transfers property to the corporation for stock and bonds much greater in value than the value of the property he so transfers.<sup>2</sup> Where brokers and promoters

in connection with the contract. *Griffith v. Blackwater, etc. Co.*, 55 W. Va. 604 (1904).

<sup>1</sup> A foreclosure sale based on fraudulently issued bonds will be set aside as against purchasers with notice, and such purchasers held liable for the real value of the road. *Drury v. Cross*, 7 Wall. 299 (1868). Judgment creditors may bring an action to set aside a mortgage and to restrain a foreclosure, where the bonds secured thereby were issued to the stockholders for purposes foreign to the corporate purposes, in fraud of corporate creditors, the object being to close out the property and organize a new corporation for the purpose of going on with the business. *Phenix Nat. Bank v. Cleveland Co.*, 11 N. Y. Supp. 873 (1890). For an issue of bonds fraudulently by issuing them in pledge and then purchasing the bonds at a pledgee's sale, see *James v. Railroad Co.*, 6 Wall. 752 (1867).

<sup>2</sup> See § 651, *supra*. In the case *Dickerman v. Northern T. Co.*, 176 U. S. 181, 206 (1900), the court said it was not called upon to decide whether promoters who receive a large quantity of bonds and stock as their profit are liable for the par value of the stock, or whether the remedy is a rescission of the transaction.

Where promoters pay out less than \$30,000 to secure options on land and then sell the options to the corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon there-

after as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in selling and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900). A stockholder in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful, and secret profits by being interested in the constituent company whose stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded their remedy is a suit at law for damages against the guilty parties. The court said (p. 241): "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation. . . . The stockholders of the con-



issue bonds greatly in excess of the value of the corporate property and by fictitious sales give a high market quotation of the bonds and borrow money thereon, the lender may hold them liable in a suit for loss due to a conspiracy.<sup>1</sup> In Massachusetts the supreme court has recently held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors, and officers approved the transaction when it was carried out, it appearing, however, that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different

stituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured." *Blum v. Whitney*, 185 N. Y. 232 (1906). Where a promoter causes the stockholders in various electric companies to turn in their stock to a new corporation in exchange for bonds of the latter, and also gives to such stockholders the right to purchase, at \$30 a share, stock in the latter, a stockholder who has done so and then discovers that the promoter has made \$20,000,000 profit in stock of the new company, may bring suit to compel the promoter to turn over the profit to the corporation and may join the new corporation as a party defendant. It is no defense that the board of directors of the latter thinks it inexpedient that the suit be brought. *Groel v. United, etc. Co.*, 70 N. J. Eq. 616 (1905). The court said (p. 1064): "The authorities hold that it is a

matter of discretion in the court whether to permit a suit to be brought by a stockholder on behalf of his corporation, and that the court will exercise its discretion having in view the circumstances of the parties, their relationships to each other and to the cause of action, the refusal to sue," etc. Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that \$75,000 of stock should be subscribed for within a certain time, and then proceeds to organize the company, he himself subscribing for \$25,000 of the stock, and the corporation then purchases certain worthless patents and agency contracts and issues therefor \$63,250 of full-paid stock, including the \$25,000 subscribed for by him, and afterwards the corporation collects \$4,000 of such donations and borrows money from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the \$4,000. *Moore v. Universal, etc. Co.*, 122 Mich. 48 (1899).

<sup>1</sup> *McElroy v. Harnack*, 213 Pa. St. 444 (1906).



case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.<sup>1</sup>

<sup>1</sup> Where a person buys all the stock of a corporation for about \$613,000, and some real estate for about \$175,000, and sells the former to a corporation formed by him for that purpose, for \$2,500,000 par value of stock, having also an actual value of \$2,500,000, and sells the real estate for \$750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said: "That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315 (1905), the court refusing to follow *Old Dominion, etc. Co. v. Lewisohn*, 136 Fed. Rep. 915; *aff'd*, 148 Fed. Rep. 1020, involving the other issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If

there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued. In the final decision of this case in Massachusetts a judgment of upwards of \$2,000,000 by the company against the defendant was sustained. The court held that although the contracts were made in New Jersey, the company being incorporated in that state, yet where they were intended to be and were carried out in Massachusetts, the law of Massachusetts governed on this subject. The court gave a wide meaning to the word promoter in defining its fiduciary relation towards the company, and held that in selling property to the company there must be (1) an independent board of directors and a full disclosure to them, or (2) a full disclosure to all existing and future subscribers to shares, or (3) ratification by the stockholders after complete organization, or (4) all the stock issued to himself. The court again held that where the property costing \$1,000,000, with a market value of not over \$2,000,000, was turned in by the promoters for \$3,250,000 of stock, and then \$500,000 remaining unissued stock was sold to the public at par, without disclosing such purchase and profit, the company might recover such secret profit, even though at the time of the sale the vendor owned the entire capital stock then outstanding. The measure of damages is the difference between the market value of the stock issued and the market value of the property received. *Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159 (1909); s. c., 225 U. S. 111 (1912). The line between liability as promoters, and freedom from liability as vendors of property, to a corporation for stock, is somewhat vague and indefinite, and in fact courts differ even where exactly the same state of facts exists. For instance, where a New York man named Lewisohn and a Boston man named Bigelow, acting together, transferred mining properties to a New Jersey corporation in payment for stock, the supreme court of the United States held that



The federal courts reached a different conclusion in the same transaction.<sup>1</sup> But even in Massachusetts it is held that where the entire capital stock of a mining company is issued to one person in exchange for mines in good faith, and in selling the stock he did not withhold or conceal the facts and took no advantage of his position to obtain an unconscionable advantage, the corporation itself cannot subsequently maintain a suit to cancel the transaction.<sup>2</sup> A promoter, who is being sued in Massachusetts by a New Jersey corporation for alleged illegal profits, cannot by a suit in equity in New Jersey enjoin the corporation from prosecuting such suit in Massachusetts, even though he has been held liable by the Massachusetts court and he alleges that the decision is erroneous, and even though the New Jersey courts might not have held him liable originally, and even though the United States court in the same transaction held that the parties were not liable, especially where he has delayed five years before he has commenced suit in New Jersey. Where a promoter has been held liable for illegal profits the court will not compel another promoter equally guilty to pay a part of the judgment, even though the judgment is for more than the profit received by the defendant promoter. The liability of a promoter is to be determined by the law of the state where the transaction occurred or where the action is tried, rather than of the state where the corporation was organized.<sup>3</sup> A somewhat similar fraud is where a mortgage is foreclosed in accordance with a reorganization agreement, whereby the stockholders of the old corporation participate in the benefits of the new to the detriment of creditors of the old.<sup>4</sup> The personal liability

Lewisohn was not liable, while the supreme court of Massachusetts held that Bigelow was liable to the corporation for his profit as a promoter. Judge Hough has well said in regard to that particular case that it has "a history writ very large in the reports, and not calculated to encourage any one who hopes to look upon the law as a science." *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911). An interesting history of the Lewisohn and Bigelow litigation in New York and Massachusetts with an analysis of the various decisions is found in *Old Dominion, etc. Co. v. Lewisohn*, 195 Fed. Rep. 637 (1911), where the United States court in New York refused to hold the Lewisohn estate liable. If the corporation has been beaten in its efforts to collect from a promoter it cannot then file a new bill alleging facts contradictory of the

allegations in the first suit. *Old Dominion, etc. Co. v. Lewisohn*, 202 Fed. Rep. 178 (1913).

<sup>1</sup> *Old Dominion, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908). After paying interest for over four years, a corporation cannot deny the legality of an issue of bonds. *McCormick v. Unity Co.*, 239 Ill. 306 (1909).

<sup>2</sup> *Stratton, etc. Mines Co. v. Stratton*, 206 Mass. 117 (1910).

<sup>3</sup> *Bigelow v. Old Dominion, etc. Co.*, 74 N. J. Eq. 457 (1908).

<sup>4</sup> See § 886, *infra*. A holder of bonds guaranteed by a railroad corporation may intervene in a suit brought to foreclose a mortgage on such railroad, and may set up that the foreclosure is for the benefit of the stockholders and for the purpose of disposing of and cutting out such guaranty. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 674



of directors and officers of a corporation on a fraudulent mortgage is considered elsewhere.<sup>1</sup> Where the court is ready to decree a sale, a bondholder will not be permitted to intervene to attack the validity of other bonds. A sale will be ordered reserving the right to him to question the bonds in later proceedings.<sup>2</sup> A pledgee of bonds of an insolvent corporation, the interest not having been paid, may maintain a suit to wind up the company, and change the trustees of the mortgage (even though the existing trustee was appointed by a state court after the pledgee's suit was commenced) and have a receiver appointed and cancel fraudulent bonds, but the pledgor is a necessary party defendant. Service on non-resident bondholders may be by publication.<sup>3</sup>

§ 766a. *Who may complain of an issue of bonds at less than par — Stockholders — The state — The corporation itself — Bondholders — Corporate creditors.* — Even though the validity of an issue of bonds is questionable, yet it is not every person who can complain.<sup>4</sup> A stockholder may enjoin the issue or cause it to be set aside where it is fraudulent or beyond the powers of the corporation.<sup>5</sup> But all stockholders who have assented to the issue, and all transferees of their stock, are estopped from objecting to the bonds.<sup>6</sup>

The attorney-general, in behalf of the state, certainly cannot enjoin the issue.<sup>7</sup> Where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company who seeks to set

(1899). A reorganization agreement whereby the bondholders are to receive new bonds and the stockholders new stock, to the exclusion of general creditors of the old corporation, is illegal and may be set aside at the instance of creditors of the old corporation, it being shown that the principal owners of the bonds were also the principal owners of the stock, and hence that in the foreclosure the rights of creditors were not protected and that the stockholders paid nothing for the new stock. The court held that the creditor had an equitable lien on the property subject only to the new mortgage. *St. Louis T. Co. v. Des Moines, etc. Ry.*, 101 Fed. Rep. 632 (1900).

<sup>1</sup> See § 831, *infra*, and § 682, *supra*. A director voting for a mortgage and the president executing it, relying on statements that it covered certain property, are liable to a purchaser of the bonds secured thereby if it turns out that the mortgage did not cover that property, a prospectus having

been issued misrepresenting the value of the property. *Lynch v. Southern, etc. Co.*, 135 Mo. App. 672 (1909). Even though a mortgage purports to cover land when in fact it merely covers the coal underlying the land, yet the president who executes the mortgage and the stockholders who authorize it are not liable for deceit to a bondholder, although they knew the facts when they acted; neither can they be held liable in equity to make the representations good or on the ground of rescission, inasmuch as they are not parties to the transaction as individuals and did not receive the consideration paid for the bonds. *Slater Trust Co. v. Gardiner*, 183 Fed. Rep. 268 (1910).

<sup>2</sup> *Trust Co. of America v. Norfolk, etc. Ry.*, 174 Fed. Rep. 269 (1909). See also § 848, *infra*.

<sup>3</sup> *State Nat. Bank, etc. v. Syndicate Co.*, 178 Fed. Rep. 359 (1910).

<sup>4</sup> See § 848, *infra*.

<sup>5</sup> See § 848, *infra*. 102 N. E. Rep. 59.

<sup>6</sup> See § 848, *infra*.

<sup>7</sup> See § 848, *infra*.



the sale aside on the ground that the mortgage was invalid is in the position of one who asks to be let in to redeem from a mortgagee in possession under an unforced mortgage. He cannot in that same action ask that the purchaser at foreclosure sale, who is about to bond the property, shall pay the judgment creditors' claim out of such bonds.<sup>1</sup> But a judgment creditor may attack the legality of the bonds or of the foreclosure where the company has become insolvent and he has exhausted his remedy against it.<sup>2</sup> But a decree invalidating the sale does so only as to complaining judgment creditors, and not as to other creditors or bondholders, or the company itself.<sup>3</sup> General creditors who have proved their claims may attack the legality of an issue of mortgage bonds.<sup>4</sup> General creditors whose suit against the company has been consolidated with a foreclosure suit may contest the validity of the bonds. An intervening creditor may also attack them.<sup>5</sup> Creditors who become such after the bonds were issued cannot attack the validity of the bonds on the ground that they were issued for less than their real value, together with a large amount of stock.<sup>6</sup> A subsequent mortgagee cannot make such an attack except as a judgment creditor.<sup>7</sup> A purchaser of the bonds with notice cannot complain.<sup>8</sup> In England it is held that although none of the stockholders and creditors of a company which is in difficulties object to a new issue of bonds and stock for contract work, a part of the bonds and stock being then given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company the scheme is illegal, and innocent purchasers of the stock may hold the directors who did the act liable for the stock and bonds thus given as a bonus.<sup>9</sup> Such a purchaser's remedy, however, is not to have the whole issue set aside as illegal.<sup>10</sup>

The corporation itself may under some circumstances complain, especially where some of the stockholders object;<sup>11</sup> and it is held that a receiver may.<sup>12</sup> Even if the bonds, and hence the mortgage, are held to be invalid, the court may retain jurisdiction in order to distribute the property.<sup>13</sup>

§ 766b. *Usury as affecting bonds issued at less than par.* — It is to be borne in mind that the statute against usury may invalidate bonds issued below par. A bond bearing the full legal interest and yet issued below par is practically an agreement to pay more than the

<sup>1</sup> See § 848, *infra*.

<sup>2</sup> See § 848, *infra*.

<sup>3</sup> See § 848, *infra*.

<sup>4</sup> See § 848, *infra*.

<sup>5</sup> See § 848, *infra*.

<sup>6</sup> See § 848, *infra*.

<sup>7</sup> See § 848, *infra*.

<sup>8</sup> See § 848, *infra*.

<sup>9</sup> See § 848, *infra*.

<sup>10</sup> See § 848, *infra*.

<sup>11</sup> See § 848, *infra*, and § 729, *supra*.

<sup>12</sup> See § 848, *infra*.

<sup>13</sup> See § 848, *infra*.



legal rate of interest. Consequently this defense may in certain cases be set up by the corporation,<sup>1</sup> but not where the issue was for property or construction work.<sup>2</sup> A mortgage executed in New York state by a

<sup>1</sup> *Craven County Com'rs v. Atlantic*, etc. R. R., 77 N. C. 289 (1877), where a stockholder brought action to have declared void railroad bonds so issued. In *Schermerhorn v. Talman*, 14 N. Y. 93 (1856), the court said that the sale of the securities (certificates of deposit in that case) is not a sale, but a loan, and "that neither individuals nor corporations can sell their mere promises to pay." That which is called a sale is nothing but a loan (p. 117). "If it appears that, at the end of all the payments, the lender will have received more than his principal, with lawful interest, the contract is usurious" (p. 121). See, also, *Neuse River Nav. Co. v. Newbern*, 7 Jones, L. (N. C.) 275 (1859). In *Sturges v. Stetson*, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, McLean, J., in a railroad case, said: "From the authority given to the directors to sell notes, bonds, scrip, and certificates for the payment of money or property which the company had previously received as donations, or in payment of the subscriptions to the capital stock, above or below par, an argument is drawn that stock may be disposed of to subscribers for less than \$50 a share. It appears to me the provision authorizes an inference in conflict with the one drawn. If bonds or other instruments for the payment of money be transferred at less than their face, with legal interest on the entire sum, in payment for the money loaned, it would be usurious, and this was the reason for the above provision. Without it the sale of the bonds, etc., would have been illegal." A \$1,000 bond may be sold for \$850, and yet not be usurious. *McTighe v. Macon Constr. Co.*, 94 Ga. 306 (1894). Usury is no defense as against *bona fide* holders of mortgage bonds. *Weed v. Gainsville*, etc. R. R., 119 Ga. 576 (1904). A stockholder cannot enjoin the corporation from issuing six per cent. bonds at seventy-five cents on the dollar, even though

such contract is usurious, where it is shown that the issue is reasonable and necessary for the protection of the corporation. *George N. Fletcher & Sons v. Alpena*, etc., 136 Mich. 511 (1904). Bonds may be issued at less than their par value where corporations are forbidden by statute from setting up the defense of usury. *Stevens v. Watson*, 4 Abb. App. Dec. 302 (1865). Where the charter authorizes the company to borrow money "on such terms as might be agreed upon by the parties," twelve per cent. interest may be agreed upon. *Morrison v. Eaton*, etc. R. R., 14 Ind. 110 (1860). If the rate of interest is legal where the corporation exists and the bonds are payable, there is no usury, although the rate is higher than in other states where suit is brought. *Butler v. Edgerton*, 15 Ind. 15 (1860). Cf. *Butler v. Myer*, 17 Ind. 77 (1861). Where the bonds of a corporation were sold for cash by the corporation for eighty-seven and one half cents on the dollar, with an agreement that, if other bonds were sold at a less rate within a certain time, any difference would be paid to the first vendee, and bonds were sold later at seventy-one cents on the dollar, a suit will not lie by the first vendee to recover the sixteen and one half cents on the dollar. The issue below par was held to be usurious. The Ohio statute relative to such issues was held to apply to domestic corporations. *McGregor v. Covington*, etc. R. R., 1 Disney (Ohio) 509 (1857).

<sup>2</sup> Even though \$150,000 of bonds and a large amount of the capital stock are issued to a contractor for construction of a railroad worth only a little over \$100,000, this does not make them usurious or fraudulent. *Real Estate, etc. Co. v. Wilmington*, etc. Ry., 77 Atl. Rep. 756 (Del. 1910). In the case *Short v. Post*, 58 N. J. Eq. 130 (1899), where two mortgages and a large amount of stock were issued by a corporation for property worth no



New Jersey corporation is valid in New Jersey so far as usury is concerned, if it is valid in New York.<sup>1</sup> A foreign corporation may set up the defense of usury, even though it could not do so by the laws of the state in which it is incorporated.<sup>2</sup>

A corporation, like any person, may at common law set up the defense of usury. But the statutes of many of the states now prohibit this defense on the part of the corporation, and in all the states the courts go to the extreme in defeating the defense if possible.<sup>3</sup> A loan of money

more than the first mortgage, and the receiver of the corporation defended against such first mortgage on the ground that the mortgage was usurious because some of the stock had been given to the mortgagee without consideration, the court held the defense not good under the facts in that case.

<sup>1</sup> *Franklin T. Co. v. Rutherford, etc. Co.*, 57 N. J. Eq. 42 (1898). A loan made by a New York corporation in Pennsylvania to be paid in New York is not usurious, if not usurious under the laws of New York. *People's, etc. Assoc. v. Berlin*, 201 Pa. St. 1 (1901).

<sup>2</sup> *Stack v. Detour, etc. Co.*, 151 Mich. 21 (1908).

<sup>3</sup> A stockholder cannot maintain a suit to have a corporate bond declared void for usury because it was issued at below par where the statutes forbid a corporation setting up the defense of usury. *MacQuoid v. Queens Estates*, 143 N. Y. App. Div. 134 (1911). Under the New York statute a corporation cannot defend on the ground of usury. *De Moltke-Huitfeldt v. Garner & Co.*, 145 N. Y. App. Div. 766 (1911). In North Dakota, by statute, a railroad company cannot plead usury against the holder of a bond or other obligation. *Rev. Civ. Code* (1895), § 2962; also in South Dakota, *Comp. L. of Dak.* (1887), § 2993. In Iowa a railroad corporation may dispose of bonds for construction and equipment at less than par, and cannot plead usury against them. 1 *Rev. Code* (1888), ¶ 1283; so also in Maine, *Rev. Stat.* (1883), ch. 51, § 56; Minnesota, § 2529 (1891); Nebraska, *Comp. Stat.* (1895), ¶ 1820 (ch. 16, § 117); New Jersey, *Gen. Stat.* (1895), vol. 3, p. 3703, § 6; New York *Laws* 1850, ch. 172. See *Curtis v. Leavitt*, 15

N. Y. 9, 152 (1857); *Central Gold Min. Co. v. Platt*, 3 Daly, 263 (1870); *Graham v. Atlantic, etc. Co.*, N. Y. *Daily Reg.*, Oct. 14, 1884. In Wisconsin also a corporation cannot plead usury. *Rev. Stat.* (1878), § 1690. Many states have no usury laws. See *Jones on Mortgages*, § 633. A charter provision authorizing the corporation to issue securities at not over seven per cent. interest does not prevent the company borrowing money at a greater rate of interest. *Union Nat. Bank v. Wheeler*, 60 N. Y. 612 (1875). The issue of bonds in New York below par cannot be attacked on the ground of usury, even by a lien creditor of the corporation. *Atlantic Trust Co. v. The Vigilancia*, 73 Fed. Rep. 452 (1896). The statutory provision that a corporation shall not plead usury in defense does not prevent a suit in equity being brought to set aside as inequitable and usurious a settlement of accounts, in which a corporation is retrospectively charged with compound interest, since equity has power to afford relief against improvident and extravagant bargains, irrespective of the statutes against usury. *Higgins v. Lansingh*, 154 Ill. 301 (1895). The courts are inclined to extend the application of laws which forbid a corporation from setting up the defense of usury. *Junction R. R. v. Bank of Ashland*, 12 Wall. 226 (1870); *Cromwell v. Sac. County*, 96 U. S. 51 (1877). Coupons at an illegal rate do not prevent a recovery of the sum actually loaned and legal interest. *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859). But any corporation as assignee of a usurious contract may set it up. *Merchants', etc. Nat. Bank v. Com-*



to a promoter on full rates of interest with a stock bonus may be usurious.<sup>1</sup>

§ 766c. *Bonds delivered or to be delivered to contractors for construction work — Failure of the contractor to complete the work — Remedy of contractor for failure of corporation to deliver — Right of adverse claimants to particular bonds or stock.* — Before leaving this subject of the issue of bonds at less than par, it is well to refer to bonus issued to a contractor for work which the contractor does not complete. The general rule is that where bonds are issued to a contractor in payment for work which he afterwards fails to complete, the bonds cannot be enforced at their full par value unless they have passed into *bona fide* hands.<sup>2</sup> Thus, where a corporation has issued stock for

mercantile, etc. Co., 49 N. Y. 635 (1872). As to usury set up against a corporation, see § 690, *supra*. 132 Pac. Rep. 219.

<sup>1</sup> *Laws v. Fleming*, 177 Fed. Rep. 450 (1910); s. c., 191 Fed. Rep. 253. Cf. § 705, *supra*.

<sup>2</sup> *State v. Brown*, 64 Md. 199 (1885); *Silliman v. Fredericksburg, etc. R. R.*, 27 Gratt. (Va.) 119 (1876); *Chicago, etc. Ry. v. Loewenthal*, 93 Ill. 433 (1879), holding that the mortgage becomes invalid. Where a contractor who is paid in stock assigns the stock and then fails to complete the contract, the assignee who took with full knowledge of the contract is not entitled to the stock, the contract saying that if it was not performed it should be null and void. *Sargent v. Kansas Mid. R. R.*, 48 Kan. 672 (1892). Where, according to contract, bonds are issued to a contractor in payment for work before the work is done, a purchaser or pledgee of the bonds from him is protected, even though he took the bonds with full knowledge of all the facts. *Mercantile Trust Co. v. Zanesville, etc. Ry.*, 52 Fed. Rep. 342 (1892). It is no defense to bonds in *bona fide* hands that they were issued to a contractor for work which he did not finish in the time agreed upon. *McElrath v. Pittsburg, etc. R. R.*, 55 Pa. St. 189 (1867). Even though a contract for the construction of a road is not finished, yet, if the bonds have been delivered and have passed into *bona fide* hands, the holders are protected. *Wells v. Northern T. Co.*, 195 Ill. 288

(1902). In the case *Fouche v. Merchants', etc. Bank*, 110 Ga. 827 (1900), where \$50,000 of stock was issued in payment for certain bonds and property, and the bonds were never delivered, and the property that was delivered was worth only \$2,500, the court held the stock was not full paid, even though the certificate recited that it was full-paid and non-assessable, and the court held that the stockholders and transferees with notice were liable on such stock.

The New York statute against the issue of stock below par and the issue of bonds below their fair market value does not prevent the issue of stock and bonds by a railroad company for construction work, and such stock and bonds may be delivered in advance of the work being done. *Hudson River, etc. R. R. v. Hanfield*, 36 N. Y. App. Div. 605 (1899). Individual stockholders may intervene in a trustee's foreclosure suit and attack the validity of certain bonds on the ground that such bonds had been issued for construction work which had not been finished, and had subsequently been issued in payment for services by officers, the mortgage providing that bonds should be issued only for construction work, and the bonds not being in *bona fide* hands. *Central T. Co. v. California, etc. R. R.*, 110 Fed. Rep. 70 (1901); *aff'd*, 128 Fed. Rep. 882. Where the corporation refuses to pay the interest on certain bonds on the ground that they were issued for property



work to be done, and the work is not done, the corporation may compel a person in whose hands the stock was deposited to deliver it back to the corporation. The person holding the stock may interplead.<sup>1</sup> Again

concerning which misrepresentations were made, the court will not foreclose the mortgage at the instance of such bondholder, unless the bondholder first brings a suit at law on the coupons and has the question of fraud determined. *Nashua, etc. Bank v. Burlington, etc. Co.*, 99 Fed. Rep. 14 (1900). But where a contractor who is paid in stock assigns the stock and then fails to complete the contract, the assignee who took with full knowledge of the contract is not entitled to the stock, the contract saying that if it was not performed it should be null and void. *Sargent v. Kansas Midland R. R.*, 48 Kan. 672 (1892). In *Hampton, etc. R. R. v. Bank*, 48 S. C. 120 (1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

If a corporation accepts an absolute order upon it by the contractor to deliver to a third person certain stock, it cannot afterwards decline to issue the stock on the ground that the contractor has not performed his work. *Hite Nat. Gas Co.'s Appeal*, 118 Pa. St. 436 (1888). Where a contractor who has been paid in bonds in advance does not perform, and by compromise he gives up all the bonds except a few which it is agreed he may retain, such compromise cannot afterwards be repudiated by the company. *Oregon, etc. R. R. v. Forrest*, 128 N. Y. 83 (1891). Notes issued by a carriage selling company to a carriage manufacturing company as payment in advance for carriages are good in *bona fide* hands, even though the carriages have never been delivered. *Scherer &*

*Co. v. Everest*, 168 Fed. Rep. 822 (1909).

<sup>1</sup> *Equity Gas-Light Co. v. McKeige*, 139 N. Y. 237 (1893). Where a corporation has issued stock for services which have never been performed it may maintain a bill in equity to cancel such stock. *Hillside, etc. Ass'n v. Holmes*, 97 Minn. 261 (1906). Although a party to whom bonds and stock have been sold or issued to be paid for in instalments has paid in part and is unable to pay the remainder, the vendor cannot rescind and demand back the securities unless he returns the money already paid. *American Water-works Co. v. Venner*, 18 N. Y. Supp. 379 (1892). As to the form of a syndicate contract to build the Southern Pennsylvania Railroad, and an action by a member to set the contract aside, and a refusal of an injunction, *pendente lite*, see *Bagaley v. Vanderbilt*, 16 Abb. N. Cas. 359 (1885). As to an issue of bonds on certificates as fast as a road is completed, see § 816, *infra*. A vendor taking mortgage bonds in payment thereby waives a condition in the contract of sale that the title should not pass until the sale was completed. *Hinchman v. Point Defiance Ry.*, 14 Wash. 349 (1896). In *U. S. Trust Co. v. Western Contract Co.*, 81 Fed. Rep. 454 (1897), bonds and stock were deposited with a railroad corporation to pay the principal and interest on certain other bonds and floating debts of another corporation. After the contract had been partially performed the former corporation became insolvent, and the court passed upon the various rights of the parties. Where bonds are to be issued *pro rata* for each five miles of completed railroad ready for rolling-stock on the certificate of the chief engineer, but the contract is to be forfeited if the road is not completed, the contractor is entitled to his bonds for completed sections on the engineer's certificate, even though the



where a street railway company having six miles of road agrees with a contractor to issue to the latter a majority of its capital stock and mortgage bonds for an extension to be built by the latter, and the latter after acquiring control refuses to build the extension, a stockholder may by bill in equity cause the contract to be canceled and the stock and bonds returned, excepting so far as they have passed into *bona fide* hands, and the contractor will be allowed his reasonable expenditures less the amount received by him from the operation of the road and the sale of its securities.<sup>1</sup>

Moreover, the contractor may be liable in damages, even though his failure to complete was due to a misunderstanding on his part as to his title to his property.<sup>2</sup>

On the other hand, if the corporation fails to deliver the stock or bonds, after the contractor has completed his work, he may recover damages to the extent of the value of the stock or bonds.<sup>3</sup> A contractor

road is not completed. *Perkins v. Locke*, 27 S. W. Rep. 783 (Tex. 1894). Where a water-works company issues all its stock and bonds to a contractor for construction work in advance of the work, and the contractor pledges them to a banker for advances, the other creditors of the water-works company cannot claim an interest in such securities, even though the banker had assumed the contractor's obligation to one other creditor. *McNeal Pipe, etc. Co. v. Bullock*, 174 Pa. St. 93 (1896).

<sup>1</sup> *Callanan v. Keeseville, etc. R. R.*, 199 N. Y. 268 (1910).

<sup>2</sup> Where parties who suppose they own a timber tract worth \$500,000, sell the same to a corporation for \$500,000 full-paid stock, and it afterwards transpires that their title is defective as to a part of the property, and the corporation in order to perfect the title pays out \$215,000, although the stock actually issued for that part of the property was only \$55,000, the parties to whom the stock was so issued are liable only for the \$55,000, especially where a settlement has been made with some of them on that basis. A contract between the original parties by which some guaranteed others against liability on account of any defects in the title cannot be enforced by the corporation, and hence cannot be made the

basis of the measure of damages. On the other hand, the parties receiving the \$55,000 of stock cannot return it and avoid liability on the ground that the consideration for the issue of stock had failed. If the stockholders are few in number, the court may decree payment directly to such of the stockholders as are entitled to participate in the distribution of the \$55,000. *Jenkins v. Bradley*, 104 Wis. 540 (1899).

<sup>3</sup> If a person sells and conveys property to a company to be paid for in stock, which the vendee refuses to deliver, the vendor may recover the value of the stock. *Humaston v. Telegraph Co.*, 20 Wall. 20 (1873). Where a person sells property to a corporation, to be paid for in stock, and the corporation issues all its stock to other parties, he may hold the corporation liable in damages. *Pendery v. Carleton*, 87 Fed. Rep. 41 (1898). Liquidated damages, specified in a contract in case of failure of a party not transferring property in consideration of stock to be issued by a corporation, cannot be proved against his bankrupt estate, the stock never having been issued and the property never transferred, and no actual damage having been suffered. *Northwest, etc. Co. v. Kilbourne, etc. Co.*, 128 Fed. Rep. 256 (1904). Even though a contractor who receives



who constructs a road for stock to be delivered may maintain a bill in equity for the delivery of the stock after the road is completed, where

practically the entire capital stock for work to be done, does not fulfill the contract, and even though he disposes of some of the stock, yet, unless liquidated damages for such breach are specified in the contract or actual damage is proved, the corporation itself can recover nothing for such breach, the only purpose of the corporation being that particular enterprise, and no business having been transacted by the corporation in consequence of such breach of the contract. *South African, etc. Co. v. Peck*, 120 Fed. Rep. 88 (1903). For a breach of an agreement to give a certain quantity of stock in payment for services to be performed, the person entitled to the stock may sue for damages. *Alford v. Wilson*, 20 Fed. Rep. 96 (1884). A corporation may agree to issue stock to a person in payment for services in procuring a loan for the corporation and guaranteeing payment of the same. If the corporation refuses to perform, the person may obtain damages to the amount of the actual value of the stock. *Saunders v. United States, etc. Co.*, 25 Wash. 475 (1901). Where a corporation deposits stock with its treasurer to be delivered in payment for property according to contract, the treasurer is liable in trover for the value of the stock if he refuses to deliver the stock to the party after such party has completed the contract. *McDonald v. McKinnon*, 92 Mich. 254 (1892). Bonds which are to be issued for building an extension must be delivered when the extension is completed. *San Antonio, etc. Ry. v. Busch*, 21 S. W. Rep. 164 (Tex. 1893). Where a road agrees to issue bonds and fails to do so, the measure of damages is the highest market price of the bonds between the time they should have been delivered and the time of the trial, with interest thereon, irrespective of the price which was to be paid for the bonds. *San Antonio, etc. Ry. v. Busch*, 21 S. W. Rep. 164 (Tex. 1893). Where a corporation agrees to pay for

a railway by bonds upon the same, and does not fulfill, the vendor may hold it liable for the full par. value of the bonds, although they were worth less than par. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). A subscriber of money to a corporation, for which the subscriber is to receive "stock, bonds, or other securities as may be determined" by the board of directors, is entitled to bonds if the board of directors have so ordered, even though the corporation afterwards became insolvent. *Barrow v. Smith*, 109 Ga. 767 (1900). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. *Tilkey v. Augusta, etc. R. R.*, 83 Ga. 757 (1889). A vendor of the stock of a street railway company may collect damages for breach of the contract of the vendee to construct the street railway to certain land owned by the vendor, even though the corporation, the stock of which was sold, had agreed to acquire certain rights of way and had not done so. *Blagen v. Thompson*, 23 Oreg. 239 (1892).

A contract to accept, in payment for property, the bonds of a corporation to be formed to take over the property, if the bonds are delivered within a certain time, such time being made of the essence of the contract, and cash to be paid if they were not delivered, is legal, and if the bonds are not tendered within that time the cash may be collected. *Barrett v. Twin City, etc. Co.*, 118 Fed. Rep. 861 (1902); *aff'd*, 126 Fed. Rep. 302.

A contractor cannot recover any damages for the failure to deliver stock if the stock is worthless and the company insolvent. *Central Trust Co. v. Condon*, 67 Fed. Rep. 84 (1895). See also § 336, *supra*. Several persons defrauded as to their contract whereby they were to receive stock cannot sue jointly. Each must sue separately. *Summerlin v. Fronteriza, etc. Co.*, 41 Fed. Rep. 249 (1890).



he shows that he cannot prove the pecuniary value of the stock, and hence that damages at law would not be sufficient.<sup>1</sup> A *bona*

If an employee is by contract to be paid in stock, and payment is not made, he may obtain judgment for money to an amount equal to the par value of the stock. *Delafield v. San Francisco, etc. Ry.*, 40 Pac. Rep. 958 (Cal. 1895). A land-owner who agrees to take pay from a railroad for a right of way in shares of stock must take the stock at its par value, and not at its market value. *Hoffman v. Bloomsburg, etc. R. R.*, 157 Pa. St. 174 (1893). Stock issued to a contractor instead of money to be paid to him may be voted by him, at least to the extent or proportion of such part of his liability as he has fulfilled. *Price v. Holcomb*, 89 Iowa, 123 (1893); *Pendleton Mfg. Co. v. Mahanna*, 18 Pac. Rep. 563 (Oreg. 1888).

Where property is deeded to trustees to deed to a corporation for part of the stock, the remaining stock to be for working capital, the *cestuis que trust* are entitled to the stock before the rest is sold. The statute of limitations does not run. *Philes v. Hickies*, 18 Pac. Rep. 595 (Ariz. 1888). If the corporation prevents the completion of the contract, the contractor may recover as damages the value of the work already done, and also the profits lost. *Myers v. York, etc. R. R.*, 2 Curtis, 28 (1854); s. c., 17 Fed. Cas. 1122; aff'd, 18 How. 246. If the corporation refuses to issue the stock according to contract, the contractor may recover as damages the *market* value of the stock. *Porter v. Buckfield Branch R. R.*, 32 Me. 539 (1851); *Barker v. Troy, etc. R. R.*, 27 Vt. 766 (1855). If the contract provides for payment to the contractor in stock, without stating that the stock is to be taken at its par value, the contractor may demand the stock at its market value; and if it is worthless, he may then demand money in lieu thereof. *Hart v. Lauman*, 29 Barb. 410 (1859). The con-

tractor cannot, however, complain because the capital stock has been increased, nor is a tender of the stock to him necessary. *Moore v. Hudson River R. R.*, 12 Barb. 156 (1851). For failure to deliver bonds as called for by a contract, the vendee may recover the highest market price between the date of the breach of the contract and the date of the trial. *San Antonio, etc. Ry. v. Wilson*, 4 Tex. Civ. App. 178 (1893).

Although a contractor who is to take stock and bonds in payment assigns his contract to a trustee and issues debenture bonds against it, and also assigns scrip certificates of the company exchangeable for mortgage bonds on completion of the work, yet no equitable lien on the property of the company is thereby created. *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896). Where the company defaults in paying in stock as agreed, the measure of damages is the actual value of the stock. *Central Trust Co. v. Richmond, etc. R. R.*, 68 Fed. Rep. 90 (1895). An executory contract of a corporation to issue debentures is enforceable, even though the corporation has become insolvent. *Pegge v. Neath, etc. Co.*, [1898] 1 Ch. 183. A broker's contract to deliver certain bonds "when, as and if issued" is valid, and the measure of damages for breach thereof is the difference between the contract price and the value of the bonds in the best available market for the bonds at the time of the breach, and fictitious sales on the New York market will not be regarded. *Zimmermann v. Timmermann*, 193 N. Y. 486 (1908). Where a judgment creditor and the corporation agree that it shall be reorganized and some bonds issued to him and other bonds to a specified amount sold and the proceeds used in the property, and he accepts the new bonds but the company pledges the remainder and does not carry out its contract,

<sup>1</sup> *Baumhoff v. St. Louis & K. R. Co.*, 205 Mo. 248 (1907).



*fide* purchaser of bonds from a corporation takes good title as against a party to whom the corporation had contracted to deliver such bonds.<sup>1</sup>

A construction company may maintain a bill in equity against a street railway company to compel the latter to deliver to the former four fifths of the latter's capital stock and certain mortgage bonds in accordance with a contract between them for the construction of the road, inasmuch as such stock cannot be procured on the market and has no general market value, and whatever value it has was given to it chiefly by the construction work. Even though it turns out that prior to the commencement of the suit the railroad company had sold the stock and since the commencement of the suit had sold the bonds, yet the court may render a decree for the value of the stock and bonds.<sup>2</sup> The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.<sup>3</sup> A contractor who has contracted to build a road,

he may hold it liable in damages. *South Texas Tel. Co. v. Huntington*, 121 S. W. Rep. 242 (Tex. 1909). Where a contractor is to get a certain amount of stock and bonds or such part thereof as the state commission may authorize, the decision of the state commission cannot be reviewed by the courts. *United States, etc. Co. v. Delaware, etc. Co.*, 112 S. W. Rep. 447 (Tex. 1908). As to the usual railroad contract for construction work, see § 911, *infra*.

<sup>1</sup> *Lembeck v. Jarvis, etc. Co.*, 70 N. J. Eq. 757 (1906), *aff'g* 69 N. J. Eq. 757. A person purchasing bonds is not liable in damages to another person who already had a contract for the purchase of the same bonds. *Sweeney v. Smith*, 167 Fed. Rep. 385 (1909). *Cf.* § 350, *supra*.

<sup>2</sup> *Altoona, etc. Co. v. Kittanning, etc. Ry.*, 126 Fed. Rep. 559 (1903). If, in organizing and issuing the stock, the amount to be issued for the property is not what the contract calls for, the vendor may compel a specific performance. *Bailey v. Champlain, etc. Co.*, 77 Wis. 453 (1890). See also §§ 61, 337, *supra*. Specific performance will be granted to compel a corporation to issue common stock in payment for property in accordance with a contract of the corporation, where the stock has no market

value, and it appears that there have never been any sales of such stock. *Selover v. Isle, etc. Co.*, 91 Minn. 451 (1904). Where work for the corporation is to be paid for in stock and the stock has been issued to a trustee for that purpose the contractor may enjoin any transfer or sale of such stock. *Macdonald v. Gerriek*, 29 Mont. 373 (1904). A bill in equity does not lie to compel an underwriting syndicate to assign to plaintiff an interest therein, which they had contracted to sell to him, even though he alleges that the value is uncertain and that specific performance is the only full and adequate relief. *Gilbert v. Bunnell*, 92 N. Y. App. Div. 284 (1904).

<sup>3</sup> *Slide, etc. Mines v. Seymour*, 153 U. S. 509, 520 (1894). But where a contractor to construct a railroad owns all the stock and bonds for which he is to build a railroad, and he buys material and pays therefor in bonds, a chattel mortgage which he individually gives to a director of the company on the engines and cars which he turns over to the railroad company is not prior in right to the mortgage bonds of the company, even though such chattel mortgage was recorded. *Flanagan Bank v. Graham*, 42 Oreg. 403 (1903).



payment to be in bonds, cannot claim an equitable lien on the bonds before the contract is finished.<sup>1</sup>

Where a mortgage covers bonds to be thereafter delivered, and instead of such delivery the mortgagor deposits the bonds as security with the United States government and then makes another mortgage covering such bonds, the first mortgagee is entitled to the bonds upon their being released by the United States government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second mortgage have passed into *bona fide* hands.<sup>2</sup>

<sup>1</sup> *Strang v. Richmond, etc. R. Co.*, 101 Fed. Rep. 511 (1900). A contract of a railroad to pay a certain claim out of the proceeds of the first bonds sold does not create a lien on such proceeds upon foreclosure. *Central T. Co. v. California, etc. R. R.*, 110 Fed. Rep. 70 (1901); *aff'd*, 128 Fed. Rep. 882. The executory contract of a railroad company to issue bonds, no particular bonds being specified, does not create any equitable lien on the bonds, and if they have been issued to other parties the only remedy is a suit for damages. *Cushing v. Chapman*, 115 Fed. Rep. 237 (1902). A contract to deliver bonds is not fulfilled by delivering an accepted order on the treasurer of the corporation for the bonds when thereafter issued. *Twin City, etc. Co. v. Barrett*, 126 Fed. Rep. 302 (1903). A person depositing securities with a trust company to distribute as directed by him cannot file a bill for an accounting unless he shows what disposition was to be made of them. *Young v. Mercantile T. Co.*, 140 Fed. Rep. 61 (1905); *aff'd*, 145 Fed. Rep. 39. The court will not enjoin a corporation from selling its bonds and stock, although a contractor is entitled to receive them after his contract work is finished. The theory of this case is that the court could not compel the contractor to perform, and hence will not enjoin the other party. *Peto v. Brighton, etc. Ry.*, 1 H. & M. 468 (1863). The courts of Massachusetts will not, at the suit of a foreign construction company, enjoin a foreign railroad company and a resident from the issue by the rail-

road company to the resident of bonds and stock which the railroad company has contracted to deliver to the construction company. The suit should be at the residence of the railroad company. *Kansas, etc. Co. v. Topeka, etc. R. R.*, 135 Mass. 34 (1883). A promise and contract of promoters to subscribers to certain bonds may create an equitable lien on the bonds enforceable in equity, if the bonds have not passed into *bona fide* hands. *Badgerow v. Manhattan Trust Co.*, 64 Fed. Rep. 931 (1894). An agreement of a railroad company to deliver its bonds in payment for sections of its road as fast as such sections were completed does not give any lien upon the bonds, and if the railroad company pledges them to others the pledgee is protected. There is not even an equitable lien upon the bonds. *Badgerow v. Manhattan Trust Co.*, 74 Fed. Rep. 925 (1896).

<sup>2</sup> *Central T. Co. v. West India, etc. Co.*, 169 N. Y. 314 (1901). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all its stock to other parties who took with notice, and it is unnecessary to bring into the suit other parties who actually have the stock, the stock having been held by the company as collateral security. *Morey v. Fish, etc. Co.*, 108 Wis. 520 (1901). A suit lies to compel a corporation to issue stock in accordance with a contract for construction work. *Citizens', etc. Assoc.*



In general, all the bonds share equally in the proceeds of a foreclosure sale, but where the corporation agreed with the first purchasers to issue only a certain amount per mile, although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers of bonds have been paid.<sup>1</sup> In a trustee's suit to foreclose, rival claimants of certain bonds cannot have their rights decided.<sup>2</sup>

*v. Belleville, etc. R. R.*, 117 Fed. Rep. 109 (1902). See also §§ 58, 61, 192, *supra*. Where the president claims certain unissued stock as assignee of a contractor who was entitled to it, and another person also claims it as assignee of the contractor, and the president issues the stock to himself without authority of the board of directors, the corporation may institute a suit to compel him to give it up, and in such suit the court will determine who is entitled to such stock. *Lakewood Gas Co. v. Smith*, 62 N. J. Eq. 677 (1902). Where a railroad pledges its bonds to a contractor to secure payments to be made to him, and he then pledges the bonds to a person who advances money to a sub-contractor, and such person wrongfully repledges the bonds to a bank to secure those moneys and also other moneys, the original pledgee may hold the second pledgee liable for the illegal pledge to the bank. *Interurban, etc. Co. v. Hayes*, 191 Mo. 248 (1905). A person holding second mortgage bonds in trust for another may purchase for himself at a foreclosure sale under the first mortgage. *Yuengling v. Betz*, 120 N. Y. App. Div. 709 (1907). Even though a party agrees to make future advances of money and is to receive bonds as security therefor, yet if, prior to such advances being made and the bonds received, the pledgor has contracted with another party to deliver to the latter said bonds, the latter is entitled to the bonds as against the first-named party who makes such advances subsequently and received the bonds with notice of such intervening contract. *Columbia, etc. Co. v. Mercer*, 57 S. W. Rep. 787

(Ky. 1900). A person to whom a corporation issues full-paid stock in settlement of a claim is not bound by any prior contracts of the corporation in regard to that stock where he took the stock without notice of the contracts. *Angle v. Chicago, etc. Ry.*, 94 Fed. Rep. 717 (1899). Where, after a subscription for stock is made, the company contracts to issue all its stock to a contractor in payment for work, and thereupon the subscriber gives up his stock to the company and it is issued to the contractor, the subscriber is not liable on such stock, even though the contractor does not fulfill, and even though the subscriber causes the contract with the contractor to be made. *Riverton Water Co. v. Hummel*, 175 Pa. St. 575 (1896). An equitable mortgage or a specific lien on property intended to be mortgaged arises from an agreement to give a mortgage or from a defectively executed mortgage or from any imperfect attempt to mortgage or appropriate specific property in payment of a particular debt. Hence, where one railroad in 1887 agreed to and did construct another railroad in consideration of twenty-year mortgage bonds of the latter to be issued and in further consideration of a ten-year contract of operation, the former railroad may maintain a suit to have the mortgage executed and the bonds issued, even though the twenty years have nearly expired. *Baltimore, etc. R. R. v. Berkeley, etc. R. R.*, 168 Fed. Rep. 770 (1909).

<sup>1</sup> *McMurray v. Moran*, 134 U. S. 150 (1890).

<sup>2</sup> *Knickerbocker T. Co. v. Oneonta, etc. R. R.*, 116 N. Y. App. Div. 78 (1906); *aff'd*, 188 N. Y. 38.



Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he hold bonds specified in such certificate, to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person named in the certificate, although the certificate itself is not actually delivered until several years after the date of the certificate.<sup>1</sup> Where a corporation has not yet issued stock as called for by a contract a claimant of such stock may bring suit in the state where the corporation was organized to obtain the stock, even though the other claimant is a non-resident.<sup>2</sup> An oral agreement on the part of a railroad contractor to take bonds in partial payment cannot vary the written agreement unless fraud or mistake is shown.<sup>3</sup>

§ 767. *Negotiable character of bonds of a corporation payable to order, bearer, or holder — Lost or stolen bonds — Registered bonds.* — A *bona fide* purchaser of the bonds of a corporation is protected not only against defenses set up by the corporation,<sup>4</sup> but also against the claims of prior owners of the bonds. This class of bonds is negotiable like promissory notes,<sup>5</sup> and this feature of negotiability is by far the

<sup>1</sup> If such coupons have been canceled and returned to the corporation issuing the bonds, and the trustee is held liable for such coupons, the trustee may hold the corporation liable. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899). A decree directing a receiver to deliver bonds to a party as his property carries also the coupons which have already been collected. *People v. Globe Sav. Bank*, 211 Ill. 99 (1904). Where stock is deposited in a bank to be delivered to a purchaser upon payment or returned to the depositors, and payment is not made, the bank is not bound to determine how the stock should be divided among the depositors. *Christian v. First Nat. Bank*, 155 Fed. Rep. 705 (1907).

<sup>2</sup> *Jennings v. Rocky Bar, etc. Co.*, 29 Wash. 726 (1902). See also § 363, *supra*. A claimant of stock in a corporation may institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, even though the holders of the stock are non-residents and are brought into the case by publication and substituted service. The court acquires jurisdiction over the defendant. *Jellenik v. Huron, etc. Co.*, 177 U. S. 1 (1900), rev'g 82 Fed. Rep. 778. Especially if the cer-

tificates of stock are within the jurisdiction, the court may obtain jurisdiction over non-resident defendants by publication. *Ryan v. Seaboard, etc. R. R.*, 83 Fed. Rep. 889 (1897); *Merritt v. American, etc. Co.*, 79 Fed. Rep. 228 (1897).

<sup>3</sup> *Ferguson, etc. Co. v. Manhattan T. Co.*, 118 Fed. Rep. 791 (1902).

<sup>4</sup> See § 766, also § 38, *supra*. Questions relative to forgery or fraud on the part of corporate officers in issuing corporate securities are considered elsewhere. See § 293, *supra*. Even though the board of directors authorizes a sale of the company's bonds by the president and treasurer, and a sale is made by the treasurer alone and he embezzles the proceeds, a *bona fide* purchaser from him is protected. *Doty v. Oriental, etc. Co.*, 28 R. I. 372 (1907).

<sup>5</sup> *White v. Vermont, etc. R. R.*, 21 How. 575 (1858); *Murray v. Lardner*, 2 Wall. 110 (1864); *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); aff'd, *sub nom.* *Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899); *Carr v. Le Fevre*, 27 Pa. St. 413, 418 (1856); *Bunting v. Camden, etc. R. R.*, 81 Pa. St. 254 (1876); *Hubbard v. New York, etc. R. R.*, 36 Barb. 286 (1862); *New Albany, etc. Co. v. Smith*, 23 Ind. 353



most important feature of corporation bonds. The fact that the parties to whom bonds are issued are aware of their invalidity does not affect the rights of subsequent holders of the same bonds in good faith and without notice.<sup>1</sup> The bond of an individual is not negotiable like a note.<sup>2</sup>

(1864); *Junction R. R. v. Cleneay*, 13 Ind. 161 (1859); *American File Co. v. Garrett*, 110 U. S. 288 (1884); *Wickes v. Adirondack Co.*, 2 Hun, 112 (1874); *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870); *Morris Canal, etc. Co. v. Lewis*, 12 N. J. Eq. 323 (1858); *Chapin v. Vermont, etc. R. R.*, 74 Mass. 575 (1857). In this case railway bonds payable "to —" were held negotiable, the legislature having ratified "the proceedings" whereby the mortgage was executed. *Brainerd v. New York, etc. R. R.*, 25 N. Y. 496 (1862); *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885); *Grand Rapids, etc. R. R. v. Sanders*, 17 Hun, 552 (1879); *Chesapeake, etc. Co. v. Blair*, 45 Md. 102 (1876); *Stanton v. Alabama, etc. R. R.*, 2 Woods, 523 (1875); s. c., 22 Fed. Cas. 1070; *State v. Cobb*, 64 Ala. 127 (1879); *Langston v. South Carolina R. R.*, 2 S. C. 248 (1870). In Massachusetts corporation bonds under seal are negotiable by statute. *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492 (1889). This statute declares negotiable all bonds or other obligations under seal for the payment of money to bearer, or some person or bearer, or to order, and issued by a corporation or joint-stock company. Stat. 1852, ch. 76. Scrip calling for a bond in the future is negotiable. *Goodwin v. Robarts*, L. R. 1 App. Cas. 486 (1876); s. c., L. R. 10 Exch. 337 (1875), distinguishing *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374 (1873). But trust certificates are not negotiable. *Railroad v. Howard*, 7 Wall. 392 (1868). Coupon bonds payable to bearer, issued by a corporation under proper authority, have all the qualities of commercial paper and are negotiable instruments. *Virginia v. Chesapeake, etc. Co.*, 32 Md. 501 (1870). Railroad bonds are nego-

tiable. *Society for Savings v. New London*, 29 Conn. 174 (1860). The bonds of a manufacturing corporation are negotiable. *Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567, 593 (1879). See also many cases in § 766, *supra*. In England the negotiability of foreign bonds is recognized. *Gorgier v. Mieville*, 3 B. & C. 45 (1824). The House of Lords, in London, etc. Bank v. Simmons, [1892] A. C. 201, reversed [1891] 1 Ch. 270, and held that *bona fide* holders of negotiable bonds of a corporation were protected. A bond or debenture, whether English or American, if payable to bearer and dealt in as being transferable by delivery, is a negotiable instrument. *Edelstein v. Schuler*, 87 L. T. Rep. 204 (1902). Corporate bonds are negotiable and pass by delivery and may be sold by the corporation at different prices to different persons. *Weed v. Gainesville, etc. R. R.*, 119 Ga. 576 (1904). A *bona fide* purchaser of bonds from a corporation takes good title as against a party with whom the corporation had contracted to deliver such bonds. *Lembeek v. Jarvis, etc. Co.*, 70 N. J. Eq. 757 (1906), aff'g 69 N. J. Eq. 450. A bond issued by an unincorporated joint-stock association, negotiable in form, is negotiable in law. *Hibbs v. Brown*, 190 N. Y. 167 (1907).

<sup>1</sup> *Belden v. Burke*, 147 N. Y. 542 (1895). Bonds negotiated by the president without authority are valid in *bona fide* hands. *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); aff'd, *sub nom.* *Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899).

<sup>2</sup> Bonds issued by an individual, though negotiable in form, are specialties and are not negotiable. *Bookes v. Hathorn*, 20 Hun, 503 (1880), holding also that the bonds of an individual, when once paid, cannot be



The negotiability of corporate "bonds" seems to have arisen in the following manner: The seal may be looked upon in one of three ways: (1) as merely the signature of the corporation, thus making the instrument one not under seal and hence a negotiable note; or (2) as corresponding to an individual's seal, making the instrument a regular bond; or (3) as being both the signature and also the seal, similar to an individual seal. The first way of considering the corporate seal probably gave rise to the negotiability of corporate "bonds." In modern times, however, these instruments are called bonds and not notes.<sup>1</sup> However, the law is well settled that the bonds of a corporation are negotiable although the seal of the corporation is attached. The negotiability of a bond is not destroyed by the fact that the corporate seal is attached,<sup>2</sup> or that the company retains the right to pay the bond before maturity,<sup>3</sup> or that registration is provided for,<sup>4</sup> or that the payee's name is left blank,<sup>5</sup> or that it is convertible into stock,<sup>6</sup>

reissued. Bonds executed by an individual are not negotiable. *Hefferman v. Briery*, 62 S. W. Rep. 852 (Ky. 1901).

<sup>1</sup> Railroad bonds "are called bonds, or railroad bonds, but they are in fact, both the bonds and the coupons, mere bills or notes, and as strictly negotiable as bank bills." *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). The court said also that they should not be under seal, but the court would disregard the seal anyway. The fact that an obligation for money issued by a corporation is under seal does not make it a bond. "It is under seal; but so, in the absence of special powers, must every instrument be which is executed by a corporation." *Re Imperial, etc. Co.*, L. R. 11 Eq. 478, 491 (1870). See also § 761, *supra*. A debenture similar to an American bond is held in England to be nothing but a promissory note. *Re Imperial, etc. Co.*, L. R. 11 Eq. 478 (1870). See also § 770, *infra*, where this same question arises in connection with the statute of limitations. The corporate seal upon a bond raises a presumption of a consideration. *Campbell v. Cypress, etc. Cemetery*, 41 N. Y. 34 (1869).

<sup>2</sup> *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251. *Re General Estates Co.*, L. R. 3 Ch. 758 (1868).

See also cases in preceding notes, and § 761, *supra*.

<sup>3</sup> *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492 (1889). Bonds payable to bearer are negotiable, even though they are subject to redemption by annual drawings. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). A provision in bonds that some of them may be redeemed before maturity does not render them non-negotiable. *McCormick v. Unity Co.*, 239 Ill. 306 (1909).

<sup>4</sup> *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878); *Reid v. Bank of Mobile*, 70 Ala. 199 (1881).

<sup>5</sup> A registered municipal bond with coupons attached is negotiable where the name of the payee is left blank on the face of the bond, even though in books kept for that purpose the name of the registered owner is entered. Hence, a purchaser in good faith of such a bond is protected, although the bond was stolen. A *bona fide* pledgee is likewise protected. *Manhattan Sav. Inst. v. N. Y. etc. Bank*, 170 N. Y. 58 (1902). See also § 815, *infra*.

<sup>6</sup> *Welch v. Sage*, 47 N. Y. 143 (1872); *Hotchkiss v. National Bank*, 21 Wall. 354 (1874). A provision in a bond that it may be converted into stock does not affect its negotiability. *Lisman v. Milwaukee, etc. Co.*, 161 Fed. Rep. 472 (1908); *aff'd*, 170 Fed. Rep. 1020.



or that it is payable on or before a specified date,<sup>1</sup> or that there is a provision against personal liability on the part of the stockholders,<sup>2</sup> or that overdue coupons are attached to the bonds,<sup>3</sup> or by the fact that the interest has been due and unpaid for a period sufficient, if the interest had been demanded, to make the bonds due, no demand having been made.<sup>4</sup> But the negotiability is destroyed by the fact that the

<sup>1</sup> Union, etc. Co. v. Southern, etc. Co., 51 Fed. Rep. 840 (1892). Corporate bonds are negotiable, even though they are payable in fifty years, with the right to pay in five years. American Nat. Bank v. American, etc. Co., 19 R. I. 149 (1895).

<sup>2</sup> The bonds and coupons of an unincorporated joint-stock association may be negotiable, even though they provide against personal liability of the stockholders, and even though the trustee of the mortgage securing their payment may with the consent of a majority of the bondholders in interest waive default in payment of the coupons. Hibbs v. Brown, 112 N. Y. App. Div. 214 (1906); aff'd, 190 N. Y. 167. Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint-stock association shall not be personally liable. Hibbs v. Brown, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void.

<sup>3</sup> Long Island L. & T. Co. v. Columbus, etc. Ry., 65 Fed. Rep. 455 (1895). See also same case, 55 Ohio St. 23 (1896); aff'd, *sub nom.* Pittsburgh, etc. Ry. v. Long Island L. & T. Co., 172 U. S. 493 (1899). The fact that overdue coupons are attached to bonds puts the purchaser on inquiry, but does not in itself render the bonds dishonored paper. Buffalo, etc. Co. v. Medina, etc. Co., 162 N. Y. 67 (1900). A purchaser may be *bona fide* although he buys bonds two days before maturity and there are eight overdue semi-annual coupons thereon. But he is not a *bona*

*fide* purchaser of such overdue coupons. Gilbough v. Norfolk, etc. R. R., 1 Hughes, 410 (1877); s. c., 10 Fed. Cas. 354. Several past-due coupons on a municipal bond are sufficient to put upon inquiry a purchaser of the bond from a thief. First Nat. Bank v. Scott County, 14 Minn. 77 (1869). "The dishonor of the unpaid coupons for interest did not infect with dishonor the bond or other coupons, putting on inquiry those who, in the usual course of trade, in good faith, and upon a valuable consideration, should acquire them." State v. Cobb, 64 Ala. 127, 158 (1879); Morton v. New Orleans, etc. Ry., 79 Ala. 590 (1885). The fact that an overdue coupon is attached to a bond does not render a purchaser a non-*bona fide* purchaser. Cromwell v. Sac County, 96 U. S. 51 (1877); Railway Co. v. Sprague, 103 U. S. 756 (1880). Unpaid coupons on bonds do "not necessarily constitute notice of any invalidity in the bonds." Grand Rapids, etc. R. R. v. Sanders, 54 How. Pr. 214 (1877). "It cannot be said that the holder of the bond, with its undetached coupons, is put upon notice of a defense as to the delay because some of the coupons happened to be overdue." McElrath v. Pittsburgh, etc. R. R., 55 Pa. St. 189 (1867). It is legal for a company to issue its bonds, with overdue coupons attached. McElrath v. Pittsburgh, etc. R. R., 55 Pa. St. 189 (1867). A purchaser may be a *bona fide* purchaser, even though he knew that there had been a default in interest. Central, etc. Co. v. Farmers', etc. Co., 116 Fed. Rep. 700 (1901); aff'd, 114 Fed. Rep. 263.

<sup>4</sup> Railway Co. v. Sprague, 103 U. S. 756 (1880). See also Morgan v. United States, 113 U. S. 476 (1885); Northampton Nat. Bank v. Kidder, 106 N. Y. 221 (1887). Where, after six months' default the principal is to become due



bonds call for labor to be done,<sup>1</sup> or that provision is made for extending the time of payment,<sup>2</sup> or by the fact that the bonds are overdue,<sup>3</sup> or by the place and method of payment being left in blank,<sup>4</sup> or by a provision that payment may be to the registered owner or a certain trust company.<sup>5</sup> If the purchaser took with notice, and there were no *bona fide* purchasers in the line of his title, he takes subject to the equities.<sup>6</sup> Where a party purchases bonds from a *bona fide* holder, he thereby becomes a *bona fide* holder himself, even though he had notice of defenses to the bonds.<sup>7</sup> A *bona fide* pledgee of bonds is protected the same as a *bona fide* purchaser.<sup>8</sup>

In determining who is and who is not a *bona fide* purchaser, the facts of each case by itself must be taken into consideration,<sup>9</sup> especially

by the terms of the bonds, it is doubtful whether at the end of the six months the bonds become past due and non-negotiable, but certainly not where the defaulted interest is afterwards paid. *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); *aff'd*, *sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). A purchaser of bonds, the coupons of which have long been in default, and who pays only two per cent. of the par value of the bonds therefor, is bound to inquire as to the validity thereof. *Bramblet v. Commonwealth, etc. Co.*, 83 S. W. Rep. 599 (Ky. 1904).

<sup>1</sup> *Knight v. Wilmington, etc. R. R.*, 1 Jones, L. (N. C.) 357 (1854).

<sup>2</sup> *McClelland v. Norfolk, etc. R. R.*, 110 N. Y. 469 (1888). But not by a provision for waiving default. *Hibbs v. Brown*, 190 N. Y. 167 (1907).

<sup>3</sup> *Vermilye v. Adams, etc. Co.*, 21 Wall. 138 (1874).

<sup>4</sup> *Ledwich v. McKim*, 53 N. Y. 307 (1873).

<sup>5</sup> A certificate of indebtedness of a corporation to pay a specified sum to a party named, or his order, at a certain time at a certain trust company, is not negotiable where it is payable to the "registered holder" only, and the company retained the right to make payment to the trust company and the trust company is authorized to make payment to the registered holder, whether he was the real owner or not. *Strickland v. National Salt Co.*, 77 N. J. Eq. 328 (1910).

<sup>6</sup> *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221 (1887); *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884).

<sup>7</sup> *Grand Rapids, etc. R. R. v. Sanders*, 54 How. Pr. 214 (1877); *rev'd* on another point in 17 Hun, 552; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221 (1887); *Cromwell v. Sac County*, 96 U. S. 51 (1877). A holder of bonds is a *bona fide* holder if any prior holder thereof was a *bona fide* holder. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). A purchaser with notice from a *bona fide* purchaser is protected as a *bona fide* purchaser himself. *Board of Commissioners, etc. v. Sutliff*, 97 Fed. Rep. 270 (1899). Bonds issued to *bona fide* purchasers and sold by the latter to purchasers with notice, and then sold by the latter to *bona fide* purchasers, may be enforced by the latter as *bona fide* purchasers. *Central, etc. Co. v. Farmers', etc. Co.*, 114 Fed. Rep. 263 (1902). A purchaser with notice from a *bona fide* purchaser is protected. *Central, etc. Co. v. Farmers', etc. Co.*, 116 Fed. Rep. 700 (1901); *aff'd*, 114 Fed. Rep. 263. A purchaser of bonds with notice does not, by repurchasing the bonds from a *bona fide* party to whom the former has sold the bonds, become thereby a *bona fide* purchaser himself. *Elwell v. Tatum*, 6 Tex. Civ. App. 397 (1893).

<sup>8</sup> *Lembeck v. Jarvis, etc. Co.*, 70 N. J. Eq. 757 (1906), *aff'g* 69 N. J. Eq. 450.

<sup>9</sup> The rule laid down in *Welch v. Sage*, 47 N. Y. 143 (1872), is as fol-



where the original issue of the bonds was fraudulent or without considera-

lows: "The law may be regarded as settled that a purchaser, for value advanced, of negotiable paper, including bonds, is not bound to exercise such care and caution as wary, prudent men would exercise. Negligence will not impair his title. It is a question simply of good faith in the purchaser. Unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict." A purchaser of bonds at an auction sale, no interest having been paid for ten years, and the purchaser knowing that they had been the subject of litigation, is not a *bona fide* purchaser. *Trask v. Jacksonville*, etc. R. R., 124 U. S. 515 (1888). The amount paid for bonds as well as the value of the bonds themselves may be taken into consideration in determining whether the holder is a *bona fide* purchaser. *Grand Rapids*, etc. R. R. v. *Sanders*, 54 How. Pr. 214 (1877); rev'd on another point in 17 Hun, 552. Where the trustee named in the mortgage is himself the vendor of the bonds, and he sells \$4,000 of bonds for \$150, the purchaser is not a *bona fide* purchaser. *Riggs v. Pennsylvania*, etc. R. R., 16 Fed. Rep. 804 (1883). Where a party contracts to deliver notes for stock, and before the delivery of the notes the stock is sent to the corporation for transfer, and the corporation refuses to transfer the same on the ground that it was overissued stock, the vendee has no recourse against the corporation if he delivers the notes to the vendor after receiving such information from the corporation. In this case the vendor was president of the corporation. *Hayden v. Charter*, etc. Park, 63 Conn. 142 (1893). The fact that one certificate of stock gives notice of irregularity does not convey notice to the holder thereof as regards another certificate of stock held by him. *Knox v. Eden Musée*, etc. Co., 74 Hun, 483 (1893); rev'd on another point in 148 N. Y. 441. A purchaser of negotiable bonds or other commercial paper, in good faith, for valuable con-

sideration, and before maturity, is entitled to protection, although he may have had suspicion of a defect of title or knowledge of circumstances sufficient to excite such suspicion in the mind of a prudent man, and even although he may have been guilty of gross negligence; and this protection equally extends to a mortgage or other security given for such commercial paper or bond. *Spence v. Mobile*, etc. Ry., 79 Ala. 576, 587 (1885). An assignment or bill of sale of bonds and coupons to a person who knows nothing thereof until nine years thereafter, the purpose being solely to enable him to bring suit in his name in the United States court, conveys no title. *Lake Co. etc. v. Dudley*, 173 U. S. 243 (1899). A person who purchases second-mortgage bonds eighteen years after the first mortgage has been foreclosed is not such a *bona fide* purchaser as is entitled to attack the foreclosure sale on the ground of technical irregularities, especially where the property has passed into new hands and been improved at large expense, there being no fraud involved. *Raphael v. Rio Grande*, etc. Ry., 132 Fed. Rep. 12 (1904). Even though no transfer of the stock on the books of the company is demanded, a pledge of stock in consideration of the extension of a past-due debt may make the pledgee a *bona fide* pledgee. *Just v. State Sav. Bank*, 132 Mich. 600 (1903). Mere suspicion on the part of a purchaser of negotiable paper of a defect in the seller's title, or knowledge of facts which would excite suspicion in the mind of a prudent man, is not sufficient to vitiate or impair his title; there must be bad faith or something equivalent to it; and while gross negligence is not of itself bad faith, it may be evidence of it. The bonds in this case referring on their face to the deed of trust executed by the railroad company for their security, which deed expressly provided that the entire debt, principal and interest, should become due and payable within ninety days after refusal to pay the semi-annual interest due.



tion.<sup>1</sup> A person taking bonds from a corporation to secure a private debt is bound to ascertain the right of the officer to so issue the bonds.<sup>2</sup> A director cannot claim to be a *bona fide* purchaser of bonds upon their issue by the corporation. He is bound to know what transpires in the meetings of the board of directors.<sup>3</sup>

A *bona fide* purchaser of a bond which has been stolen takes good title.<sup>4</sup> Where bonds have been lost or destroyed, a court of equity will

by the coupons, on demand made at the agency of the corporation in the city of New York, a purchaser having knowledge of such demand and refusal at the time he acquired the bonds cannot claim to be an innocent purchaser without notice; but when he has proved the payment of value, the onus of proving knowledge or notice of such extrinsic fact is on the party who seeks to impeach his title. *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885). Concerning the subject of what constitutes a *bona fide* purchaser, see also § 771, *infra*, and § 293, *supra*.

<sup>1</sup> See § 766, *supra*.

<sup>2</sup> *Germania, etc. Co. v. Boynton*, 71 Fed. Rep. 797 (1896). See also § 293, *supra*. A pledgee of bonds of a corporation from an officer of a corporation for his personal debt is not protected and is liable if he sells the bonds to a *bona fide* purchaser. *Medina, etc. Co. v. Buffalo, etc. Co.*, 119 N. Y. App. Div. 245 (1907); *aff'd*, 193 N. Y. 92. Where a corporate note is issued to a third person and then passes into the hands of an officer, the person taking it from the officer is not affected by the rule that a person taking corporate paper in its original issue by a corporation is bound to ascertain the facts if the officer is personally interested in the transaction. *Cheever v. Pittsburgh, etc. R. R.*, 150 N. Y. 59 (1896). In the federal courts a person taking from the president of a corporation a note signed by the corporation and indorsed by him is not bound to inquire into the consideration. *Doe v. Northwestern Coal, etc. Co.*, 78 Fed. Rep. 62 (1896). A principal taking bonds as collateral security to a note sent to him by his agent is not chargeable with notice of the fact that the agent, as the agent of a corporation,

has fraudulently put the bonds into circulation. *Thomson-Houston Elec. Co. v. Capitol Elec. Co.*, 56 Fed. Rep. 849 (1893).

<sup>3</sup> *Greenville Gas Co. v. Reis*, 54 Ohio St. 549 (1896). See also § 727, *supra*. A bond or debenture payable to bearer, unless registered, is a negotiable instrument, and a *bona fide* pledgee of the same from the secretary of the company is protected, even though the secretary fraudulently stole the bond from the company itself. *Bechuana-land, etc. Co. v. London, etc. Bank*, [1898] 2 Q. B. 658, the court refusing to follow *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

<sup>4</sup> Quoted and approved in *Cochran v. Fox Chase Bank*, 209 Pa. St. 34 (1904). A *bona fide* purchaser of a stolen bond is protected. *Hibbs v. Brown*, 190 N. Y. 167 (1907). A *bona fide* purchaser of negotiable corporation bonds is protected even though the bonds were stolen by the vendor. *Dutchess County Ins. Co. v. Hachfield*, 73 N. Y. 226 (1878). A *bona fide* purchaser of stolen railroad bonds is protected. *Murray v. Lardner*, 2 Wall. 110 (1864); *Evertson v. Newport Nat. Bank*, 66 N. Y. 14 (1876); *Gilbough v. Norfolk, etc. R. R.*, 1 Hughes, 410 (1877); s. c., 10 Fed. Cas. 354. Municipal bonds are negotiable, even though the payee's name is left blank. A *bona fide* purchase from one who steals such bonds is protected. A newspaper advertisement of the loss is not notice, unless such purchaser had knowledge thereof. *Manhattan, etc. Institution v. N. Y., etc. Bank*, 42 N. Y. App. Div. 147 (1899); *aff'd*, 170 N. Y. 58. Where a trustee has deposited funds with a bank as trustee for a long time, and obtains a loan as trustee, and pledges bonds as security, the bank may be a *bona fide*



direct the company to issue new and suitable representatives thereof to the owner upon full indemnity being given.<sup>1</sup> Thus where two one-hundred-year coupon railroad bonds payable to bearer are lost in the registered mail, the company will not be ordered to issue duplicate bonds, but the court will order the company to issue a certificate of

holder of the same, even though the bonds have been stolen and have been issued twenty years prior thereto and the corners appear to have been burned. Depositing funds as "trustee" did not give notice that he was acting for others and did not require an investigation as to his authority. *Manhattan Sav. Ins. v. N. Y., etc. Bank*, 170 N. Y. 58 (1902). The owner of bonds, which had been stolen, who pays money to get them back from the bankers into whose hands they have passed, cannot recover back the money so paid, unless he proves that the bankers were not *bona fide* holders. *Lawyers', etc. Co. v. Jones*, 113 N. Y. App. Div. 105 (1906). The *bona fide* purchaser of stolen railroad bonds payable to bearer is protected. *Carpenter v. Rommel*, 5 Phila. 34 (1862). So, also, as to water-works bonds. *Consolidated Assoc. v. Avegno*, 28 La. Ann. 552 (1876). Buying a security *bona fide* twelve months after receiving notice that it had been stolen does not invalidate the purchaser's title. *Raphael v. Bank of England*, 17 C. B. 161 (1855). A national bank may be protected as a *bona fide* purchaser of government bonds which have been stolen, although it had not paid any attention to a notice sent to it of the theft of the bonds. *Seybell v. National Currency Bank*, 54 N. Y. 288 (1873). Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no *bona fide* purchaser of them. *Maas v. Missouri, etc. Ry.*, 83 N. Y. 223 (1880). If stolen bonds are sold, the owner may follow the proceeds of the sale into the hands of one who takes with notice. *Newton v. Porter*, 69 N. Y. 133 (1877). Where negotiable bonds are stolen from the owner, and they pass into *bona fide* hands, and then

the thief obtains them by fraud from such *bona fide* hands and returns them to the first owner, the latter is entitled to keep them. *London, etc. Co. v. London, etc. Bank*, L. R. 21 Q. B. D. 535 (1888). A *bona fide* purchaser of stolen coupons not yet due is protected. *Spooner v. Holmes*, 102 Mass. 503 (1869). See also § 771, notes, *infra*.

<sup>1</sup> *Chesapeake, etc. Co. v. Blair*, 45 Md. 102 (1876). A person losing negotiable bonds may compel the company to issue new ones to him upon giving ample indemnity, since a *bona fide* purchaser of the lost bonds may enforce them, and he may be a *bona fide* holder although he had suspicions and grounds of suspicion as to the title, and was guilty of gross negligence in not investigating, but yet acted in good faith. *New Orleans, etc. R. R. v. Mississippi College*, 47 Miss. 560 (1873). See also *Lawrence v. Lawrence*, 42 N. H. 109 (1860). Equity will compel payment of a lost bond where full indemnity is given. *Force v. Elizabeth*, 27 N. J. Eq. 408 (1876). So, also, of coupons where the bonds and coupons were destroyed by fire on a steamboat. *Rogers v. Chicago, etc. Ry.*, 6 Abb. N. Cas. 253 (1878). A lost bond will be paid if indemnity is given. *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867). The owner of a lost coupon may recover interest from the date when he made a demand and tendered proper indemnity. *Fitchett v. North Pennsylvania R. R.*, 5 Phila. 132 (1863). Where a creditor of a bondholder has obtained by default a judgment against the corporation restraining it from paying the bonds or coupons to any person except the plaintiff, the corporation must pay the amount of the coupons to the plaintiff without requiring security. *Schreiber v. Garden*, 152 N. Y. App. Div. 817 (1912).



indebtedness reciting the loss of the bonds and stating that the certificate was to replace them, the certificate to bear interest the same as the coupons and to become void if the bonds appear in *bona fide* hands.<sup>1</sup>

Although there is a suit pending to restrain a mortgagor railroad company from negotiating its bonds, yet where the company does negotiate them, even in violation of an injunction, the *bona fide* purchaser of the bonds is protected. The doctrine of *lis pendens* does not apply.<sup>2</sup> A person selling bonds has no purchase-money lien on such bonds for the price thereof.<sup>3</sup> The holder of bonds is presumed to be the *bona fide* holder of them,<sup>4</sup> but this burden is easily shifted.<sup>5</sup> A person suing on bonds payable to bearer need not show how he came by them,<sup>6</sup> nor to whom they were first issued.<sup>7</sup> Where the trustee of a mortgage in foreclosing proves the issue of the bonds and that it is the holder thereof, this raises a presumption that the owners of the bonds are

<sup>1</sup> Switzerland, etc. Co. v. New York Central, etc. R. R., 152 N. Y. App. Div. 70 (1912).

<sup>2</sup> Farmers', etc. Co. v. Toledo, etc. R. R., 54 Fed. Rep. 759 (1893). The doctrine of *lis pendens* does not apply to negotiable corporate bonds. Pittsburgh, etc. Ry. v. Lynde, 55 Ohio St. 23 (1896); aff'd, *sub nom.* Pittsburgh, etc. Ry. v. Long Island L. & T. Co., 172 U. S. 493 (1899). See also § 364, *supra*.

<sup>3</sup> Barstow v. Pine Bluff, etc. Ry., 57 Ark. 334 (1893).

<sup>4</sup> Macon County v. Shores, 97 U. S. 272 (1877); Murray v. Lardner, 2 Wall. 110 (1864). The holder of a municipal bond is presumed to be a *bona fide* holder. Kennicott v. Wayne County, 6 Biss. 138 (1874); s. c., 14 Fed. Cas. 333; aff'd, 94 U. S. 498. The possession of a negotiable bond is *prima facie* evidence of title, and ordinarily is presumptive evidence that the holder is *bona fide*. Western N. C. R. R. v. Drew, 3 Woods, 691 (1879); s. c., 29 Fed. Cas. 747. The burden of proof that the plaintiff is not a *bona fide* purchaser of bonds which he is suing on, and which were stolen and the theft advertised, is upon the company which is being sued. Gilbough v. Norfolk, etc. R. R., 1 Hughes, 410 (1877); s. c., 10 Fed. Cas. 354. *Bona fide* ownership is presumed. Lehman v. Tallassee, etc. Co., 64 Ala. 567 (1879). The holder of bonds payable to "holder" is presumed

to be the owner of them. Martin v. Somerville, etc. Co., 16 Fed. Cas. 903 (1863). The holder of bonds payable to bearer is presumed to be the owner upon foreclosure proceedings until the contrary is shown. Chicago, etc. Land Co. v. Peck, 112 Ill. 408 (1885); Carr v. Le Fevre, 27 Pa. St. 413 (1856).

<sup>5</sup> Smith v. Sac County, 11 Wall. 139 (1870); Stewart v. Lansing, 104 U. S. 505 (1881). Even though bonds are issued in violation of law, which first requires the capital stock to be paid up, yet the corporation must pay back what it received for the bonds and must pay the full par value to *bona fide* holders, but after proof of illegality of issue no one is presumed to be a *bona fide* purchaser. Shellenberger v. Altoona, etc. R. R., 212 Pa. St. 413 (1905).

<sup>6</sup> A holder of bonds payable to bearer need not prove how he came by them. He is presumed to be the rightful owner. Chicago, etc. R. R. v. Peck, 112 Ill. 408 (1885).

<sup>7</sup> Where the bonds are payable to bearer, "no rule of law requires it to be shown by averment to whom such bonds, or any of them, were negotiated in the first instance." Savannah, etc. R. R. v. Lancaster, 62 Ala. 555 (1878), holding also that the bondholder need not show how much was paid for the bonds or when they were issued. See also §§ 771, 772, *infra*.



*bona fide* holders for value, and, if the corporation claims that the bonds were issued without consideration, it must prove that the holders are not *bona fide* holders.<sup>1</sup>

The registration of a bond by the corporation obligates the corporation to protect the registered holder. Where trustees under a will hold registered bonds, the registration being to them as trustees, it is illegal for the corporation to allow one of them to transfer such registered bonds, and the corporation is liable for the same if such transfer is in breach of trust on the part of the trustees.<sup>2</sup> Nevertheless, municipal bonds are negotiable, even though the payee's name is left blank, and the bond is registered on the company's books. A *bona fide* purchaser from one who steals such bonds is protected.<sup>3</sup> The statute does not begin to run in favor of the thief of bonds until his identity is discovered.<sup>4</sup> Where the treasurer of a charitable corporation forges a resolution of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable it has recourse against the broker by reason of the stock exchange rule which renders liable a broker who witnesses signatures to transfers of stock or bonds.<sup>5</sup>

§ 768. *The negotiability of the bonds extends also to the mortgage.* — The bonds of a corporation are negotiable, and the corporation is unable to set up many defenses against *bona fide* holders which it might have set up against the parties to whom the bonds were originally issued. But does this protection and negotiability extend also to the mortgage as well as the bonds? Can the corporation

<sup>1</sup> Atlantic T. Co. v. Crystal Water Co., 72 N. Y. App. Div. 539 (1902).

<sup>2</sup> Cooper v. Illinois, etc. R. R., 38 N. Y. App. Div. 22 (1899). In this case the bonds had been registered in the name of the executor of the estate, who, upon his death, was succeeded by two trustees, and one of these trustees caused the corporation to transfer the bonds from the name of such executor to bearer. The court held, however, that a broker who sells the bonds is not liable, although he knew that the bonds were registered in the name of the executor prior to the transfer thereof to bearer. See also

§ 327, *supra*, and Holmes v. Northern, etc. Ry., 65 N. Y. App. Div. 49 (1901).

<sup>3</sup> A newspaper advertisement of the loss is not notice, unless such purchaser had knowledge thereof. Manhattan, etc. Institution v. N. Y., etc. Bank, 42 N. Y. App. Div. 147 (1899); *aff'd*, 170 N. Y. 58. A debenture running to a person or other registered holder for the time being is not negotiable, although transferable. *Re Palmer's, etc. Co.*, [1904] 2 Ch. 743.

<sup>4</sup> Lightfoot v. Davis, 198 N. Y. 261 (1910).

<sup>5</sup> Clarkson Home v. Missouri, etc. R. R., 182 N. Y. 47 (1905).



defend against the mortgage on grounds which it cannot set up against *bona fide* holders of the bonds? In the federal courts and in most of the states of the Union the corporation cannot. The mortgage follows and partakes of the negotiability of the bonds.<sup>1</sup>

<sup>1</sup> A negotiable note secured by a mortgage enables a *bona fide* indorsee thereof to enforce the mortgage free from defenses that exist against the payee. *Carpenter v. Logan*, 16 Wall. 271 (1872). The negotiability of the bond extends also to the mortgage. *Central T. Co. v. Bodwell, etc. Co.*, 181 Fed. Rep. 735 (1910). See also § 775, *infra*. Such also is the rule where bonds are so secured and have passed into *bona fide* hands. *Kenicott v. Supervisors*, 16 Wall. 452 (1872); *Chicago Ry., etc. Co. v. Merchants' Bank*, 136 U. S. 268, 283 (1890); *Swift v. Smith*, 102 U. S. 442, 444 (1880); *Collins v. Bradbury*, 64 Me. 37 (1875); *Towne v. Rice*, 122 Mass. 67, 73 (1877); *Heath v. Silverthorn, etc. Co.*, 39 Wis. 146 (1875). The prevailing rule is that the transfer of a negotiable note or bond gives a *bona fide* transferee the same protection as to a mortgage securing the note or bond as it gives him in regard to the latter; in other words, the mortgage being an incident to the negotiable paper partakes of its negotiability, and a defense which was not good as against the note or bond is not good as against the mortgage. *O'Rourke v. Wahl*, 109 Fed. Rep. 276 (1901). In *Spence v. Mobile, etc. Ry.*, 79 Ala. 576, 587 (1885), the court said: "Two states—Ohio and Illinois—depart from the general ruling which extends the immunity accorded to negotiable instruments to the mortgages given to secure their payment. *Baily v. Smith*, 14 Ohio St. 396 (1863); *Kleeman v. Frisbie*, 63 Ill. 482 (1872). And in 2 Pom. Eq., § 708, n. 1, the reasoning of these cases is commended. Our ruling in *Hawley v. Bibb* [69 Ala. 52] is supported by the great weight of authority." See also *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18 (1891); *Swett v. Stark*, 31 Fed. Rep. 858 (1887). "The same immunity from defenses in the hands of *bona fide* holders applies to mort-

gages securing such bonds as to the bonds themselves." *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). The general rule is that, where a negotiable note is secured by a mortgage, the mortgage may be enforced by a *bona fide* purchaser of the note. But in some states the negotiability of the note does not extend to the mortgage. The former rule prevails in the federal courts. *Myers v. Hazzard*, 50 Fed. Rep. 155 (1881). See also § 764, *supra*. The question of whether the mortgage partakes of the negotiability of the negotiable paper which it secures has not often arisen, because in most of the states the practice is for an individual to give his personal non-negotiable bond instead of a note for the principal debt. The early cases holding that the negotiability of the note extends to the mortgage are *Reeves v. Scully*, Walk. (Mich.) 248 (1843); *Dutton v. Ives*, 5 Mich. 515 (1858); *Fisher v. Otis*, Pin. (Wis.) 83 (1850); *Croft v. Bunker*, 9 Wis. 503 (1859). The mortgagee of a corporation is not chargeable with knowledge of facts appearing on its records in regard to the title to the property. *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 684 (1885); *aff'd*, 133 U. S. 534. The lower court, in the case *Belden v. Burke*, 72 Hun, 51, 74, 75, held that a *bona fide* purchaser of bonds secured by a mortgage was, nevertheless, chargeable with notice of defenses against the mortgage itself; but the court of appeals in 147 N. Y. 542 (1895), reversed this decision and held that subsequent holders of bonds in good faith and without notice were entitled to the benefit of the mortgage, even though the original parties to whom the bonds were issued might not have been so entitled.

Land patents granted by the United States to a railroad company may be vacated for mistake, even as against a mortgagee of such railroad. *United*



This rule of law would seem to be one of the first requirements of trade. The average corporate bond would be a very dangerous instrument if the mortgage were liable to be swept away by some defense which the bond purchaser knew nothing about. It is a wise rule of public policy which causes the mortgage to partake of the negotiability of the instrument which it secures. Nevertheless in Ohio and Illinois a contrary rule prevails.<sup>1</sup> Where the bondholders purchased their bonds with knowledge of the fact that a manufacturing company has erected machinery on the property covered by the mortgage, under a contract by which said company reserved title in the machinery, and the right to take it away in default of payment, the lien of the manufacturing company is prior in right to that of the bondholders.<sup>2</sup> If negotiable bonds are given as collateral security to a note that is not negotiable, the bonds lose their negotiability as regards that note.<sup>3</sup>

§ 769. *Miscellaneous features of bonds — Issue in payment for the property of another corporation — Consolidations — Bondholders' suits — Bonds exchangeable into stock.* — Where bonds are secured by a mortgage on property which is taken over from an insolvent party, difficult questions arise as to the rights of creditors of that insolvent party as against the bondholders and stockholders.<sup>4</sup> Where

*States v. Southern, etc. R. R.*, 117 Fed. Rep. 544 (1902); *aff'd*, 200 U. S. 341 and 133 Fed. Rep. 651.

<sup>1</sup> The supreme court of Ohio, in the early case of *Baily v. Smith*, 14 Ohio St. 396 (1863), established the rule for that state that the mortgage did *not* partake of the negotiability of the note which it secured. A *bona fide* purchaser of a note who takes with the note an assignment of chattels mortgaged to secure the note takes the latter subject to the equities. *Commercial Nat. Bank v. Burch*, 141 Ill. 519 (1892). The supreme court of Illinois has held, however, that railroad bonds are negotiable, and the mortgage securing them may be enforced in behalf of *bona fide* purchasers, even though the bonds were issued below par, in violation of the statute. *Peoria, etc. R. R. v. Thompson*, 103 Ill. 187 (1882), overruling *Chicago, etc. Ry. v. Loewenthal*, 93 Ill. 433 (1879). *Cf. Hodson v. Eugene Glass Co.*, 156 Ill. 397 (1895). If a statute prohibits the issue of bonds below par, a *bona fide* holder may enforce them, but the mortgage is void and he becomes an unsecured creditor.

*Union Trust Co. v. New York, etc. R. R.*, 17 Weekly Law Bull. 176 (Ohio, 1887). In general, see also *Kleeman v. Frisbie*, 63 Ill. 482 (1872). In *Pomerooy, Eq.*, § 708, note 1, the reasoning of these cases is commended. Where by the charter all rights are to be forfeited unless the road is completed within a certain time, and it is not so completed, and the state forfeits all its rights and turns them over to another company a mortgage of the old company falls also. Where no part of the money from the bonds was expended on the road, holders of bonds with notice get nothing. *Silliman v. Fredericksburg, etc. R. R.*, 27 Gratt. (Va.) 119 (1876).

<sup>2</sup> *Central Trust Co. v. Arctic, etc. Mfg. Co.*, 77 Md. 202 (1893). See §§ 855, 857, *infra*.

<sup>3</sup> *Thomson-Houston Elec. Co. v. Capitol Elec. Co.*, 56 Fed. Rep. 849 (1893).

<sup>4</sup> As to this, see ch. XL, *supra*. Bondholders who took with notice that the property was received by the corporation from another corporation or firm in payment for stock, and that the latter corporation or firm was in



a New Jersey corporation having power to purchase its own stock and issue its bonds in payment therefor has made such an issue, the bonds may be enforced in *bona fide* hands, even though the stock so purchased was worthless.<sup>1</sup>

A railroad company is liable on its bonds although by consolidation with another company all its property has passed out of its possession.<sup>2</sup> The consolidated company may be made liable on the bonds.<sup>3</sup> Where a company has issued \$112,000 of \$200,000 mortgage bonds and then sells its property, the vendee assuming the mortgage cannot issue the remaining bonds and make them equal in right to the \$112,000 of bonds.<sup>4</sup> The holders of mortgage bonds cannot claim the right to exchange the same for new bonds, even though the mortgage securing the new bonds provides for such exchange.<sup>5</sup>

A judgment creditor cannot attack consolidated bonds on the ground that the old bonds which have been taken up were informally and illegally issued.<sup>6</sup>

debt, cannot enforce them as against such creditors. *Blair v. St. Louis, etc. Ry.*, 22 Fed. Rep. 36 (1884).

<sup>1</sup> *Hoskins v. Seaside, etc. Co.*, 68 N. J. Eq. 476 (1905).

<sup>2</sup> A bondholder in a corporation that is afterwards consolidated with another cannot be compelled to look to the consolidated company only. *Market Street Ry. v. Hellman*, 109 Cal. 571 (1895); *Gale v. Troy, etc. R. R.*, 51 Hun, 470 (1889).

<sup>3</sup> See § 897, *infra*. The holder of a bond unsecured by mortgage cannot prevent a consolidation where such consolidation is authorized by an existing statute. The consolidated company is liable for the debts of the constituent companies, including this bonded debt, but one of the constituent companies may place a mortgage on the property to secure other debts and still leave this bonded debt unsecured. Where a consolidated company agrees to "protect" unsecured bonds of the consolidating companies, an equitable lien is created on the consolidated company property. *Tysen v. Wabash Ry.*, 11 Biss. 510 (1883); s. c., 15 Fed. Rep. 763. As to this litigation, see *Compton v. Jesup*, 167 U. S. 1 (1897). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. *Hervey*

*v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). In suing a foreign consolidated company on bonds issued by one of the constituent companies, the statutes rendering the former liable must be pleaded. *Rothschild v. Rio Grande, etc. Ry.*, 59 Hun, 454 (1891). As to the liability of the consolidated company under the New York statute, see *James v. Fitchburg Ry.*, 50 Hun, 310 (1888); *Polhemus v. Fitchburg R. R.*, 50 Hun, 397 (1888); *aff'd*, 123 N. Y. 502.

<sup>4</sup> *Security, etc. Co. v. St. Louis, etc. Co.*, 137 N. W. Rep. 807 (Mich. 1912). See § 765, *supra*.

<sup>5</sup> *Morse v. Chicago, etc. R. R.*, 84 N. Y. App. Div. 406 (1903).

<sup>6</sup> *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. *Farmers' L. & T. Co. v. Toledo, etc. Ry.*, 67 Fed. Rep. 49 (1895). A street-railway company and a land company cannot legally join in the execution and issue of bonds and mortgages on the property of both, even though the proceeds are used to pay the debts of the latter and to con-



A contract to deliver the bonds of a company is not fulfilled by tendering the bonds of a company into which the former company has been merged by consolidation.<sup>1</sup> The question whether bonds may be issued by a company that has consolidated with another is considered elsewhere.<sup>2</sup>

Bonds are sometimes by their terms made convertible into stock. This subject is considered elsewhere.<sup>3</sup> A person entitled to mortgage bonds, but who accepts stock in lieu thereof, cannot after insolvency claim the bonds.<sup>4</sup> Where bonds are convertible into preferred stock within ten days after any dividend has been paid on the stock upon unmatured coupons being delivered up, it is too late to demand exchange after the ten days, or after the coupons have matured and been paid.<sup>5</sup> Where debentures are issued at eighty cents on the dollar and by their terms the holder may convert them into stock equal to the par value of the debentures, this is the same as issuing stock at a discount for cash, and may be enjoined by its shareholders.<sup>6</sup>

The right of bondholders to complain of *ultra vires* or fraudulent acts of the corporation and directors, and in general to bring suits to protect the corporate property, is considered elsewhere.<sup>7</sup>

§ 770. *Suits at law on bonds — Demand of payment — Form of action — Statute of limitations.* — A suit at law may be brought to obtain judgment on a bond of a corporation, even though the bond, with many other bonds, is secured by a mortgage.<sup>8</sup> Nevertheless

struct the railway of the former. But each is liable on the bonds to the extent of the proportion of the money received by it. *Northside Ry. v. Worthington*, 88 Tex. 562 (1895). A general creditor of a consolidated corporation cannot attack the validity of the bonds of the corporation on the ground that the consolidation was not legal. *Louisville T. Co. v. Louisville, etc. Ry.*, 84 Fed. Rep. 539 (1898); reversed on other grounds in 174 U. S. 674.

<sup>1</sup> *New Jersey, etc. Ry. v. Strait*, 35 N. J. L. 322 (1872).

<sup>2</sup> See § 765, *supra*.

<sup>3</sup> See § 283, *supra*. Where a railroad issues bonds convertible into stock within ten days after any dividend, and another railroad buys all the stock of the former, and never pays any dividends, the holder of the bonds cannot demand stock in exchange therefor and maintain a suit for refusal, especially where there is no proof that the stock was of greater value than the

bonds. *Lisman v. Milwaukee, etc. Ry. Co.*, 161 Fed. Rep. 472 (1908); *aff'd*, 170 Fed. Rep. 1020.

<sup>4</sup> *Lembeek v. Jarvis, etc. Co.*, 69 N. J. Eq. 450 (1905); *aff'd*, 70 N. J. Eq. 757.

<sup>5</sup> *Carpenter v. Chicago, etc. R. R.*, 119 N. Y. App. Div. 169 (1907); *aff'd*, 192 N. Y. 586. Where bonds are by their terms convertible into stock within ten days after any dividend, and the conversion is not made while many dividends are paid, and then dividends cease by reason of another company buying its property, the right of conversion ceases at the same time. *Welles v. Chicago, etc. Ry.*, 175 Fed. Rep. 562 (1910).

<sup>6</sup> *Moseley v. Koffyfontein Mines, Ltd.*, [1904] 2 Ch. 108. See also § 283, *supra*.

<sup>7</sup> See § 735, *supra*, and § 830, *infra*.

<sup>8</sup> The holders of bonds which are due may sue upon them, notwithstanding they are secured by a mortgage. "The fact that a mortgage had been



the bondholder, after obtaining judgment, cannot levy execution on the property covered by the mortgage. The law does not allow this as against the mortgagor, nor as against the other bondholders.<sup>1</sup> No demand of payment need be made.<sup>2</sup> A mortgage may provide that the company shall be sued on the bonds only after the mortgage security has been exhausted.<sup>3</sup> In New Jersey, by statute, a mortgage bond or coupon cannot be sued upon until after foreclosure is had.<sup>4</sup> A trustee of a mortgage cannot bring a suit at law to collect the bonds.<sup>5</sup> Where the trustee enters a deficiency judgment a bondholder cannot thereafter bring suit on his bond.<sup>6</sup> A pledgee of bonds may bring suit on them against the corporation without selling them out.<sup>7</sup>

given as security for the debt with trusts and covenants, which a court of equity would control and enforce in a proper case, afforded not a shadow of defense. The bond was the principal debt, the mortgage the incidental security. Remedies peculiar to each exist, both in law and equity, but they do not clash and destroy each other — they co-exist." Philadelphia, etc. R. R. v. Johnson, 54 Pa. St. 127 (1867). A bondholder may bring suit at law on his bond and obtain judgment without regard to the mortgage. Kimber v. Gunnell, etc. Co., 126 Fed. Rep. 137 (1903). The agreement of a corporation to pay a specified sum of money, with the provision that it shall not be chargeable against a certain part of the capital stock, can be enforced in equity only, inasmuch as an accounting is involved. Heflin, etc. Co. v. Hilton, 124 Ala. 365 (1899). The California constitutional provision that each stockholder shall be liable for his proportionate part of the corporate debts incurred while he is a stockholder, may be enforced without first attempting collection from the corporation, even though the debt is secured by a corporate mortgage. Dolbear v. Foreign, etc. Co., 196 Fed. Rep. 646 (1912). See 205 Fed. Rep. 1.

<sup>1</sup> See § 772, *infra*.

<sup>2</sup> Shaw v. Bill, 95 U. S. 10 (1877), where the corporation was insolvent. Demand of payment need not be made, alleged, or proved in an action on the bond, even though the bond is payable at a certain place, but the defendant

may set up that the money was there to pay the bond. Langston v. South Carolina R. R., 2 S. C. 248 (1870). If the bonds are payable at the office of the company in a particular place and it has no office there, the demand may be made elsewhere. Alexander v. Atlantic, etc. R. R., 67 N. C. 198 (1872). See also § 772, *infra*, concerning demand of payment of coupons. Where the company has the right to pay off the bonds, it may do so and stop interest by depositing the money at the place stated in the bond as the place of payment. But the offer to pay must not be conditioned on all the past-due coupons being also turned in. So held in regard to municipal bonds. Bailey v. Buchanan County, 54 N. Y. Super. Ct. 237 (1887). Where directors borrow money on their own credit for the corporation and give its note indorsed by them, they may be sued without the note being presented for payment to the corporation, under the Negotiable Instrument Act of Pennsylvania, the note being for their accommodation and they not expecting the corporation to pay it. Luckenbach v. M'Donald, 164 Fed. Rep. 296 (1908).

<sup>3</sup> Pennsylvania Steel Co. v. New York City Ry., 189 Fed. Rep. 661 (1911).

<sup>4</sup> Holmes v. Seashore Electric Ry., 57 N. J. L. 16 (1894).

<sup>5</sup> Mackay v. Randolph, etc. Co., 178 Fed. Rep. 881 (1910).

<sup>6</sup> Grant v. Winona, etc. Ry., 85 Minn. 422 (1902). Where the trustee

<sup>7</sup> Stegmaier v. Keystone Coal Co., 225 Pa. St. 221 (1909).



The mode of issuing bonds depends upon the orders of the board of directors, or of the mortgage itself.<sup>1</sup> A bondholder who buys prior liens on the property does so for the benefit of other bondholders, who, within a reasonable time after they know of such purchase, offer to contribute such part of the sum paid by him as the par value of the bonds held by the contributing bondholder bears toward all the bonds.<sup>2</sup>

The corporation cannot set up in defense to its bonds that it was irregularly incorporated.<sup>3</sup> An agreement to pay dividends, whether earned or not, is illegal, and hence certificates of indebtedness issued in advance of such dividends cannot be enforced.<sup>4</sup>

The bond may be sued upon as though it were a promissory note.<sup>5</sup> Bonds secured by a mortgage are debts within the meaning of the New York statute making the directors personally liable for failure to file annual reports.<sup>6</sup>

The statute of limitations begins to run on a bond the same as on other agreements to pay money, but it is a matter of doubt whether the statute relative to sealed instruments or the statute applicable to promissory notes applies to the bonds of a corporation.<sup>7</sup> Where the lessee of a railroad gives a mortgage to apply the earnings to the debts of the lessor, a purchaser of the lessee's rights is bound to do the same;

has obtained judgment on the entire issue of bonds, an individual holder of bonds cannot sue the company on his bonds. Upon the trustee obtaining judgment the bonds were all merged therein. *Laing v. Queen City Ry.*, 49 S. W. Rep. 136 (Tex. 1898). The bonds ran to the trustee or bearer, and the court construed all the papers as constituting the trustee of the debt as well as of the property mortgaged. A deficiency judgment by the trustee does not prevent the owners of bonds proving their bonds in bankruptcy proceedings against the mortgagee, even though the trustee has proved the deficiency judgment in the bankruptcy proceedings. *Mackay v. Randolph, etc. Co.*, 178 Fed. Rep. 881 (1910).

<sup>1</sup> As to the right of a particular officer to sell them, see *Chew v. Henrietta, etc. Co.*, 2 Fed. Rep. 5 (1880). If valid on their face, compliance with the charter is presumed. *Nichols v. Mase*, 94 N. Y. 160 (1883). See also ch. XLIII, *supra*.

<sup>2</sup> *Booker v. Crocker*, 132 Fed. Rep. 7 (1904).

<sup>3</sup> § 637, *supra*.

<sup>4</sup> *Strickland v. National Salt Co.*, 79 N. J. Eq. 182 (1911).

<sup>5</sup> A corporation bond may be sued and declared upon as though it were a bill of exchange or promissory note. *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). A railway bond payable to bearer may be sued upon in assumpsit and set forth as a "bond." It may be joined with the common counts in *indebitatus assumpsit*. *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). The holder of bonds payable to bearer is an original payee and not an assignee merely. *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883). For the form of complaint on a railroad bond, see *Miller v. New York, etc. R. R.*, 8 Abb. Pr. 431 (1859). The holder of the bond may of course sue upon it in his own name. *Carr v. Le Fevre*, 27 Pa. St. 413 (1856). See also § 761, *supra*.

<sup>6</sup> *Morgan v. Hedstrom*, 164 N. Y. 224 (1900).

<sup>7</sup> See § 772, *infra*, as to coupons; and § 846, *infra*.



such purchaser having agreed in writing to carry out the terms of the lease. The fifteen years statute of limitations applies to such an obligation.<sup>1</sup>

Where a party sues to foreclose a mortgage and fails because the mortgage was *ultra vires* of the corporation, he cannot in that action recover on the bonds.<sup>2</sup> A decree at the instance of a corporation declaring void a trust agreement is not a bar to a holder of one of the bonds, secured thereby, collecting his bonds.<sup>3</sup> Bonds of an insolvent corporation become due on its dissolution, and accordingly the stockholders' statutory liability thereon commences at that date.<sup>4</sup> A mortgagee is entitled to share proportionately in unmortgaged corporate assets without reference to his mortgage security, except that the total amount received must not exceed his debt. The court may require him to realize on his security so as to ascertain the balance due.<sup>5</sup> A deficiency on foreclosure sale may participate with unsecured creditors in the distribution of assets not covered by liens.<sup>6</sup>

§ 771. *Coupons and interest on bonds — Negotiability of coupons — Participation in foreclosure — Interest on overdue bonds and coupons — Purchase of coupons when presented for payment.* — Nearly all bonds of corporations have attached to them coupons, representing the semi-annual or annual interest on the bonds themselves. These coupons are usually in the form of promissory notes payable to the bearer. They are generally signed by the engraved signature of the treasurer of the company.<sup>7</sup>

Coupons may be detached from the bond and sold like promissory notes. They are negotiable, and a *bona fide* purchaser of them is protected.<sup>8</sup> The holder need not prove his title.<sup>9</sup> But if the bonds

<sup>1</sup> Schmidt v. Louisville, etc. R. R., 139 Ky. 81 (1910).

<sup>2</sup> Dudley v. Congregation, etc. St. Frances, 138 N. Y. 451 (1893).

<sup>3</sup> National Salt Co. v. Ingraham, 143 Fed. Rep. 805 (1906).

<sup>4</sup> Ramsden v. Knowles, 151 Fed. Rep. 718 (1906). See also § 642, *supra*.

<sup>5</sup> Mark v. American, etc. Co., 84 Atl. Rep. 887 (Del. 1912).

<sup>6</sup> Homer v. Baltimore, etc. Co., 117 Md. 411 (1912).

<sup>7</sup> A lithographed signature on the coupons is good. McKee v. Vernon County, 3 Dill. 210 (1874); s. c., 16 Fed. Cas. 188. Coupons of bonds may be signed by a printed fac-simile of a corporate officer's autograph adopted by the corporation for that purpose, though not expressly authorized by statute. Pennington v. Baehr, 48 Cal. 565 (1874).

<sup>8</sup> Fox v. Hartford, etc. R. R., 70 Conn. 1 (1897); Commonwealth v.

<sup>9</sup> The holder of coupons suing thereon need not prove the origin of his title. He sues as holder and not as assignee. McCoy v. Washington County, 3 Wall. Jr. 381 (1862); s. c., 15 Fed. Cas. 1341. A possession of uncanceled coupons, detached from negotiable bonds, is *prima facie* evidence of title with all the rights of a

purchaser. Duncan v. Mobile, etc. R. R., 3 Woods, 567 (1877); s. c., 8 Fed. Cas. 19; aff'd, 96 U. S. 659. A person suing on coupons may allege that he is the owner and holder and need not allege that he is the owner for value. New, etc. Co. v. Price, 50 S. W. Rep. 963 (Ky. 1899).



are not negotiable the coupons are not, even though the latter are negotiable in form.<sup>1</sup> If the coupon does not run to order or bearer, it is not negotiable.<sup>2</sup> Coupons resemble promissory notes, and a pur-

Chesapeake, etc. Co., 32 Md. 501, 547 (1870); *Spooner v. Holmes*, 102 Mass. 503 (1869), where the coupons had been stolen; *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251, where a guaranty of the coupon was enforced; *Haven v. Grand Junction, etc. Co.*, 109 Mass. 88 (1871), the coupons being payable to bearer; *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867). To same effect, and holding that detached coupons create a distinct obligation, *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866). See also *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868); *Clark v. Iowa City*, 20 Wall. 583 (1874); *Walnut v. Wade*, 103 U. S. 683 (1880); *Thomson v. Lee County*, 3 Wall. 327 (1865); *Aurora City v. West*, 7 Wall. 82, 105 (1868); *Morris Canal, etc. Co. v. Fisher*, 9 N. J. Eq. 699 (1855). That coupons are negotiable, see also *Chesapeake, etc. Canal Co. v. Blair*, 45 Md. 102 (1876), where bonds were lost and representatives thereof were issued by the company to the owner. *Cicero v. Clifford*, 53 Ind. 191 (1876), a municipal bond coupon case; *Gilbough v. Norfolk, etc. R. R.*, 1 Hughes, 410 (1877); s. c., 10 Fed. Cas. 354, holding that a *bona fide* purchaser of stolen bonds might enforce coupons not yet due, but not the overdue coupons. See also *Dillon, Mun. Corp.*, for many cases relative to coupons on municipal bonds. The purchaser from a *bona fide* purchaser is protected, even though the former was not a *bona fide* purchaser himself. *Grand Rapids, etc. R. R. v. Sanders*, 54 How. Pr. 214 (1877); *rev'd* on another point in 17 Hun, 552; *Miller v. Berlin*, 13 Blatchf. 245 (1876); s. c., 17 Fed. Cas. 306; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221 (1887). Coupons are negotiable without indorsement, and title passes by delivery. *Johnson v. Stark County*, 24 Ill. 75 (1860). Where overdue coupons from bonds stolen before maturity are sued for,

the holder must prove that he, or a *bona fide* purchaser prior to him, purchased the coupons before maturity. *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147 (1881). Payment of interest coupons on bonds cannot be refused on the ground that certain forged bonds are in circulation. *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888). The numbers on coupons do not destroy their negotiability. *Evertson v. Newport Nat. Bank*, 66 N. Y. 14 (1876). "Coupons, where payable to bearer, are promissory notes negotiable by the law merchant, and possess all the attributes of promissory notes." *Cooper v. Thompson*, 13 Blatchf. 434 (1876); s. c., 6 Fed. Cas. 491. A coupon may be enforced, even though the bond itself has been paid. *New, etc. Co. v. Price*, 50 S. W. Rep. 963 (Ky. 1899). Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint-stock association shall not be personally liable. *Hibbs v. Brown*, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void.

<sup>1</sup> *McClelland v. Norfolk, etc. R. R.* 110 N. Y. 469 (1888), holding that under a mortgage power the majority of the bondholders might extend the time of payment of the coupons. But see *Manning v. Norfolk, etc. R. R.*, 29 Fed. Rep. 838 (1887).

<sup>2</sup> In *Myers v. York, etc. R. R.*, 43 Me. 232 (1857), and *Jackson v. York, etc. R. R.*, 48 Me. 147 (1858), the court held that a coupon worded, the company "will pay thirty dollars on this coupon," is not negotiable, it not being to bearer or order, though taken from a negotiable bond. But a similar



chaser of the coupon after it becomes due is not a *bona fide* purchaser.<sup>1</sup> A purchaser of overdue coupons is not bound by a general understanding between his vendor and the company that the coupons would not be presented for payment until it was convenient for the company to pay.<sup>2</sup>

Coupons stand upon the same footing as the bond in regard to the terms of the bond.<sup>3</sup> A provision in the bond that it and the coupons shall be redeemable within a certain time follows the coupons, although the latter are detached, the coupons being still held by the bondholder.<sup>4</sup>

The coupon, although detached from the bond, is secured by the mortgage.<sup>5</sup> But coupons detached from the bond before the bond is certified by the trustee as required by its terms are not entitled to the benefit of the mortgage.<sup>6</sup> After a coupon has been detached

coupon attached to a municipal bond was held to be negotiable in *Smith v. Clark County*, 54 Mo. 58 (1873), and in *McCoy v. Washington County*, 3 Wall. Jr. 381 (1862); s. c., 15 Fed. Cas. 1341, a municipal-bond case, where the court said that the coupon took its negotiability from the bond. In *Wright v. Ohio, etc. R. R.*, 1 Disney (Ohio), 465 (1857), the court held that coupons worded as "warrants for thirty-five dollars . . . payable in New York on the first day of," etc., were not negotiable. Coupons are not negotiable if they are not payable to bearer nor to any one's order. *Evertson v. Newport Nat. Bank*, 66 N. Y. 14 (1876). See also *Clarke v. Janesville*, 1 Biss. 98 (1856); s. c., 5 Fed. Cas. 962, holding a municipal-bond coupon not negotiable.

<sup>1</sup>*Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868), holding also that a guaranty of the coupon passes to any holder. Where railroad-bond coupons are stolen and are purchased after they become due, the purchaser is not protected. *Wylie v. Speyer*, 62 How. Pr. 107 (1881). A contract to sell railroad bonds implies that the unpaid coupons are included, where the intent of the parties was to practically give title to a railroad free from all debts. Another purchaser of the coupons with notice is not protected. *Farmers' L. & T. Co. v. Oregon, etc. R. R.*, 58 Fed. Rep. 639 (1893). Where a person sells coupon bonds on a con-

tract, by which he is entitled to the bonds on the payment of a certain sum, the coupons which accrue in the meantime belong to the vendee. *Fox v. Hartford, etc. R. R.*, 70 Conn. 1 (1897).

<sup>2</sup>*Fox v. Hartford, etc. R. R.*, 70 Conn. 1 (1897).

<sup>3</sup>*Guilford v. Minneapolis, etc. Ry.*, 48 Minn. 560 (1891).

<sup>4</sup>And a tender stops the interest on the coupons. *Bailey v. Buchanan County*, 115 N. Y. 297 (1889), holding also that detached coupons in the hands of the holders of the bonds are mere incidents of the latter, and may be redeemed if the bonds may be.

<sup>5</sup>*Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867); *Sewall v. Brainerd*, 38 Vt. 364 (1865); *Stevens v. New York, etc. R. R.*, 13 Blatchf. 412 (1876); s. c., 23 Fed. Cas. 22, giving a priority in payment to the coupons. Although the coupons are detached from the bond, yet they are protected by the mortgage and secured by it. *Union Trust Co. v. Monticello, etc. R. R.*, 63 N. Y. 311 (1875). The coupons are secured by the mortgage equally with the bonds. *Long Island T. Co. v. Long Island, etc. R. R.*, 85 N. Y. App. Div. 36 (1903); *aff'd*, 178 N. Y. 588.

<sup>6</sup>*Holland Trust Co. v. Thomson-Houston El. Co.*, 170 N. Y. 68 (1902), *aff'g* 62 App. Div. 299. Coupons that become due before the mortgage is executed and before the bonds are issued do not share in the security of the mortgage, even though such cou-



it is no longer subject to conditions contained in the bond or mortgage.<sup>1</sup> Although the coupons participate ratably in any mortgage which secures the bonds, yet they are not entitled to any priority in payment over the bonds when a foreclosure takes place,<sup>2</sup> unless the mortgage provides otherwise.<sup>3</sup>

When coupons are presented for payment and are cashed, they

pons were detached and sold, and even though in the hands of *bona fide* purchasers they might be collected by suit. So also as to coupons detached before the mortgage was executed and the bonds delivered, although becoming due afterwards. *Holland Trust Co. v. Thomson-Houston, etc. Co.*, 62 N. Y. App. Div. 299 (1901). Coupons detached and sold before the bonds are issued may not be entitled to the security of the mortgage. *Klein v. East River, etc. Co.*, 182 N. Y. 27 (1905).

<sup>1</sup> *Haskins v. Albany, etc. Co.*, 74 N. Y. App. Div. 31 (1902).

<sup>2</sup> *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867); *Re Sewall*, 38 Vt. 364 (1865). Even though by the mortgage no preference is given to interest on foreclosure, yet there may be a preference for interest not paid on some bonds while interest on the other bonds was paid. *Real Estate T. Co. v. Union T. Co.*, 102 Md. 41 (1905). The coupons are not entitled to any priority of payment over the bonds on a distribution of the funds after a foreclosure. *Duncan v. Mobile, etc. R. R.*, 3 Woods, 567 (1877); s. c., 8 Fed. Cas. 19; aff'd, 96 U. S. 659. *Cf. Stevens v. New York, etc. R. R.*, 13 Blatchf. 412 (1876); s. c., 23 Fed. Cas. 22. The interest has no priority over the principal in the distribution upon foreclosure, even though the interest on some bonds had been paid while the interest on others had not been. *M'Tighe v. Keystone, etc. Co.*, 99 Fed. Rep. 134 (1900). The acceptance of funded interest bonds for overdue coupons does not waive the mortgage security. It is a change and extension of the debt, but not of the security. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586 (1880). See § 765, *supra*. The court may, with the consent of the interested parties,

authorize the receiver to issue certificates extending the unpaid coupons without invalidating the lien of the coupons. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 341 (1879); s. c., 22 Fed. Cas. 274. No preference is given to the coupons. *Dunham v. Cincinnati, etc. Ry.*, 1 Wall. 254 (1863). As to distribution, see also § 881, *infra*. Where a corporation issues debentures secured by a deposit of mortgages with coupons, and the coupons are to be and are actually delivered to the corporation as they become due, and the corporation fails, and the depository forecloses the mortgage, not knowing that the coupons on the mortgage had not been paid, the holder of such coupons cannot claim an interest in the property which has been bought in by the depository. *State Finance Co. v. Commonwealth, etc. Co.*, 69 Minn. 219 (1897). Where past-due coupons are, by the terms of the mortgage, entitled to payment before the bonds themselves, the holders of such coupons may intervene in the foreclosure suit, and, if they do so in time, may compel the purchaser at the sale to pay them in cash, where such purchaser made payment in bonds. *Holland Trust Co. v. Thomson-Houston Elec. Co.*, 9 N. Y. App. Div. 473 (1896); aff'd, 153 N. Y. 645. See also *Low v. Blackford*, 87 Fed. Rep. 392 (1898). 108 L. T. Rep. 489.

<sup>3</sup> Past-due coupons may be entitled to payment before the principal upon foreclosure where the terms of the mortgage clearly indicate that intent. *West End T. Co. v. Wetherill*, 77 N. J. Eq. 590 (1910). A coupon holder is entitled to a preference over the bond where the mortgage so provides, even though he does not own any bond. *Real Estate Trust Co. v. Pennsylvania, etc. Co.*, 85 Atl. Rep. 365 (Pa. 1912).



are held to be canceled so far as the bonds and other coupons are concerned.<sup>1</sup> Even though a third person was buying them instead of the company paying them, the bondholders may insist on their mortgage lien free from these purchased coupons, unless the party presenting the coupons knew that he was selling them. The reason is that it takes two parties to make a sale, and moreover the coupon holders might have preferred to foreclose rather than to sell.<sup>2</sup>

<sup>1</sup> *United, etc. Co. v. Farmers' L. & T. Co.*, 11 Colo. App. 225 (1898).

<sup>2</sup> Quoted and approved in *Farmers' L. & T. Co. v. Iowa Water Co.*, 78 Fed. Rep. 881 (1897). Also in *Baker v. Meloy*, 95 Md. 1 (1902), the court saying: "This embodies a proposition that is sustained by authority, and which, in the absence of authority, addresses itself most strongly to reason and the common understanding." In *Cameron v. Tome*, 64 Md. 507 (1885), the court stated the law as follows: "That as against bondholders who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up, under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured." Coupons presented and paid cannot afterwards participate. It takes two to make a sale. *Morton, etc. Co. v. Home, etc. Co.*, 66 N. J. Eq. 106 (1904). Where the corporation pays to its fiscal agent the money necessary to pay coupons, but the agent uses it for other purposes, and subsequently takes up the coupons, the mortgage does not secure such coupons. *Farmers' L. & T. Co. v. New England, etc. Co.*, 137 Fed. Rep. 729 (1905). Coupons which were supposed to be paid cannot be enforced as having been bought. *Venner v. Farmers' L. & T. Co.*, 90 Fed. Rep. 348 (1898). Although the president and manager of the corporation claims that when he paid coupons he did so from his personal funds and for the purpose of holding the coupons as unpaid and

as a lien, yet where the parties presenting the coupons supposed that they were paid, and the directors knew nothing to the contrary, the coupons cannot be enforced by the president. *Lloyd v. Wagner*, 93 Ky. 644 (1893). In *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501 (1870), the court held that persons "taking up and holding" coupons as they came due under agreement with the directors, whose authority was only to obtain a loan and pay the coupons, cannot claim that the coupons are still unpaid. In the case *Duncan v. Mobile, etc. R. R.*, 3 Woods, 567 (1877); s. c., 8 Fed. Cas. 19; aff'd, 96 U. S. 659, the court allowed the purchaser of coupons to participate in the assets, although purchased when they came due and were presented for payment, where the owners presenting them knew that they were purchased instead of being paid, and did not object, the court saying that the rule was that "there was no purchase unless there was an intent on the part of the original holder to sell;" but in this case there was such intent. Where coupons are presented at the place of payment, and money is paid for them, such coupons cannot participate in the security as against bondholders who supposed the coupons were so paid and canceled. This is the rule even though, instead of being paid, the coupons were purchased by an outside party when they were received at the place of payment. *Union Trust Co. v. Monticello, etc. Ry.*, 63 N. Y. 311 (1875); *Martin v. Citizens' Trust Co.*, 94 Tenn. 176 (1894). Coupons cashed by the mortgagor are paid as against the bondholders, although actually purchased by an outside party instead of being paid. *Bockes v. Hathorn*, 20 Hun, 503



A person who sells bonds with a representation that past-due coupons have been paid may be compelled to deliver up such coupons.<sup>1</sup>

(1880). A purchase of coupons by a syndicate is not payment and cancellation of them by the company. *Clafin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880). A person who advances money to the corporation to pay coupons cannot claim that the coupons are a lien under the mortgage unless the bondholders consented. *Fidelity, etc. Co. v. West Pennsylvania R. R.*, 138 Pa. St. 494 (1891). Where bondholders are entitled to participate in a reorganization on a certain basis, a person purchasing coupons under an agreement with the company when they become due may be shut out of the reorganization. *Child v. New York, etc. R. R.*, 129 Mass. 170 (1880). In *Hand v. Savannah, etc. R. R.*, 17 S. C. 219 (1881), the court held that uncanceled coupons having been taken up by parties who advanced the money to an embarrassed corporation for that purpose, although marked paid in the company's books, these parties have an equity to claim for their coupons the benefit of the lien which originally secured them. The court also said that the recognition of this equity may be required at the hands of persons seeking the equitable powers of the court to enable them to contest the liability of the company to pay these coupons. When the parties practically know that the company is not paying out its money for the coupons, the sale is sustained and the coupons are enforceable. *Ketcham v. Duncan*, 96 U. S. 659 (1877). But where the parties presenting them know nothing about this, they may exclude these from participating in the assets until they are first paid. *South Covington, etc. Ry. v. Gest*, 34 Fed. Rep. 628 (1888). Railroad coupons which are paid and so understood cannot afterwards be enforced as having been merely assigned. *Holister v. Stewart*, 111 N. Y. 644 (1889). It is a question of fact whether a taking up of overdue coupons was intended as a cancellation of them or

only a transfer of interest. *Wood v. Guarantee, etc. Co.*, 128 U. S. 416 (1888). Where a person pays corporate bond coupons as they become due, and takes a note of the corporation in payment, the coupons no longer exist as a corporate liability. The person cannot claim that he is secured by the mortgage which secured the coupons. *South Covington, etc. Ry. v. Gest*, 34 Fed. Rep. 628 (1888). But where, in order to maintain the credit of a company, a director, upon presentation of its coupons for payment, pays out his own money and takes the coupons, he may enforce them, there being sufficient assets to pay all other creditors first. *Haven v. Grand Junction, etc. Co.*, 109 Mass. 88 (1871). Where a parent company, owning the stock of branch companies, passes into a receiver's hands, coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. *Phinzy v. Augusta, etc. R. R.*, 62 Fed. Rep. 771 (1894). Where on the sale of bonds sufficient is deducted from the price to pay the first coupons, and is left with the vendee for that purpose, such coupons are considered paid. *Farmers' L. & T. Co. v. Oregon, etc. R. R.*, 67 Fed. Rep. 404 (1895). As to the purchase of coupons, compare *Atlantic Trust Co. v. Kinderhook, etc. Ry.*, 17 N. Y. App. Div. 212 (1897). Where the coupons are cashed by a bank and punched as being paid, the bank cannot afterwards claim that they are still secured by mortgage. *United Waterworks Co. v. Farmers' L. & T. Co.*, 82 Fed. Rep. 144 (1897). Where the trustee sells the coupons to the president of the mortgagor corporation and knows that the corporation has not paid the coupons, they remain in force. *Union Trust Co. v. Berwick, etc. Co.*, 196 Fed. Rep. 511 (1910).

<sup>1</sup> And his wife may also be compelled so to do. *Chicago, etc. Ry. v. Turner*, 79 Mich. 133 (1889).



Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he holds bonds specified in such certificate to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person named in the certificate, although the certificate itself is not actually delivered until several years after the date of the certificate.<sup>1</sup> The pledgee of bonds may collect the coupons thereon as they become due.<sup>2</sup> Money deposited to pay coupons cannot be attached as belonging to the company.<sup>3</sup> But the trustee of a mortgage with whom money is deposited by the corporation to pay the interest may return to the corporation any balance which it has for coupons not yet presented for payment. The trustee is merely the agent of the corporation in this respect and there is no irrevocable trust as to such funds in favor of the coupon-holders.<sup>4</sup> Where a bank pays coupons on the corporate bonds under a mistaken idea that it had corporate funds to do so, it cannot recover the money back from the holder of the coupons.<sup>5</sup>

It is well settled that bonds bear interest after they become due, unless the corporation has the money ready for payment at the time and place of payment and continues to keep the money there for that purpose.<sup>6</sup> There is some doubt as to whether the coupons bear interest

<sup>1</sup> If such coupons have been canceled and returned to the corporation issuing the bonds, and the trustee is held liable for such coupons, the trustee may hold the corporation liable. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899).

<sup>2</sup> The pledgees of bonds have a right to collect the coupons, although the debt which is secured by the bonds is not yet due. Such a pledgee may also start foreclosure proceedings the same as the full owner. "He only differed from an absolute owner in this: that he was bound to account for any surplus received from the bonds and coupons, over and above what was necessary to the payment of his debt." *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514 (1878); s. c., 29 Fed. Cas. 261. See also § 468, *supra*.

<sup>3</sup> *Rogers Locomotive, etc. Works v. Kelley*, 88 N. Y. 234 (1882), aff'g 19 Hun, 399. Money paid to a trustee with which to pay coupons cannot be attached by a general creditor. *Holland Trust Co. v. Sutherland*, 177 N. Y. 327 (1904).

<sup>4</sup> *Staten Island, etc. Club v. Farm-*

*ers' L. & T. Co.*, 41 N. Y. App. Div. 321 (1899).

<sup>5</sup> *Citizens' Bank v. Schwarzschild, etc. Co.*, 109 Va. 539 (1909).

<sup>6</sup> Interest at the legal rate as fixed by statute runs on bonds after their maturity, and commences to run on bonds and coupons from the time they fall due, even though no demand of payment is made; but of course the company may show that the money was there to pay with. *Langston v. South Carolina R. R.*, 2 S. C. 248 (1870). Where the company does not deposit the money for the payment of the bonds at the time and place of payment, it is liable for interest up to the time when payment is actually made. Publication of a notice in a newspaper is not sufficient to stop interest unless the bondholders actually receive such notice. A circular stating that a higher rate of interest will be paid if the bonds are not presented for payment is binding on a corporation. *Kelley v. Phenix Nat. Bank*, 17 N. Y. App. Div. 496 (1897). Simple interest at the legal rate is recoverable on the principal of



from the time when they become due, where no presentation or demand of payment has been made.<sup>1</sup> Certainly the company is not obliged to

the bonds after they become due, "not upon and by virtue of the original contract, but as damages for the detention of money due." *Ashuelot R. R. v. Elliot*, 57 N. H. 397, 437 (1874); s. c., 58 N. H. 451. *Langston v. South Carolina R. R.*, 2 S. C. 248 (1870); *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501, 551 (1870). Interest is allowed on the bonds after they are declared due. *Welsh v. St. Paul, etc. R. R.*, 25 Minn. 314 (1878). If bonds are redeemable and are called by the company, which, however, is unable to pay them, they continue to bear interest. *Gordillo v. Weguelin*, L. R. 5 Ch. D. 287 (1877). Bonds do not bear interest after they become due and no demand is made, where the company proves that it was ready, able, and willing to pay them, even though it did not set aside a specific sum for that purpose, the money being in its general account. *Emlen v. Lehigh, etc. Co.*, 47 Pa. St. 76 (1864). In a foreclosure of a mortgage securing bonds, interest on the bonds is figured to the commencement of the foreclosure suit where the assets are not sufficient to pay the debts. *Gillett v. Chicago Title & T. Co.*, 230 Ill. 373 (1907). Municipal bonds after maturity bear interest at the rate which they bore before maturity, even though it is in excess of the legal rate. *Pruyn v. Milwaukee*, 18 Wis. 367 (1864). The principal bears interest unless the company is ready to pay and gives notice. *Price v. Great Western, etc. Ry.*, 16 M. & W. 244 (1847). See also *Ohio v. Frank*, 103 U. S. 697 (1880); *Brewster v. Wakefield*, 22 How. 118 (1859). The interest on the bonds after maturity is the same as that before maturity. *Beckwith v. Hartford, etc. R. R.*, 29 Conn. 268 (1860); *Cromwell v. Sac County*, 96 U. S. 51 (1877). Interest continues on the bonds from the time of foreclosure at the rate specified in the bond, although different from the statutory rate. *Jackson, etc. Co. v. Burlington, etc. R. R.*, 29 Fed. Rep. 474 (1887). Interest is allowed up to the date of distribution. *Re Lon-*

*don, etc. Co.*, L. R. [1892] 1 Ch. 639.

<sup>1</sup>Coupons bear interest from the date of their maturity, even though not presented for payment, if there was no money on deposit to pay them. *Parsons v. Utica, etc. Co.*, 80 Conn. 58 (1907). Compound interest will not be allowed on coupon bonds. *West End T. Co. v. Wetherill*, 77 N. J. Eq. 590 (1910). Interest is allowed on overdue coupons from the time they are detached from the bonds and are sold. *Long Island T. Co. v. Long Island, etc. R. R.*, 85 N. Y. App. Div. 36 (1903); *aff'd*, 178 N. Y. 588. Coupons bear interest from their maturity, even though not presented, unless it is shown that the money was deposited to pay them. *Abraham & Son v. New Orleans, etc. Assoc.*, 110 La. 1012 (1903). See also cases in following note. In Minnesota it is held that under the Minnesota statute, coupons will not bear interest from their date, even though the agreement was that they should bear interest. *Lee v. Melby*, 93 Minn. 4 (1904). After the principal sum has been declared due interest continues thereon, until decree, at the rate specified in the bonds themselves, but the interest on past-due coupons is the legal rate of interest. All bondholders are bound by the decree determining the amount of interest allowed. *Farmers' L. & T. Co. v. Northern, etc. Ry.*, 94 Fed. Rep. 454 (1899). Where the principal and interest of a bond is payable in New York state, the statutes of that state relative to interest govern, and no interest is allowed on coupons which remain attached to the bonds. *Columbus, etc. R. R. Appeals*, 109 Fed. Rep. 177 (1901). In *Alexander v. McDowell County*, 67 N. C. 330 (1872), the court said that demand was necessary before action on a municipal coupon, inasmuch as the changing officials necessitated such a rule, although a different rule prevailed as to individuals. But interest runs from the time of non-payment. *McLendon v.*



pay interest on the coupons if it can show that it was ready and willing to pay the coupons, if they had been presented for payment, and has continued to keep separate, for that purpose, sufficient funds.<sup>1</sup> There is also doubt as to whether coupons have three days of grace.<sup>2</sup>

Anson County, 71 N. C. 38 (1874). Interest may be recovered on overdue coupons from the time of demand of payment. *Fox v. Hartford*, etc. R. R., 70 Conn. 1 (1897). Coupons bear interest after their maturity. *Cromwell v. Sac County*, 96 U. S. 51 (1877); *Aurora City v. West*, 7 Wall. 82 (1868) — municipal-bond cases. In New York it is held that coupons which remain in the hands of the holder of the bonds, whether attached or detached, do not bear interest from the maturity of such coupons. *Williamsburg Sav. Bank v. Solon*, 136 N. Y. 465 (1893). To same effect, *Beattys v. Town of Solon*, 136 N. Y. 662 (1893); *Buffalo Loan, etc. Co. v. Medina Gas, etc. Co.*, 12 N. Y. App. Div. 199 (1896); *aff'd*, 162 N. Y. 67; *Klein v. East River, etc. Co.*, 33 N. Y. Misc. Rep. 596 (1901); *rev'd* on another point in 182 N. Y. 27; *Jackson v. York, etc. R. R.*, 48 Me. 147 (1858); *Crosby v. New London, etc. R. R.*, 26 Conn. 121 (1857). Bond coupons detached from the bond bear interest from maturity. *Philadelphia, etc. R. R. v. Knight*, 124 Pa. St. 58 (1889); *Internal Imp. Fund v. Lewis*, 34 Fla. 424 (1894). In Rhode Island the coupons bear interest from the time of demand of payment. *Whitaker v. Hartford, etc. R. R.*, 8 R. I. 47 (1864); *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866). Coupons bear interest from the time that the company is in default in paying them. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586

(1880). There are many municipal corporation cases also on this subject; and to the same effect, *San Antonio v. Lane*, 32 Tex. 405 (1869); *Genoa v. Woodruff*, 92 U. S. 502 (1875); *Jeffersonville v. Patterson*, 26 Ind. 15 (1866); *Davis v. Yuba County*, 75 Cal. 452 (1888), a municipal-bond case, where the interest was allowed from the time when payment was demanded. Interest is a creation of contract and not of the common law. *Pekin v. Reynolds*, 31 Ill. 529 (1863). In *Corcoran v. Chesapeake, etc. Co.*, 1 MacArthur (D. C.), 358 (1874); *aff'd*, 94 U. S. 741, the court held that interest began to run on coupons only after demand and refusal of payment, and that a waiver by the state of its lien so as to make it second to other bonds and coupons is not a waiver of interest on those coupons. In Connecticut the coupon does not bear interest after maturity. *Rose v. Bridgeport*, 17 Conn. 243 (1845). The company may decline to pay a coupon unless it is presented and delivered up. *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514 (1878); *s. c.*, 29 Fed. Cas. 261. If the bonds are payable in England with interest at five per cent., the interest collectible after default is the legal rate in England, and not the legal rate in the state wherein the railroad company is. *Coghlan v. South Carolina R. R.*, 142 U. S. 101 (1891.) The trustee is not the party to demand payment of the coupons. *Taber v. Cincinnati, etc. Ry.*, 15 Ind. 459 (1860.)<sup>1</sup> *Philadelphia, etc. R. R. v. Smith*,

<sup>2</sup> *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888). The coupon is deemed due on the day fixed for the payment of interest. It is not a bill of exchange, although in the form of an order to pay money. *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868). In New York they are entitled to days of grace. *Evertson v. Newport Nat. Bank*, 66 N. Y. 14

(1876). But the common-law rule has now been changed in New York by statute. L. 1894, ch. 607. There are no days of grace on coupons so far as concerns the provision that the bonds shall become due six months after default on maturity and demand of payment. *Alabama, etc. Mfg. Co. v. Robinson*, 56 Fed. Rep. 690 (1893).



§ 772. *Suit to collect coupons — Execution cannot be levied upon the mortgaged property — Demand of payment — Statute of limitations.* — A coupon-holder may sue at law on an overdue coupon.<sup>1</sup> But it is well-settled law that neither a mortgage bondholder nor the holder of a coupon can levy an execution upon the mortgaged property in order to enforce a judgment obtained upon the bond or coupon. There are two reasons for this rule: First, that a mortgagee at common law cannot so enforce his security; second, other bondholders and coupon-holders are entitled to participate equally in the security.<sup>2</sup> Other

105 Pa. St. 195 (1884); North Pennsylvania, etc. R. R. v. Adams, 54 Pa. St. 94 (1867), holding also that demand of payment at maturity is excused if the corporation was unable to pay; Langston v. South Carolina R. R., 2 S. C. 248 (1870); Mills v. Jefferson, 20 Wis. 50 (1865); Arents v. Commonwealth, 18 Gratt. (Va.) 750 (1868); Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R., 41 Barb. 9 (1863); aff'd, 4 T. & C. 251, allowing same as damages for delay of payment; Welsh v. St. Paul, etc. R. R., 25 Minn. 314 (1878); Burroughs v. Commissioners, 65 N. C. 234 (1871); Beaver County v. Armstrong, 44 Pa. St. 63 (1862); Commonwealth v. Chesapeake, etc. Co., 32 Md. 501, 547 (1870); Gelpcke v. Dubuque, 1 Wall. 175 (1863); Hollingsworth v. Detroit, 3 McLean, 472 (1844); s. c., 12 Fed. Cas. 352; Walnut v. Wade, 103 U. S. 683 (1880). No interest is allowed on the coupons if the money was deposited to pay them. Grand Trunk Ry. v. Central, etc. R. R., 105 Fed. Rep. 411 (1900).

<sup>1</sup> Montgomery, etc. Soc. v. Francis, 103 Pa. St. 378 (1883). A bondholder may detach a past-due coupon and bring a separate suit upon it, and is not restrained by a provision in the bond and mortgage relative to the trustees acting to have the bonds declared due in case of default. Mack v. American, etc. Co., 79 N. J. L. 109 (1909). As to a statutory provision, see Holmes v. Seashore Elec. Ry., 57 N. J. L. 16 (1894). A holder of coupons from railroad bonds may sue on them, and his right to do so is not taken away by the fact that they are secured by a mortgage. Manning v. Norfolk, etc.

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R. R., 29 Fed. Rep. 838 (1887). The holder of a coupon may obtain judgment thereon although the mortgage provides that he shall not levy execution on the road. Widener v. Railroad, 1 W. N. Cas. 472 (Pa. 1875). Suit on one interest coupon is no bar to a subsequent suit on another, though the latter was due at the time of the first suit. Butterfield v. Ontario, 44 Fed. Rep. 171 (1890). The holder of coupons may sue on them even though the mortgage is being foreclosed and the principal sum mentioned in the bonds has become due, and even though in the trustee's foreclosure suit no judgment for deficiency can be granted, the trustees not suing on the bonds. Welsh v. St. Paul, etc. R. R., 25 Minn. 314 (1879). In suing a railroad for interest on registered bonds it must be alleged that the agreement of the railroad was made under seal or upon a consideration, and that the covenant was made with or for the plaintiff's benefit. Holmes v. Northern, etc. Ry., 65 N. Y. App. Div. 49 (1901).

<sup>2</sup> The bondholders cannot recover judgment at law and sell out the mortgaged premises. Pugh v. Fairmount, etc. Co., 112 U. S. 238 (1884). A bondholder who has obtained judgment on his bonds cannot, by an execution levied on the property mortgaged to secure the bonds, obtain an advantage over other bondholders. Bowen v. Brecon Ry., L. R. 3 Eq. 541 (1867). In West Branch Bank v. Chester, 11 Pa. St. 282 (1849), it seems that a sale of the equity of redemption, based on a judgment obtained by a bondholder for interest, was upheld. The holder of coupons

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bondholders may enjoin the execution or attachment.<sup>1</sup> But a bondholder may obtain judgment at law and levy upon any property not covered by the mortgage.<sup>2</sup> A bondholder who buys prior liens on the property does so for the benefit of other bondholders, who, within a reasonable time after they know of such purchase, offer to contribute such part of the sum paid by him as the par value of the bonds held by the contributing bondholder bears towards all the bonds.<sup>3</sup>

The holder of coupons need not demand payment before commencing suit thereon.<sup>4</sup> Where the principal is to become due thirty days

may obtain judgment and levy on such property as is not covered by the mortgage securing his coupons. *Commonwealth v. Susquehanna, etc. R. R.*, 122 Pa. St. 306 (1888); *Dupont v. Bushong*, 1 W. N. Cas. 378 (1875); *Pennock v. Coe*, 23 How. 117 (1859). A bondholder cannot obtain judgment at law on unpaid coupons or the bond, and by levy of execution sell the mortgaged railway and franchises and buy it in and turn it over to a reorganized company to operate. The state will oust such a corporation from possession. The only execution which the bondholder can levy in such a case is on property not subject to the mortgage. The mortgage securing that bond and others still exists. *Commonwealth v. Susquehanna, etc. R. R.*, 122 Pa. St. 306, 321 (1888). Where bonds are secured by a chattel mortgage, one bondholder cannot obtain payment from such chattels in preference to other bondholders by levying an execution on them, even though the chattel mortgage has not been recorded as required by the statutes. *Fish v. New York, etc. Paper Co.*, 29 N. J. Eq. 16 (1878). One of the parties secured by a mortgage cannot levy an attachment on the mortgaged property "without alleging that the residue of the debts secured had been paid, and bringing the trustees or legal title-holders before the court." *Martin v. Mobile, etc. R. R.*, 7 Bush (Ky.), 116 (1870). Where a judgment is obtained upon coupons, the judgment cannot be levied on the income of the road. The mortgagor company and the trustee of the mortgage may enjoin such collection. *Roberts v. Denver, etc. R. R.*, 8 Colo. App.

504 (1896). A holder of bonds secured by a trust deed on all the property of a corporation, who seeks to enforce payment by an action at law, will not be permitted to enforce a lien by execution, to the embarrassment of the other bondholders. *Hacketts-town Nat. Bank v. Yuengling Brewing Co.*, 74 Fed. Rep. 110 (1896).

<sup>1</sup> A bondholder may enjoin another bondholder from levying an execution on the property mortgaged. They are to be treated as partners, and one is not allowed to obtain an advantage over others. Moreover, they have all agreed that the property shall be sold as a whole. And again, the reorganization provision in the mortgage is a covenant that is binding. See *Philadelphia, etc. R. R. v. Woelpper*, 64 Pa. St. 366 (1870), giving the decision of the court below. A bondholder may enjoin an execution sale. *Butler v. Rham*, 46 Md. 541 (1877).

<sup>2</sup> *Western, etc. Hospital v. Mercantile, etc. Co.*, 189 Pa. St. 269 (1899).

<sup>3</sup> *Booker v. Crocker*, 132 Fed. Rep. 7 (1904).

<sup>4</sup> *Walnut v. Wade*, 103 U. S. 683 (1880); *Smith v. Tallapoosa County*, 2 Woods, 574 (1874); s. c., 22 Fed. Cas. 682; *New, etc. Co. v. Price*, 50 S. W. Rep. 963 (Ky. 1899). Demand of payment need not be alleged in a suit on coupons. It is a matter of defense to the company. *Philadelphia, etc. R. R. v. Johnson*, 54 Pa. St. 127 (1867). Demand of payment of the coupons is not required where the place specified therefor no longer exists. *Long Island T. Co. v. Long Island, etc. R. R.*, 85 N. Y. App. Div. 36 (1903); *aff'd*, 178 N. Y. 588. A



after default in the payment of interest and after demand thereof, a written demand is sufficient, even though the coupons are not presented.<sup>1</sup>

The question whether a demand of payment is necessary before commencing foreclosure proceedings turns upon the provisions of the mortgage.<sup>2</sup>

The holder of coupons, upon which he is suing, need not produce the bonds to which they were attached, nor need he be interested in them.<sup>3</sup> Inasmuch as coupons are practically promissory notes, the form of action on coupons is the same as that upon promissory notes.<sup>4</sup>

coupon is like a note, and not like a bill. *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62 (1880). Coupons are like other commercial paper in that, although payable at a particular place, suit may be brought or foreclosure commenced on them without demand of payment at that place. So held where payment was to be "at financial office of said company in the city of New York." *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514 (1878); s. c., 29 Fed. Cas. 261. Coupons need not be presented before suit if the company has resolved to default, and has no funds to pay with. In the suit the mortgage need not be introduced. *Conshohocken Tube Co. v. Iron Car Equip. Co.*, 161 Pa. St. 391 (1894). See also § 770, *supra*, as to demand of payment of a bond.

<sup>1</sup> *Security, etc. Co. v. New Jersey, etc. Co.*, 57 N. J. Eq. 603 (1899). Where there are no funds deposited by the mortgagor to pay coupons a default occurs without demand, and the principal may be declared due under the terms of the mortgage. *Arnot v. Union Salt Co.*, 109 N. Y. App. Div. 433 (1905); *rev'd* on another point in 186 N. Y. 501.

<sup>2</sup> See § 836, *infra*.

<sup>3</sup> *Thomson v. Lee County*, 3 Wall. 327 (1865). "Suits on the coupons are sustained entirely independently of the bonds to which they were originally annexed. It is therefore of very little consequence whether they are promissory notes, bills, drafts, or checks, for they have the same quality of negotiability as either of those instruments, and the

holder sues upon them and recovers in his own name." *Beaver County v. Armstrong*, 44 Pa. St. 63 (1862). It is not necessary to produce the bond, and the surrender and cancellation of the bond after the coupon was transferred do not affect the coupon. *Miller v. Berlin*, 13 Blatchf. 245 (1876); s. c., 17 Fed. Cas. 306. In suing on the coupons the bonds to which they were attached need not be set out. *Ring v. Johnson County*, 6 Iowa, 265 (1858). The holder of a coupon may sue on it although he does not own the bond. *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866); *Knox County v. Aspinwall*, 21 How. 539 (1858); *Cromwell v. Sac County*, 94 U. S. 351, 362 (1876); *Kenosha City v. Lamson*, 9 Wall. 477 (1869). The holder of coupons who sues thereon need not produce or prove an interest in the bond itself. He should set forth the number of the bond, however, the date, sum, and time of payment. *Kennard v. Cass County*, 3 Dill. 147 (1874); s. c., 14 Fed. Cas. 307. Coupons may be sued on without producing the bonds. *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501 (1870); *New London, etc. Bank v. Ware, etc. R. R.*, 41 Conn. 542 (1874). The payment of a coupon payable to bearer must be to the holder of it, and not to the holder of the bond. *Sewall v. Brainerd*, 38 Vt. 364 (1865).

<sup>4</sup> A general count in debt is sufficient to recover on a coupon. *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866). It may be proved under the common counts.



The statute of limitations applicable to coupons is the same as that applicable to the bonds. This is generally twenty years.<sup>1</sup> The statute commences to run from the time when the coupons become due.<sup>2</sup>

*Johnson v. Stark County*, 24 Ill. 75 (1860). An action in tort for the conversion of coupons lies against a purchaser of the same from a thief, but not if such purchaser is *bona fide*. *Spooner v. Holmes*, 102 Mass. 503 (1869). A single count may include several coupons. *New London, etc. Bank v. Ware, etc. Co.*, 41 Conn. 542 (1874). In a suit upon coupons they should be put in evidence. *De Graaf v. Wyckoff*, 13 Daly, 366 (1885). For the pleading, etc., on an interest warrant, see *Crosby v. New London, etc. R. R.*, 26 Conn. 121 (1857).

<sup>1</sup> *Kenosha City v. Lamson*, 9 Wall. 477 (1869). "A suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond." *Lexington v. Butler*, 14 Wall. 282 (1871). See also *Huey v. Macon County*, 35 Fed. Rep. 481 (1888). See ch. XLIX, § 846, *infra*. Interest coupons attached to a sealed bond are a part of the bond and the twenty years' statute of limitations applies to them the same as to the bond. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899). The statute of limitations as against the mortgage of a corporation is a personal defense and can be interposed only by the mortgagor. *Hanchett v. Blair*, 100 Fed. Rep. 817 (1900). The statute of limitations runs in behalf of a foreign corporation after it has acquired a domicile in the state for purposes of litigation. *Travellers' Ins. Co. v. Fricke*, 99 Wis. 367 (1898). Even though bonds do not become due until 1884, yet if the company becomes insolvent and is dissolved in 1872 and its property is sold out under a prior judgment, the twenty years' statute of limitations may begin to run from 1872. *Gunnison v. Chicago, etc. Ry.*, 117 Fed. Rep. 629 (1902); *aff'd*, 130 Fed. Rep. 259. In *Best v. Davis S. M. Co.*, 65 Hun, 72 (1892), it was held that the six years' statute of limitations applied to corporate

bonds, the court saying: "The obligations being promissory notes and not sealed instruments, the six years' statute of limitations applies." Where the instrument recites that it is under seal it will be presumed to be a sealed instrument, especially where a seal follows the name of the officer who signs it. So held as regards the statute of limitations. *Rusling v. Union Pipe, etc. Co.*, 5 N. Y. App. Div. 448 (1896); *aff'd*, 158 N. Y. 737 (1899). In the case *Downer v. Union Land Co.*, 103 Minn. 392 (1908), bonds were held to be barred by the six years' statute of limitations, and it was also held that a judgment creditor's suit to sequester the corporate property did not stop the running of the statute as to other creditors. Detached coupons are barred by the four-year statute of limitations in California, even in a foreclosure suit. *California Safe, etc. Co. v. Sierra, etc. Ry.*, 158 Cal. 690 (1910), distinguishing *Meyer v. Porter*, 65 Cal. 67.

<sup>2</sup> *Clark v. Iowa City*, 20 Wall. 583 (1874). So held whether the coupons are detached from the bonds or not. *Koshkonong v. Burton*, 104 U. S. 668 (1881); *Amy v. Dubuque*, 98 U. S. 470 (1878); *Huey v. Macon County*, 35 Fed. Rep. 481 (1888). *Contra*, where the coupon is not detached. *Kenosha City v. Lamson*, 9 Wall. 477 (1869); *Lexington v. Butler*, 14 Wall. 282 (1871). The statute of limitations on the coupons of municipal bonds begins to run from the date when the coupons became due. *Huey v. Macon County*, 35 Fed. Rep. 481 (1888). The statute of limitations of ten years applies to detachable interest coupons. *Griffin v. Macon County*, 36 Fed. Rep. 885 (1888). As to the effect of the statute of limitations on the interest, see *Re Cornwall Minerals Ry.*, [1897] 2 Ch. 74. The statute of limitations does not begin to run six months after default, merely because at that time the bondholders have an option to de-



The right of the company to pay coupons in land scrip does not prevent the holders from suing for money if the scrip is not issued.<sup>1</sup> The federal courts have no jurisdiction of a suit brought by the holder of coupons, where it appears that he does not own them, but is merely allowing his name to be used to give jurisdiction to the court.<sup>2</sup> Where by the terms of a lease the lessee is to apply the net earnings to mortgage bonds and coupons of the lessor, a coupon holder may maintain a bill in equity to compel the lessee to account for such net earnings.<sup>3</sup>

§ 773. *Income bonds.*—A corporation may issue an "income bond," the interest on which is not payable annually, but is payable only in case there is income sufficient to pay the regular charges and interest due from the corporation and to leave a surplus which is applicable to the income bonds.<sup>4</sup> An income bond differs from preferred stock in that it cannot vote; it generally is secured by mortgage; and its right to interest is more clear than that of dividends. The power to issue irredeemable bonds, interest on which is to be paid after certain dividends have been declared on the stock, is a question still in dispute.<sup>5</sup>

clare the whole sum due. *Nebraska, etc. Bank v. Nebraska, etc. Co.*, 14 Fed. Rep. 763 (1883). Fifteen years' delay in enforcing a railroad mortgage after the principal became due is, in Vermont, a bar to foreclosure; but a foreclosure commenced during that time preserves the security for all bondholders, although they are not parties to the suit. *Re Chickering*, 56 Vt. 82 (1883). *Cf. Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895), *rev'g Simmons v. Taylor*, 38 Fed. Rep. 682 (1889).

<sup>1</sup> *Marlor v. Texas, etc. Ry.*, 19 Fed. Rep. 867 (1884); *s. c.*, 21 Fed. Rep. 383 (1884); *Barry v. Missouri, etc. Ry.*, 27 Fed. Rep. 1 (1886). For a case involving land scrip issued in payment of coupons, the coupons, however, being kept alive as collateral, to be retired and paid in money, whenever the finances of the company fully warrant it, see *Little Rock, etc. Ry. v. Huntington*, 120 U. S. 160 (1887).

<sup>2</sup> *Lake County, etc. v. Dudley*, 173 U. S. 243 (1899).

<sup>3</sup> *Schmidt v. Louisville, etc. Ry.*, 119 Ky. 287 (1904). Where the lessee of a railroad gives a mortgage to apply the earnings to the debts of the lessor,

a purchaser of the lessee's rights is bound to do the same such purchaser having agreed in writing to carry out the terms of the lease. The fifteen years' statute of limitations applies to such an obligation. *Schmidt v. Louisville, etc. R. R.*, 139 Ky. 81 (1910).

<sup>4</sup> *Garrett v. May*, 19 Md. 177 (1862), upholding the giving of a mortgage which took precedence over prior income bonds.

<sup>5</sup> The supreme court of Pennsylvania, by a divided court, about 1882, held that a railroad company without express authority might issue irredeemable interest-bearing bonds at a large discount, the interest to be paid only after a certain dividend had been declared on the common stock. The bonds were called "deferred income bonds." *Philadelphia, etc. R. R. v. Stichter*, 21 Am. L. Reg. (Pa.) 713 (1882); 11 W. N. Cas. 325. A contrary conclusion was reached in *Taylor v. Philadelphia, etc. R. R.*, 7 Fed. Rep. 386 (1881). An "income bond" under the New York statute is secured by a lien in regard to its principal only. Its interest is unsecured. The income bondholder cannot control the discretion of the directors in paying such interest or raising the



The rights of income bondholders are governed and determined entirely by the terms of the bonds themselves and the mortgage securing them, if such a mortgage exists.<sup>1</sup>

funds for other purposes. *Day v. Ogdensburgh, etc. R. R.*, 107 N. Y. 129 (1887). A building and loan association has no inherent power to issue income stock. *Bettle v. Republic, etc. Ass'n*, 47 N. J. Eq. 613 (1906).

<sup>1</sup> The question of what constitutes income within the meaning of an income bond depends largely upon the wording of the bond and mortgage. *Central, etc. Ry. v. Central Trust Co.*, 135 Ga. 472 (1910). An income mortgage was foreclosed in *Seibert v. Minneapolis, etc. Ry.*, 58 Minn. 39 (1894), for default in applying net earnings to the payment of interest due on the bonds, and also for failure to repair and replace rolling-stock, the mortgage providing for foreclosure in such a case. In *State v. Cowen*, 83 Md. 549 (1896), trustees representing income bondholders were placed in control of the property by the court for four years. The trustees expended \$500,000 in improvements, and thereby the business greatly increased. The court thereupon extended the time to the trustees to operate the canal, and said that if the income did not pay the operating expenses and produce a net revenue the property would be sold. The court held also that such trustees might contract with other companies for the use of the property. The case *Barry v. Missouri, etc. Ry.*, 27 Fed. Rep. 1 (1886), considered the rights of income bondholders under the particular mortgage in that case. The income bond provided for the payment of the interest, "provided such net or surplus earnings shall be sufficient therefor." The court held that "unless within some one of the six months' periods between the date and the maturity of the bonds net income is realized, the company is not in default, and is under no present obligation to pay interest," but nevertheless the words of the bond may give the holder the right to claim this interest at a later date, "whenever there is net income

applicable thereto." It must be paid before any dividends are declared. "According to the scheme of the mortgage, as denoted by the several provisions referred to, the surplus earnings of each interest period belong to the holders of coupons for that period. If the earnings are insufficient to pay the interest in full, the holders are entitled to scrip certificates for the residue; if the net earnings more than suffice to pay the interest for the six months, the surplus falls into a general fund for the payment of holders of scrip certificates ratably; if there are no net earnings until an exercise of the power of sale under the eighth article, the unearned interest becomes principal, and is to be paid as principal out of the proceeds of the sale. The coupon-holders have the first lien upon the surplus earnings for the period represented by their coupons, but as to earnings from any other period they have only the rights of certificate-holders; and whether they surrender their coupons or not, if the earnings are insufficient to pay the interest in full they stand as certificate-holders for their interest unearned." The coupon-holders and the certificate-holders were held to stand upon substantially the same ground. It was the duty of the company to keep its accounts so as to show the net income for each six months. The trustee was bound to see that this was done. An accounting was ordered. In the case *Yazoo, etc. R. R. v. Martin*, 94 Miss. 700 (1908), where income bonds were executed and issued, the income to be ascertained after paying the interest on all other bonds, a suit had been started by income bondholders to modify the bonds so that they should be subject only to the first-mortgage bonds, and that suit was compromised by a supplemental mortgage being executed to the effect that the income bonds were subject only to the first mortgage bonds, but the supplemental



Frequently there is difficulty in determining whether any "income" actually exists which should be applied to the payment of interest on income bonds. The same difficulty that is experienced in ascertaining whether there are net profits for a dividend is experienced in ascertaining whether there is a surplus properly applicable to income bonds. In general, the courts decide each case on the terms and conditions of the income bonds themselves. The various rights, remedies, and incidents peculiar to different kinds of income bonds are set forth in the notes below.<sup>1</sup> Where an income bond provides that the interest in any

mortgage did not change the phraseology of the income bonds and the court held that the income bonds did not become second only to the first-mortgage bonds, even though there was stamped on the income-mortgage bonds a statement that they were secured by such supplemental mortgage. An income bond for £10 with £25 bonus to be paid at the rate of £5 per annum for seven years with the right to the holder to convert the debenture into a £10 mortgage debenture, will not justify the company paying them off and then issuing to the holders £20 full-paid shares on account of the £25 bonus. *Bury v. Famatina, etc. Co. Ltd.*, [1909] 1 Ch. 754. On this subject see § 283, *supra*.

<sup>1</sup> Passing upon the rights of income bondholders in a suit brought by them to have their interest paid, the court said: "The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period. . . . It is preposterous to assert that the company could properly charge against income for any period during the life of the mortgage a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. It might with equal propriety seek to offset its whole funded debt against its income." *Barry v. Missouri, etc. Ry.*, 27 Fed. Rep. 1, 5 (1886). An income bondholder may obtain an accounting by the mortgagor railroad in order to determine whether there is any income applicable to his bonds.

Improper items of the account will be stricken out. But where most of the income bonds have been turned in for a lower security, the complainant is entitled to an income based only on all the income bonds as originally issued. *Barry v. Missouri, etc. Ry.*, 34 Fed. Rep. 829 (1888). Where an income bondholder applies for an injunction against a misappropriation of the income of a railroad, giving figures, the injunction will be granted though in large part the allegations are made on information and belief, if the defendant does not specifically explain the figures and merely denies the misapplication. *Barry v. Missouri, etc. Ry.*, 36 Fed. Rep. 228 (1888), holding also that an income bondholder may enjoin an application of the company's funds to other unusual corporate purposes, thereby affecting the payment of interest due to him. An income bondholder may file a bill for an accounting where the funds upon which he has a lien have been mingled with other funds and no separate account has been kept. If the directors have made no determination in the matter, it is immaterial that the mortgage provided for a final determination by them. Suit lies. Losses incurred by reason of new lines, leased lines, etc., are not to be paid before funds are set apart to pay the interest on income bonds, the income mortgage being a lien on the income of the main line. Ordinarily an income mortgage on present and future property as a security for interest is "but little more than the pledge of the good faith of the company in managing its lines." The company ordinarily



year shall be chargeable only on the income for that year, the holder of the bond may file a bill in equity for a disclosure and an accounting

under such a mortgage may improve, alter, or extend its lines and may lease others without violating its obligation to the income bondholders. If the directors have neglected to ascertain whether net income exists, the court will undertake to do so. *Spies v. Chicago, etc. R. R.*, 40 Fed. Rep. 34 (1889), holding also that although an income bondholder is entitled to an accounting as to the income applicable to the interest on his bonds, yet, if he charges fraud against the directors, he must prove fraud or his bill will be dismissed, even though fraud need not have been alleged. In *Day v. Ogdensburgh, etc. R. R.*, 107 N. Y. 129 (1887), income bondholders were held not entitled to any surplus in one year to make up for a deficiency in the payment of interest in a prior year. The court held also that the company might take a lease of another railroad and use its income to pay the rental, and the income bondholders could not object. The holder of coupon bonds secured by a mortgage on the proceeds from the sale of certain lands owned by a railroad may by bill in equity subject that income to the payment of the coupons, even though the railroad has been consolidated with another and the consolidated railroad owns the lands. *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883). Where by the terms of the lease the lessee is to apply the net earnings to mortgage bonds, and coupons of the lessor, a coupon holder may maintain a bill in equity to compel the lessee to account for such net earnings. *Schmidt v. Louisville, etc. Ry.*, 119 Ky. 287 (1904). For an instance of bonds and a mortgage on the income of the property of a canal company, see *Stewart v. Chesapeake, etc. Canal Co.*, 5 Fed. Rep. 149 (1881). In this case a bondholder asked to have a receiver appointed for the purpose of operating the canal and applying the profits to the interest on the bonds. Mismanagement was charged. The court refused to appoint the receiver, the proof not being sufficient,

but retained the suit for the purpose of compelling the company to render accounts from time to time. The court stated that the only remedy of the bondholders was a receiver, foreclosure not being possible of such a mortgage. Concerning the construction of the rights of an income bondholder, see also *Lehigh, etc. Co. v. Central R. R.*, 34 N. J. Eq. 88 (1881). Income bonds do not necessarily restrict the owner to payment in land scrip, where the company may so pay interest thereon, in any year when the income is sufficient. Unless the company declares its election to pay in scrip, the owner may sue for the money as soon as the income is sufficient. Failure of the bondholder to demand payment of the interest is no bar, he having been notified that the company could not pay it. *Texas, etc. Ry. v. Marlor*, 123 U. S. 687 (1887). Where an income bond has its coupons payable in money or land scrip at the option of the company, and the company does not exercise its option when the coupons become due, the holder may insist on payment in money and sue therefor. *Marlor v. Texas, etc. Ry.*, 21 Fed. Rep. 383 (1884). It is immaterial that the mortgage is a lien on land only and not on the railroad. *Marlor v. Texas, etc. Ry.*, 19 Fed. Rep. 867 (1884). Where the income mortgage contains no provision for the trustee taking possession, the only remedy may be "that no dividend can be declared until the interest on it is regularly paid." *Union Trust Co. v. Missouri, etc. Ry.*, 26 Fed. Rep. 485 (1880). In New York, by statute, income bonds with voting privileges may be issued. Laches on the part of a dissenting stockholder in objecting to interest-bearing stock will bar his remedy. *Taylor v. South, etc. R. R.*, 13 Fed. Rep. 152 (1882). An income bondholder bringing suit to compel the corporation to account and pay his interest coupons must allege a request to the trustee in the deed of trust to bring the suit and a refusal by



as to the income for the particular year, where he alleges that it has been misappropriated and diverted.<sup>1</sup>

The ordinary income bond of a corporation does not create such a trust relationship between the holder and the company as authorizes a suit for an accounting. The bond does not operate as an equitable assignment of the profits, and does not create an equitable lien thereon. If the company refuses to apply the profits as called for by the bond, it is a breach of contract, the remedy for which is at law. If the income bond gives discretion to the directors as to payments for repairs, an error of judgment on their part cannot be reviewed by the court where there was room for a difference of opinion.<sup>2</sup> Income bondholders cannot prevent the consolidation of the company with another company under statutes existing at the time when the income bonds were issued.<sup>3</sup> The unpaid interest on an income bond, even though cumulative, does not belong to the tenant for life if the bond is sold with all rights as regards arrears.<sup>4</sup>

§ 774. *Accommodation paper by a corporation — Bona fide holders.* — It is a well-established rule that a corporation cannot ordinarily be bound by its signature to or indorsement or guaranty of the

him. The trustee must also be joined as a party defendant. *Morgan v. Kansas, etc. Ry.*, 15 Fed. Rep. 55 (1882). In the case *Pollitz v. Wabash, etc. Co.*, 167 Fed. Rep. 145 (1909), a controversy having arisen between the income bondholders and the company as to whether the company had a right to apply profits to improvements, the income bonds were merged into new bonds and stock. A reorganization plan by which outstanding income bonds of the Wabash Railroad were to be taken up by an issue of newly authorized mortgage bonds with a bonus of preferred and common stock, was involved in the case *State v. Barnett*, 149 S. W. Rep. 311 (Mo. 1912), and the court held that a suit could not be maintained by other security holders to adjudge the whole plan void where it appeared that the plaintiffs and the trustee of the new mortgage and most of the interested parties lived in New York and had not been personally served in the proceeding and that there were many unknown holders of the securities, and especially where suit had been already commenced in the United States court by the New York trustee for accounting

in connection with the income bonds.

<sup>1</sup> *Morse v. Bay State Gas Co.*, 91 Fed. Rep. 938 (1897); *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 946 (1898). Even though bondholders agree that the lessee of a railroad need not pay the interest on the bonds unless the earnings are sufficient for that purpose, yet if the lessee owns a majority of the stock of the lessor and diverts the earnings of the lessor and pays no interest, the bondholders may compel an accounting. *Hubbard v. Galveston, etc. Ry.*, 200 Fed. Rep. 504 (1912).

<sup>2</sup> *Thomas v. New York, etc. Ry.*, 139 N. Y. 163 (1893), holding also that a refusal of the directors to certify that the interest had been earned is sufficient as an allegation without alleging a demand for such certificate. As to the pleadings of an income bondholder in a suit to compel the payment of interest, see *Thomas v. New York, etc. Ry.*, 19 N. Y. Supp. 766 (1892).

<sup>3</sup> *Hart v. Ogdensburgh, etc. R. R.*, 69 Hun, 378 (1893).

<sup>4</sup> *Re Taylor's Trust*, [1905] 1 Ch. 734.



note or paper of another person for the accommodation of the latter. The directors are authorized by the stockholders to do business for corporate purposes, but are not authorized to use the corporation to perform acts of friendship or accommodation to others. The general rule is that the accommodation indorsement, signature, or guaranty of the corporation is illegal and cannot be enforced.<sup>1</sup>

<sup>1</sup> Bank of Genesee v. Patchin Bank, 13 N. Y. 309 (1855); National Bank v. Wells, 79 N. Y. 498 (1880), reversing s. c., 15 Hun, 51; Central Bank v. Empire, etc. Co.; 26 Barb. 23 (1857); Morford v. Farmers' Bank, 26 Barb. 568 (1857); Bridgeport City Bank v. Empire, etc. Co., 30 Barb. 421 (1859); Fox v. Rural Home Co., 90 Hun, 365 (1895); aff'd, 157 N. Y. 684; Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. Rep. 742 (1898); Carney v. Duniway, 35 Oreg. 131 (1899); M. V. Monarch Co. v. Farmers' and Drovers' Bank, 49 S. W. Rep. 317 (Ky. 1899); South, etc. Nat. Bank v. La Grange, etc. Co., 40 S. W. Rep. 328 (Tex. 1897); *Ex parte* Estabrook, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794; Lafayette Sav. Bank v. St. Louis Stoneware Co., 2 Mo. App. 299 (1876); West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557 (1877), holding that a cashier is not presumed to have power to bind his bank as indorser of his personal note. The payee of such a note, in order to hold the bank, must prove that he had such power; *Ætna Nat. Bank v. Charter Oak L. I. Co.*, 50 Conn. 167 (1882), holding that a president has no implied power to bind his corporation as accommodation indorser; *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367 (1879); *Beecher v. Dacey*, 45 Mich. 92 (1881); *Smead v. Indianapolis, etc. R. R.*, 11 Ind. 104 (1858). A corporation is not liable on accommodation notes in the hands of parties who took with notice of the facts. *Johnson v. Johnson Bros.*, 108 Me. 272 (1911). A note given by a mercantile company to a bank for the debt of a third party for which the former is not responsible cannot be enforced by the bank which knew the facts. *Mapes v. German Bank, etc.*, 176 Fed. Rep. 89 (1910). A plumbing

company is not liable on an accommodation note for the benefit of an automobile company, there being no proof that all the stockholders assented. *Owen & Co. v. Storms & Co.*, 78 N. J. L. 154 (1909). The agreement of a corporation to indorse a note of a subscriber so that he might pay for his subscription may not be enforceable as to renewals of such note. *Houser v. Farmers', etc. Co.*, 6 Ga. App. 102 (1909). Even though a corporate indorsement on a note is invalid, yet as a medium of transfer of title it may be sufficient. *Winer v. Bank of Blytheville*, 89 Ark. 435 (1909). The Negotiable Instruments Law to the effect that an accommodation surety is liable even to a holder of a note with notice, does not apply to the suretyship of a corporation *ultra vires*. *Bradley, etc. Co. v. Heyburn*, 56 Wash. 628 (1910). A manufacturing company is not bound by its accommodation indorsement to a personal note given to a bank by its treasurer unless the note has passed into *bona fide* hands. *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368 (1910). So also a lumber company is not bound by an accommodation guaranty of payment of another person's note. *Gaston & Ayres v. Campbell Co.*, 130 S. W. Rep. 222 (Texas, 1910). A corporation may defend against its note payable to the order of its president and used by him to pay his personal debt, even though a majority of the directors authorized it, there being no consideration and the note being in the hands of the party to whom it was issued. *Kenyon Realty Co. v. National Deposit Bank*, 140 Ky. 133 (1910). A corporation formed to deal in merchandise is not liable on its accommodation guaranty to another merchandise company of a debt due from a third person. *Ellett-Kendall, etc. Co. v. Western,*



The indorsement, however, though not enforceable by parties taking it with notice that it was for accommodation, may be enforced by *bona fide* holders.<sup>1</sup>

etc. Co., 132 Mo. App. 513 (1908). Accommodation paper by a corporation is not enforceable except in *bona fide* hands, even though a majority of the stockholders consented to its issue. *Cook v. American*, etc. Co., 28 R. I. 41 (1905). The secretary has no power to indorse the company's name on a note, especially an accommodation note. *Wheeling*, etc. Co. v. Connor, 61 W. Va. 111 (1906). Where a bank knows that a corporate note is accommodation paper it must not only prove that the note was signed by the president and treasurer, but also that they were authorized to sign or that the company received the proceeds or that there was a course of business justifying such note. *Nat. Bank, etc. v. Snyder Mfg. Co.*, 107 N. Y. App. Div. 95 (1905); s. c., 117 N. Y. App. Div. 370. A street railway company is not liable to the payee of a note for its accommodation indorsement thereof, even though the indorsement was authorized by the directors and a majority of the stockholders. *Brill Co. v. Norton*, etc. Ry., 189 Mass. 431 (1905). *Prima facie* a bank is not bound as a surety on a replevin undertaking in a suit between third parties. *Sturdevant, etc. Co. v. Farmers'*, etc. Bank, 69 Neb. 220 (1903). The president cannot collect an amount paid by him on a note to which he had indorsed the company's name without authority. *Triplett v. Fauver*, 103 Va. 123 (1904). A national bank cannot certify a check payable if a building contract is not performed, there being no money to respond to the check. *Fidelity, etc. Co. v. National Bank*, etc., 48 Tex. Civ. App. 301 (1908). A person taking a corporate note which he knows is accommodation paper cannot enforce it. *El Dorado, etc. Co. v. Citizens' Bank*, 85 Ark. 185 (1908). A corporate agent has no power to sign the company's name as an accommodation indorser. *Federal Nat. Bank v. Cross Creek*, etc.

Co., 220 Pa. St. 39 (1908). An accommodation indorsement by a manufacturing corporation is not enforceable. *Preston v. Northwestern*, etc. Co., 67 Neb. 45 (1903). A general manager has no power to guarantee in the corporate name the payment of a third person's note. *Dobson v. More*, 164 Ill. 110 (1896). The treasurer of a manufacturing corporation has no implied power to bind the corporation as an accommodation indorser, and a person taking the note with notice cannot enforce such indorsement. *Usher v. Raymond Skate Co.*, 163 Mass. 1 (1895). A pledgee of a note held by a corporation, the pledge being to secure the personal debt of the president, is not legal as against the subsequent objection of the corporation. *El Capitan, etc. Co. v. Boston-Kansas*, etc. Co., 65 Kan. 359 (1902). A warehouse corporation has no power to indorse paper as an accommodation, even for a consideration paid. A person discounting the same for the maker thereby has notice of the illegal indorsement. *National Park Bank v. German*, etc. Co., 116 N. Y. 281 (1889). A corporation organized for freight transfer business is not bound, and is not liable on its bond of surety, for the debt of another. Even a co-surety cannot enforce contribution. *Lucas v. White Line*, etc. Co., 70 Iowa, 541 (1886). A corporation cannot be surety on a note which has nothing to do with its business — pure accommodation. The payee cannot collect. *Hall v. Auburn Turnp. Co.*, 27 Cal. 255 (1865). A national bank cannot become an accommodation indorser. *National Bank v. Atkinson*, 55 Fed. Rep. 465 (1893); *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430 (1898). A cashier has no power to make the bank a surety on a replevin bond for the accommodation of a third person. *Sturdevant v. Farmers'*, etc. Bank, 62 Neb. 472 (1901). Cf. note 1, p. 2953.

<sup>1</sup> *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312 (1859), holding also that



Notwithstanding the general rule on this subject, there is no rule of public policy which prohibits an accommodation indorsement of

a third party is not put upon his inquiry if the paper purports on its face to be regularly indorsed in the course of business; *Ex parte Estabrook*, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794; *Florence, etc. Imp. Co. v. Chase Nat. Bank*, 106 Ala. 364 (1895); *American, etc. Bank v. Gluck*, 68 Minn. 129 (1897). An innocent purchaser of paper indorsed for accommodation by a trading corporation may enforce the same against the corporation. *Jacobs Pharmacy Co. v. Southern Bkg., etc. Co.*, 97 Ga. 573 (1895). The fact that the constitution of the state prohibits fictitious indebtedness does not render void, as against a *bona fide* holder, an accommodation indorsement by a corporation. *Marshall, etc. Bank v. O'Neal*, 34 S. W. Rep. 344 (Tex. 1895). A *bona fide* purchaser of a bill of exchange accepted for accommodation by a corporation may enforce it. *Farmers' Nat. Bank v. Sutton, etc. Co.*, 52 Fed. Rep. 191 (1892). To same effect, *Mechanics' Banking Assoc. v. New York, etc. Lead Co.*, 35 N. Y. 505 (1866), and cases cited; *Central Bank v. Empire, etc. Co.*, 26 Barb. 23 (1857), holding that a note made by the president and indorsed by the corporation is binding upon the corporation in the hands of one who had been induced by its agent to accept it as a transaction of the corporation and within the scope of its business. *Morford v. Farmers' Bank*, 26 Barb. 568 (1857); *Bridgeport City Bank v. Empire, etc. Co.*, 30 Barb. 421 (1859); *Monument Nat. Bank v. Globe Works*, 101 Mass. 57 (1869); *Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299 (1876), holding also that in a suit on the note the burden of showing that it was taken by a third party with notice of the inability of the corporation to indorse lies upon the defendant. A corporation cannot be an accommodation indorser. Yet a *bona fide* holder of the paper may hold the corporation liable. *National Bank v. Young*, 41 N. J. Eq. 531 (1886); *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357

(1887). A manufacturing corporation has no right to give accommodation paper, but such paper may be enforced by a *bona fide* holder. *Blake v. Domestic, etc. Co.*, 64 N. J. Eq. 480 (1897). Even though the president of a company is the maker of a note, the holder of such note is not chargeable with notice thereby that the corporation was an accommodation indorser of the same. *Hiawatha, etc. Co. v. John Strange, etc. Co.*, 106 Wis. 111 (1900). Even though a note signed by directors of a bank is indorsed by the bank itself for accommodation, the bank having no interest therein, and not receiving the proceeds thereof, yet a *bona fide* purchaser of the note may hold the bank liable. *First Nat. Bank v. Arnold*, 156 Ind. 487 (1901). In a suit on an accommodation note the holder must prove that he is a holder for value and did not know that it was accommodation paper. *National, etc. v. Snyder, etc. Co.*, 117 N. Y. App. Div. 370 (1907). A person receiving a note for the debt of another, which bears the indorsement of a corporation, not in the chain of title, is not a *bona fide* holder and if the corporation signed it as an accommodation, the corporation is not liable. *Pelton v. Spider Lake, etc. Co.*, 117 Wis. 569 (1903). A *bona fide* holder of a note indorsed by the corporation may enforce it, even though the indorsement was for accommodation. *National Bank, etc. v. Sancho, etc. Co.*, 186 Fed. Rep. 257 (1911). A director has no power to sign the company's name as an accommodation acceptance on bills of exchange, and not even a *bona fide* purchaser can enforce such acceptance. *Premier, etc. Bank, Ltd. v. Crabtree, Ltd.*, [1909] 1 K. B. 106. Although a corporation becomes surety *ultra vires*, yet if it pays its liability, a person who gave his bond to protect the corporation cannot set up the defense of *ultra vires*. *Dunbar v. Cazort-McGehee Co.*, 96 Ark. 308 (1910). Upon corporate insolvency a mortgage which the corporation has given in payment of one



commercial paper by a corporation. Consequently, if such an indorsement is made with the knowledge and assent of all the directors and stockholders, and creditors' rights are not affected, the indorsement is valid and enforceable.<sup>1</sup>

half of its own capital stock, which it has purchased, cannot be enforced, whether it be considered as a purchase by the company or as security for the purchase of the stock from a third person. *Hunter v. Garancio*, 151 S. W. Rep. 741 (Mo. 1912).

<sup>1</sup> *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890). *Cf. McLellan v. Detroit, etc. Works*, 56 Mich. 579 (1885). By consent of all the stockholders and the board of directors a private corporation may become liable as an accommodation indorser. *Murphy v. Arkansas, etc. Co.*, 97 Fed. Rep. 723 (1899). The board of directors have no power to indorse the note of another company for accommodation, unless all the stockholders assent, and such assent on the part of a woman stockholder is not assumed, even though the business is conducted by her husband or father. Moreover, such indorsement is subject to the claims of creditors of the corporation. *In re Prospect, etc.*, 126 Fed. Rep. 1011 (1904). A railroad company has no legal power to subscribe for the stock of a land company nor become accommodation indorser of the latter's note even though all the stockholders assent thereto, but a stockholder cannot complain where the owner of his stock at the time of the act consented thereto, excepting that a mere authorization prior to his purchase of his stock will not sustain acts done after suit commenced by him objecting to the same. *McC Campbell v. Fountain, etc. R. R.*, 111 Tenn. 55 (1903). A business corporation cannot defeat an accommodation note if all the stockholders assented thereto and there are no creditors. *Perkins v. Trinity, etc. Co.*, 69 N. J. 723 (1905), the court saying: "To permit stockholders of corporations to unanimously make a disposition of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudi-

ate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud." In the case *First Nat. Bank, etc. v. Winchester*, 119 Ala. 168 (1898), where a private corporation had but four stockholders, and two of them bought the stock of the other two, and paid therefor by notes signed by them and the corporation, and secured by mortgage on the corporate property, the court held that the note was not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving *Swift v. Smith*, 65 Md. 428 (1886). The claim that all the stockholders consented to an accommodation indorsement and to give a mortgage as security therefor must be clearly proven in order to be valid. *Steiner v. Steiner, etc. Co.*, 120 Ala. 128 (1898). Even though a corporation, as the owner of an undivided interest in land, mortgages it to secure the debt of an individual, the owner of the remaining interest in the land cannot question the title of a purchaser at foreclosure sale on the ground that the mortgage was *ultra vires*. *Collins v. Rea*, 127 Mich. 273 (1901). Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. *Solomon Co. v. Barber*, 58 Kan. 419 (1897). Even though a corporation borrows money to pay the obligations of an insolvent debtor of such corporation without consideration, yet if thereafter all of the former's stock is sold on the basis of such loan being legal, the corporation cannot thereafter repudiate it. *Remington, etc. Co. v. Caswell*, 126 N. Y. App. Div. 142



Where the directors of a business corporation accept paper for accommodation, they are personally liable for payments made or liabilities incurred on such paper.<sup>1</sup> But where an officer causes a manufacturing company to indorse for accommodation the note of a party all of whose goods it purchases, he is not personally liable to the former company unless it is proved that the directors and stockholders were ignorant thereof and hence did not acquiesce therein.<sup>2</sup> A corporation engaged in selling manufactured goods may indorse a manufacturer's note to enable him to furnish goods.<sup>3</sup> A trust company authorized to buy and sell securities may join with a railroad in signing a note for the benefit of the railroad company which it is financing, especially where all the stockholders ratify the transaction.<sup>4</sup> Where a trading corporation owns most of the stock of a manufacturing corporation, and is the agent of the latter in making sales, and furnishes it with money, and pays dividends to the minority stockholders under an arrangement to that effect, the indorsements by the manufacturing company on the trading company's paper are not accommodation indorsements.<sup>5</sup>

(1908). See also §§ 3 and 766, *supra*.

<sup>1</sup> *Hutchinson v. Sutton Mfg. Co.*, 57 Fed. Rep. 998 (1893). A bank taking a note of a corporation payable to its president and indorsed by him to the bank cannot collect the note as against the corporation, if it was merely an accommodation note, but where the note was indorsed by two directors they are liable to the bank, even though the corporation is not. *Klein v. German Nat. Bank*, 69 Ark. 140 (1901). A corporate officer who issues its notes as an accommodation, a small commission being paid to him, is liable to the corporation therefor. *Shepard v. Morgan*, 123 N. Y. App. Div. 128 (1908). The manager of a company has no power to make it a surety or guarantor, but he is not personally liable, he not having expressly agreed to be. *Haupt v. Vint*, 68 W. Va. 657 (1911). *Cp.* § 682, *supra*.

<sup>2</sup> *Willard v. Holmes*, 142 N. Y. 492 (1894).

<sup>3</sup> *Holmes, etc. Co. v. Willard*, 125 N. Y. 75 (1890).

<sup>4</sup> *First Nat. Bank, etc. v. Guardian T. Co.*, 187 Mo. 494 (1905).

<sup>5</sup> *Blake v. Domestic, etc. Co.*, 64 N. J. Eq. 480 (1897). Where a corporation legally owns all the stock of another corporation it may indorse

the notes of the latter. *In re New York, etc.*, 141 Fed. Rep. 430 (1905). The accommodation indorsement may be valid if the proceeds of the note are used to pay a debt due to the corporation. *Lyon, P. & Co. v. First Nat. Bank*, 85 Fed. Rep. 120 (1898). See also § 775, *infra*. As against corporate creditors, however, even though two corporations are engaged in the same line of business and have the same officers and stockholders and are run practically as one institution and become sureties for each other, yet such suretyship is illegal and cannot be enforced. *Rogers v. Jewell, etc. Co.*, 184 Ill. 574 (1900). The rule that a corporation cannot make or indorse accommodation paper does not apply to notes issued to take up the notes of another company for the purpose of protecting the interests of the former having property rights or interests affected. *Bacon v. Montauk Brewing Co.*, 130 N. Y. App. Div. 737 (1909). Under the New York statutes bonds may be issued to take up past-due notes, and where the business of a partnership and of a corporation is carried on as one institution such bonds are valid, even though some of the notes so taken up grew out of the business of the partnership, but were indorsed by the cor-



§ 775. *Guaranty by one corporation of the bonds or dividends of another corporation — Guaranty by an individual.* — One of the most important and yet difficult branches of railroad and corporation law is the question whether one railroad corporation may guarantee the bonds or dividends of another railroad corporation. The power of a railroad corporation in this respect is much more restricted than that of a trading or manufacturing corporation, because the former is a quasi-public corporation and its powers are strictly construed. Moreover, the location of its railroad is specified in the charter, and the guaranty of the bonds or dividends on the stock of another railroad corporation is much the same as buying the stock of the latter, which is not legal, unless expressly authorized by the charter or the statutes of the state. A railroad corporation has no implied power to guarantee the bonds or dividends on the stock of another railroad corporation.<sup>1</sup>

poration. Matter of Snyder, 29 N. Y. Misc. Rep. 1 (1899).

<sup>1</sup> See § 314, *supra*. In the case Louisville, etc. Ry. v. Louisville Trust Co., 174 U. S. 552, 567 (1899), the court said: "A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful, and void, and incapable of being made good by ratification or estoppel." In the case Pennsylvania R. R. v. St. Louis, etc. R. R., 118 U. S. 290 (1886), the court refused to enforce a guaranty of rent to be paid on a railroad lease where the lease itself was void. In the case Coleman v. Eastern Counties Ry., 10 Beav. 1 (1846), the court held that a contract by which a railroad corporation undertook to guarantee a five per cent. dividend on the stock of a steamship company, is invalid, even though the operations of the steamship company would augment the traffic on the railway.

In the case Madison, etc. Co. v. Watertown, etc. Co., 7 Wis. 59 (1858), where a plank-road company guaranteed and paid the debts of another plank-road company, which built and owned a road over that part of the former's route which the former had

not constructed, the guarantor was defeated in a suit for repayment from the guaranteed corporation. In Simpson v. Dennison, 10 Hare, 51 (1852), the stockholder of a railroad company enjoined the company from guaranteeing a certain dividend on all the stock of another railroad, in consideration of the right to carry on the business of the latter railroad. A stockholder in a railway company cannot set aside the company's indorsement of another company's bonds in consideration of certain contracts between them, the indorsing company having paid the interest for five years. Cozart v. Georgia, etc. Co., 54 Ga. 379 (1875). A traffic contract by which one company guarantees a fixed income to another company may be assigned as collateral to a mortgage and the issue of bonds thereunder will not be enjoined on the ground that it is practically a mortgage on the guaranteeing company, inasmuch as the contract is not negotiable and *bona fide* purchasers of the bonds are not protected against defenses to the contract itself. Kissel v. Chicago, etc. R. R., 44 N. Y. Misc. Rep. 156 (1904). See S. C. 126 N. Y. App. Div. 852. For a careful discussion of the power of corporations to execute guaranties and on the power of corporations in connection therewith generally, see 31 Am. Law Rev. 363.



It is legal, however, for a railroad in purchasing or taking a lease of or consolidating with another railroad, as allowed by statute, to guarantee bonds of the latter or dividends on its stock.<sup>1</sup> The guaranty of the

<sup>1</sup> Where, under its power to lease (as to which see § 892, *infra*), a railroad buys all the stock of another railroad, it may, as a consideration for such stock, guarantee the bonds of the lessor railroad. *Achison, etc. R. R. v. Fletcher*, 35 Kan. 236 (1886). Where a lease of one railroad to another is valid, the consideration of the lease may be the guaranty by the lessee of the bonds of the lessor. *Low v. Central Pac. R. R.*, 52 Cal. 53 (1877). It is sufficient consideration for a guaranty that the guarantor is the lessee of the principal debtor and the proceeds are to be used in equipping the leased road. *Codman v. Vermont, etc. R. R.*, 16 Blatchf. 165 (1879); s. c., 5 Fed. Cas. 1157. Where by the terms of a lease the net earnings are to be used to pay mortgage bondholders of the lessor, and the lessee afterwards passes into a receiver's hands, the court will enforce such agreement. *Grand Trunk Ry. v. Central Vt. R. R.*, 78 Fed. Rep. 690 (1897). In the case *Green Bay, etc. R. R. v. Union Steamboat Co.*, 107 U. S. 98 (1882), the railroad company had charter power to construct and operate steamboats, and, instead of doing so, guaranteed to a steamboat company, for the purpose of carrying traffic in connection with its railroad, that the gross earnings of each boat for two years should amount to a certain sum. The court upheld such guaranty. See *Harrison v. Union Pac. Ry.*, 13 Fed. Rep. 522 (1882), where the guarantor was a stockholder in the corporation whose bonds were guaranteed, and the new road, when finished, would become a feeder to the guarantor, the guaranty was enforced. A railroad corporation, which has also banking powers, may guarantee bonds of another railroad corporation of which it owns a majority of the stock, where such guaranty is for its own purposes and advantage. *Central, etc. Co. v. Farmers', etc. Co.*, 114 Fed. Rep. 263 (1902). A corpo-

ration's guaranty of another corporation's bonds is an original undertaking, and may be enforced without resorting to the latter company. The guarantor of the prompt payment of the principal and interest of bonds is liable for interest on the coupons which are not paid when they become due. *Philadelphia, etc. R. R. v. Knight*, 124 Pa. St. 58 (1889). A lessee railroad, which on the face of the bonds of the lessor agrees to pay the coupons, cannot, as against *bona fide* holders, set up that its agreement was *ultra vires* or informally authorized. *Singer v. St. Louis, etc. R. R.*, 6 Mo. App. 427 (1879). Where the complaint alleges that the defendant had authority to guarantee the bonds the suit being upon the guaranty, the question of *ultra vires* cannot be raised by a demurrer. *Bryce v. Louisville, etc. Ry.*, 73 Hun, 233 (1893). Damages were allowed to a contractor for breach of contract of a railroad company to guarantee bonds in *Leroy, etc. R. R. v. Sidell*, 66 Fed. Rep. 27 (1895). In *Leavenworth County v. Chicago, etc. R. R.*, 25 Fed. Rep. 219 (1885), *aff'd*, 134 U. S. 688, it appeared that the Rock Island railroad guaranteed the interest on the bonds of another railroad. In *March v. Eastern R. R.*, 43 N. H. 515 (1862), s. c., 40 N. H. 548, where one railroad leased its entire property and franchises to another, it was held that, under the provisions of the lease there was neither a union of interest and capital between the two roads nor any warrant of an equality of dividends between the stockholders of the two corporations. Where one railroad company contracts with another company to pay the interest on the bonds of the latter company, and then caused or consented to the latter company's issuing bonds with a statement in such bonds that the interest was guaranteed by the former company, the former company is liable for such interest, even though it



lessee of a railroad to pay bonds of the lessor is an agreement to pay any deficiency after the mortgage securing the bonds has been foreclosed, excepting as to interest due at the time the claim was filed in the receivership.<sup>1</sup> The agreement of the lessee to take care of bonds of the lessor on maturity "by the issue or renewal of bonds" does not obligate the lessee to pay the bonds.<sup>2</sup>

The power of a railroad company to consolidate with or purchase the railroad of another company does not give power to guarantee the bonds of the latter company without such a consolidation or purchase.<sup>3</sup> In many of the states there are statutes which expressly authorize such guaranties.<sup>4</sup> A consolidated Connecticut, Massachusetts, and Rhode Island steam railroad company may be compelled by a bill in equity

was not a party to the bonds themselves. *Opdyke v. Pacific R. R.*, 3 Dill. 55 (1874); s. c., 18 Fed. Cas. 744. Where the guarantor of bonds is secured by a mortgage, the holder of the bonds is entitled to the benefit of the mortgage. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. If a railroad may lease another road, it may guarantee interest on the latter's bonds, such interest being the rent. Though the bonds are negotiable the guaranty is not. If bonds are issued for construction work which is not done, a *bona fide* purchaser of the bonds cannot enforce a guaranty thereof by another corporation. *Eastern, etc. Bank v. St. Johnsbury, etc. R. R.*, 40 Fed. Rep. 423 (1889). A railroad that owns all the stock of another railroad, and builds the latter, may take the mortgage bonds of the latter in payment, and guarantee the principal and interest of the bonds and sell the same. Where the principal may be declared due on default in payment of interest, the guarantor is liable on the principal so declared due. *Dougan v. Evansville, etc. R. R.*, 15 N. Y. App. Div. 483 (1897). A railroad taking a lease of the property of another company may guarantee dividends on the stock of the latter. *Marklove v. Utica, etc. R. R.*, 48 N. Y. Misc. Rep. 258 (1905).

<sup>1</sup> *Pennsylvania Steel Co. v. New York City Ry.*, 198 Fed. Rep 721 (1912).

<sup>2</sup> *Farmers' Loan, etc. Co. v. Central* (185)

*Park, etc. R. R.*, 193 Fed. Rep. 963 (1911).

<sup>3</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899).

<sup>4</sup> The Ohio statute was involved in the case *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859), where a stockholder's suit to enjoin the fulfillment of a guaranty, which had not been made in accordance with a statute authorizing it, failed because of the laches of the stockholder. The same transaction was involved in *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251, where the guaranty was upheld although the required assent of the stockholders had not been obtained. Though the bonds were void, the guaranty was upheld. In this case the court also held that bondholders and coupon-holders may assume that stockholders have authorized a guaranty as required by statute and that the consideration of the guaranty under the Ohio statute might be the change of the gauge of the railroad, the bonds of which are guaranteed, the effect being to increase the business of the guarantor. In the case *Madison, etc. R. R. v. Norwich Sav. Assoc.*, 24 Ind. 457 (1865), the guaranty of bonds in the hands of *bona fide* purchaser was sustained, the bonds having been issued to and in the name of the guarantor, although the latter acted only for accommodation. Under a statute authorizing a guaranty of bonds of any railroad company within the



in Connecticut to execute its guaranty of dividends on street railway stock in accordance with its agreement to that effect, even though the same consolidated railroad company cannot do so under the laws of Massachusetts.<sup>1</sup> A railroad has no power to purchase the stock of a coal mining company or guarantee the latter's bonds.<sup>2</sup>

Even though a statute, authorizing one railroad corporation to guarantee the bonds of another corporation, provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, but a purchaser with notice cannot enforce such guaranty.<sup>3</sup> A suit in equity lies at the

state, a railroad may guarantee the bonds of a railroad with which it connects by means of a leased line, and the consideration of the guaranty may be the stock of the company whose bonds are guaranteed. *Louisville Trust Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896); *aff'd*, 174 U. S. 552, holding also that where the road of a consolidated corporation runs into both Kentucky and Indiana, and the Kentucky statutes authorize a guaranty by the company and the Indiana statutes authorize a guaranty upon the petition of a majority in interest of the stockholders, the guaranty may be in accordance with the Kentucky statutes. If all the parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). Where a guaranty by one railroad corporation of the bonds of another railroad corporation is authorized by statute only in a case where the railroad line of the former extends across the state, and the line of the former does not extend across the state except by an illegal lease, the guaranty cannot be enforced by purchasers of the bonds who took with notice, but may be enforced by purchasers who took without notice. *Central Trust Co. v. Indiana, etc. R. R.*, 98 Fed. Rep. 666 (1900). A railroad company may accept the bills of exchange of another

railroad company, the consideration being the altering the gauge of the latter company so as to enable the cars of the former to run over the tracks. *Smead v. Indianapolis, etc. R. R.*, 11 Ind. 104 (1858). A person accepting a guaranty of a railroad, knowing that it could be given only on the petition of a majority in interest of the stockholders, and knowing that such petition had not been made, cannot enforce the guaranty. *Louisville Trust Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896); *aff'd*, 174 U. S. 552. In general, see *Macon, etc. R. R. v. Georgia R. R.*, 63 Ga. 103 (1879), upholding a mortgage given by the guaranteed corporation to the guarantor corporation. The Ohio statute prohibiting the sale of corporate bonds to a director at less than par, does not apply where the purchaser is merely a director in a corporation which guarantees the bonds. *Cincinnati, etc. Ry. v. Kleybolte*, 80 Ohio St. 311 (1909). A guarantee by the Canadian government of railroad bonds to the extent of seventy-five per cent. of the cost of the railroads, was involved in *Grand Trunk, etc. Ry. v. The King*, [1912] A. C. 204.

<sup>1</sup> *Mackay v. New York, etc. Co.*, 82 Conn. 73 (1909).

<sup>2</sup> *State v. Ry.*, 31 Ohio St. 175 (1909).

<sup>3</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers



instance of a railroad corporation that has guaranteed negotiable bonds of another railroad corporation to have such guaranty canceled and suits upon the guaranty restrained, because of facts not appearing upon the face thereof and because otherwise the bonds may pass into *bona fide* hands.<sup>1</sup>

A railroad cannot guarantee certain receipts to another corporation in a different line of business.<sup>2</sup> A different question arises where a railroad legally comes into possession of bonds or notes and upon selling them places its indorsement or guaranty upon such bonds or notes. That is the same as indorsing commercial paper, which the company has received in due course of business.<sup>3</sup>

granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established and has been constantly recognized by this court." To same effect *Zabriskie v. Cleveland*, etc. R. R., 23 How. 381 (1859); Conn., etc. Ins. Co., 41 Barb. 9 (1863). A corporate guaranty of the bonds of another corporation is presumed to have been authorized by the stockholders as required by the New York statute where the guaranty recites a vote. *Gay v. Hudson River*, etc. Co., 190 Fed. Rep. 773 (1911).

<sup>1</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899).

<sup>2</sup> *Davis v. Old Colony R. R.*, 131 Mass. 258 (1881), where the guaranty by a corporation of the expenses of a musical festival was held *ultra vires*. A railroad subscription to a state fair was enforced in *State Board of Agriculture v. Citizens' Street Ry.*, 47 Ind. 407 (1874). Cf. §§ 64, 681, *supra*; § 909, *infra*. A stockholder may enjoin a railway from donating its funds to an exhibition, even though it is claimed that thereby the corporate receipts will be increased. *Tomkinson v. South Eastern Ry.*, L. R. 35 Ch. D. 675 (1887). A stockholder who offsets against his statutory liability the corporate guaranty of bonds held by him must prove the consideration. *Briggs v. Cornwell*, 9 Daly, 436 (N. Y. 1881). A railroad cannot guarantee the dividends of an elevator corporation in consideration of the latter company subscribing for the stock of the former company.

*Elevator Co. v. Memphis*, etc. R. R., 85 Tenn. 703 (1887). A freight and transfer corporation has no power to guarantee the credit of a third person. *Lucas v. White Line Transfer Co.*, 70 Iowa, 541 (1886). A guaranty by a railroad company of dividends on the stock and interest on the bonds of a hotel company cannot be enforced by the hotel company. *Western*, etc. R. R. *v. Blue Ridge*, etc. Co., 102 Md. 307 (1905).

<sup>3</sup> *Arnot v. Erie Ry.*, 67 N. Y. 315 (1876); aff'g 5 Hun, 608, upholding a guaranty which the defendant had made on bonds sold by it; *Railroad Co. v. Howard*, 7 Wall. 392 (1868), where the guaranty by a railroad of bonds given to it by a city was upheld. Where a railroad company purchases, through a third person, land which it needs for railway purposes and guarantees his note given in payment, it is liable on such guarantee. *Lake Street*, etc. R. R. *v. Carmichael*, 184 Ill. 348 (1900). A railroad company may guarantee a construction company's contract to pay an engineer for services rendered in constructing the road. *Mathesius v. Brooklyn*, etc. R. R., 96 Fed. Rep. 792 (1899). In *DeGroof v. American*, etc. Co., 21 N. Y. 124 (1860), a corporation was held liable on its guaranty that the patronage of the employees of the corporation should continue to a store which the corporation sold with such guaranty. A railroad corporation may guarantee and sell the bonds of another railroad company which have been given by the latter to the former



Where various properties are transferred to a coal company for stock, on the further understanding that all moneys already expended on such properties should be repaid in bonds of a railway to be guaranteed by the coal company, but such distribution of bonds is never

company in payment of a debt. *Rogers, etc. Works v. Southern R. R.*, 34 Fed. Rep. 278 (1888). Guarantors of bonds sold to a corporation are liable, though the corporation had no power to purchase. *State v. Woram*, 6 Hill, 33 (1843). Where the bonds are payable to the order of another railroad company or its assigns, and are indorsed by the latter and sold, the latter are liable as an indorser to a *bona fide* holder, even though the indorsement was *ultra vires*. *Madison, etc. R. R. v. Norwich, etc. Soc.*, 24 Ind. 457 (1865). Where a railroad company guarantees the bonds of an iron company and sells the bonds and receives the proceeds, it is liable on such guarantee, even though it paid over the proceeds to the iron company for the construction of a blast furnace. *Roosevelt v. Nashville, etc. Ry.*, 128 Fed. Rep. 465 (1904). Where a municipal bond is payable to a railroad company or its assigns, and the company sells it with the indorsement, "The New Orleans, Jackson & Great Northern Railroad Company, for value received, hereby transfers the within bond to the New Orleans Savings Institution, or assigns," the company is liable as an indorser of the bond when it becomes due. *Bonner v. New Orleans*, 2 Woods, 135 (1875); s. c., 3 Fed. Cas. 853. A railroad company may accept the bills of exchange of another railroad company, the consideration being the altering the gauge of the latter company so as to enable the cars of the former to run over the tracks. *Smead v. Indianapolis, etc. R. R.*, 11 Ind. 104 (1858). Where a land company has power to purchase the bonds of a railway company, it may guarantee their payment upon selling them. *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893); *aff'd* on this point in 62 Fed. Rep. 335, Judge Taft in this case said (p. 345): "But why is it necessary to show that what

was done in this case was in fact a complete consolidation within the statute, to make it lawful? It seems to us that the purchase of the stock and guaranties can be supported on the ground that, even if they did not constitute a consolidation, they were legitimate steps towards a consolidation. They involved the exercise of powers similar to, but less extensive than, that of consolidation, and may fairly be said to have been included in it, as the part is included in the whole. It would be strange, indeed, if the land company had power, in order to encourage the construction of a railroad, to embark in the enterprise its total capital, with a railway company as a partner, and did not have power to accomplish the same purpose by risking only part of that capital." Where an insolvent corporation owns all the stock of the railroad and causes the railroad to give its note for a debt of the former, such note cannot be enforced in the hands of the payee. *Re Mills Co.*, 162 Fed. Rep. 42 (1908). A loan and trust company may guarantee the payment of bonds taken by it in the ordinary course of business. *Broadway, etc. Bank v. Baker*, 176 Mass. 294 (1900). Where the general manager who is also vice-president executes his personal note to the company and indorses the company's guaranty on it and sells it, a *bona fide* purchaser may collect it, one half of the amount having been paid by the corporation and the remaining half being a balance to be paid later by the payee. *Gaston & Ayres v. Campbell Co.*, 140 S. W. Rep. 770 (Tex. 1911). A corporation in purchasing property which is subject to a mortgage may give its own mortgage in cancellation of the old mortgage. This is not a guarantee of a debt. *Citizens', etc. Bank v. Globe, etc. Works*, 155 Mich. 3 (1908).



made on account of the impossibility of such a guaranty being legally made, one of the parties who turned in his property may hold the coal company liable in damages for the amount of money expended by him on the property before turning it in for stock.<sup>1</sup> A land and lumber company having power to consolidate with a railroad company may own the stock and guarantee the bonds and preferred stock of such railroad company, the railroad of which is beneficial to the land company in its mining, manufacturing, and lumbering business.<sup>2</sup> If the guaranty is within the power of the company, and no stockholder objects, it is not necessary to show that it was beneficial to the stockholders, nor to show any special consideration other than the money paid for the securities having the guaranty.<sup>3</sup> Where a land company owns land and also bonds and shares of stock in a railroad company, it has power, upon selling such stock and bonds, to guarantee dividends and interest thereon.<sup>4</sup> A telegraph company may take a lease of the prop-

<sup>1</sup> *Crown, etc. Co. v. Thomas*, 177 Ill. 534 (1898).

<sup>2</sup> *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335 (1894), holding also that it is not necessary that an actual consolidation be made; aff'g on this point *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893). A mining company having power to build a railroad or to subscribe to stock in the railroad may guarantee bonds of a railroad and may give a mortgage to secure such guaranty. *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898), holding also that under the Ohio statutes a coal company may guarantee the bonds of a railroad company and may give a mortgage to secure such a guaranty. Where, in order to develop the property of a land company, its stockholders organize a railroad company and also a light, heat, and power company, the respective interests of the various companies being practically the same, it is legal for the land company to indorse and guarantee the notes of the other companies, the court saying: "For purposes of equity, courts will look behind that artificial personality, and, if need be, ignore it altogether, and deal with the individuals who constitute the corporation, and that is what, in justice and fairness, must be done here, where practically the same persons

were associated together for one common purpose under three or four different names, corresponding to the several branches of the single common enterprise, and acted together only formally as distinct organizations, each devoted to the corporate pursuit of its appropriate branch." *Kendall v. Klapperthal Co.*, 202 Pa. St. 596 (1902). A saw-mill and lumber company has implied power to guarantee the interest of bonds of a railroad constructed for the purpose of supplying the mill with logs, even though the railroad also serves the public. All the officers and stockholders of the former company assented to the guaranty. The aid in procuring logs was a sufficient consideration. *Mercantile Trust Co. v. Kiser*, 91 Ga. 636 (1893).

<sup>3</sup> *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335 (1894). See also § 3, *supra*. A guaranty by one corporation of an obligation of another corporation by reason of the former employing an expert of the latter is legal if all the stockholders of both companies assent thereto. *Butterworth, etc. v. Kritzer, etc. Co.*, 115 Mich. 1 (1897).

<sup>4</sup> *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335 (1894), the court saying: "The power of the land company to enter into such an obligation for such a purpose is completely



erty and business of a company engaged in transmitting quotations and may guaranty a rental which the vendor had guaranteed.<sup>1</sup> A company organized to manufacture ironwork for mining plants cannot legally guarantee the performance of a person's contract for the erection of a mining plant, even though it thereby makes a sale of iron. The company is not liable even though the contract was not performed.<sup>2</sup> Closely connected with this subject is that of accommodation paper made or indorsed by a corporation, and while such paper is not generally binding on the corporation, it may be in the hands of *bona fide* holders, or when made with the knowledge and consent of all the directors and stockholders without injury to corporate creditors,<sup>3</sup> and such paper may also be legal where the relations between the parties are such that the paper is not really accommodation paper, but carries an incidental but valuable consideration to the corporation so making or indorsing the paper; as, for instance, where one company owns a majority of the stock of another similar company and gives financial assistance to the latter.<sup>4</sup>

Many instances of guarantees by miscellaneous corporations are given in the notes below.<sup>5</sup>

established by the case of *Railroad Co. v. Howard*, 7 Wall. 392 (1868). In that case it was held that a railroad corporation, with power to issue bonds for the construction of its road, might guarantee the bonds of cities and counties, which had been lawfully issued for the purpose of aiding the railroad in the construction." A corporation having the charter power to purchase the stock of another corporation has power to guarantee dividends on such stock in selling it. *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903). A railroad that owns all the stock of another railroad, and builds the latter, may take the mortgage bonds of the latter in payment, and guarantee the principal and interest of the bonds and sell the same. Where the principal may be declared due on default in payment of interest, the guarantor is liable on the principal so declared due. *Dougan v. Evansville, etc. R. R.*, 15 N. Y. App. Div. 483 (1897). The fact that the charter of a gas company provides that it may issue bonds for \$500,000 and secure them by mortgage, does not prevent the company borrowing additional sums of money,

nor from guaranteeing bonds in other companies which it has lawfully acquired. *Fidelity Trust Co. v. Louisville Gas. Co.*, 118 Ky. 588 (1904). Where without the knowledge of the board of directors the president purchases from a corporation notes which it owns and indorses the corporate name thereon, the corporation cannot be held liable on such indorsement. *Smith v. Pacific, etc. Works*, 145 Cal. 352 (1904).

<sup>1</sup> *Midland Tel. Co. v. National, etc. Co.*, 236 Ill. 476 (1908).

<sup>2</sup> *Humboldt Min. Co. v. American Mfg., etc. Co.*, 62 Fed. Rep. 356 (1894). An iron manufacturing concern is not bound by its agreement to pay the debt of an individual. *Bailey, etc. Co. v. Mobile, etc. R. R.*, 59 S. Rep. 191 (Ala. 1912).

<sup>3</sup> See § 774, *supra*.

<sup>4</sup> See § 774, *supra*.

<sup>5</sup> A building association having statutory power to purchase land on which it has a lien has no power to purchase land upon which it has no lien, and hence the association cannot be held liable for a deficiency in the foreclosure of a mortgage which rested upon such property when purchased by the as-



A lumber company may become surety on a building contractor's

sociation and which the association *assumed*, it being shown also that the transaction had not been authorized by the board of directors, but that on the contrary they repudiated it. *National, etc. Assoc. v. Home, etc. Bank*, 181 Ill. 35 (1899). A New Jersey corporation, having corporate power so to do, may purchase stock in another corporation in a similar business, and as a part of the purchase price may guarantee and agree to pay dividends on certain outstanding preferred stock of the latter company. Such a contract is not illegal, immoral, or against public policy. *Windmuller v. Standard, etc. Co.*, 106 N. Y. App. Div. 246 (1905); *aff'd*, 186 N. Y. 572. A mercantile corporation has no power to guarantee the debt of another person. *Kellogg-Mackay Co. v. Havre Hotel Co.*, 199 Fed. Rep. 727 (1912). The guarantee by a trading company of a letter of credit to an individual may be enforced by the banking house which issues it in good faith. *Morgan & Co. v. Hall, etc. Co.*, 83 Atl. Rep. 113 (R. I. 1912). A guaranty by a brewery corporation of the purchase price of a liquor store which agrees to sell the beer of the corporation exclusively, is legal. *Hagerstown Brewing Co. v. Gates*, 117 Md. 348 (1912). Where a hotel corporation has guaranteed the payment of material for its building it is bound. *Kellogg-Mackay Co. v. Havre Hotel Co.*, 199 Fed. Rep. 727 (1912). A lumber company owning practically the entire plant of a transportation company may guarantee payment of the latter's notes. *Cunningham, etc. Co. v. Gama, etc. Co.*, 58 S. Rep. 740 (Ala. 1912). A brokerage company has no power to guarantee a debt to a bank, but if it does so and obtains the benefit it is bound. *Richeson v. Nat. Bank of Mena*, 96 Ark. 594 (1910). A lumber company is not liable for a guaranty by its manager of payment for supplies to a boarding house where its employees boarded. *Gulf, etc. Co. v. Chapman & Co.*, 159 Ala. 444 (1909). A rice mill company has no power to guarantee a contract made by a rice packing

company, even though they have stockholders in common and do business with each other. *Robert Gair Co. v. Columbia, etc. Co.*, 124 La. 193 (1909). A town improvement company has no power to guarantee dividends on the stock of an investment company. *Greene v. Middleborough, etc. Co.*, 121 Ky. 355 (1905). A manufacturing corporation may be liable on its guaranty of a third person's obligation to pay for materials which are to be manufactured into articles for the corporation, and which it could not otherwise obtain. *Whitehead v. American, etc. Co.*, 70 N. J. Eq. 581 (1905). A brewing company may become surety on a liquor license bond to induce the licensee to lease a building from the company and deal in its product. *Horst v. Lewis*, 71 Neb. 365 (1904). A brewing company may guarantee a note in order to obtain a new customer. *Blue Island Brewing Co. v. Fraatz*, 123 Ill. App. 26 (1905). A wholesale liquor corporation has no power to guarantee the notes of one of its customers. *Re Liquor, etc. Co.*, 177 Fed. Rep. 197 (1910). A construction company's contract to pay certain interest on bonds, which it received in payment in advance, does not obligate it to pay interest on bonds received by it in regular payment. *Foster v. Mansfield, etc. R. R.*, 36 Fed. Rep. 627 (1888); *aff'd*, 146 U. S. 88 (1892). A trading corporation may defend against its guarantee of a note on the ground that it received no consideration therefor. *Deaton, etc. Co. v. International, etc. Co.*, 47 Tex. Civ. App. 267 (1907). A corporation which has taken an assignment from one of its debtors of the price of a product sold by the latter may guarantee to a third party the cost of finishing such product, in order to realize the price. *Flint, etc. Co. v. Kerr-Murray, etc. Co.*, 56 N. E. Rep. 858 (Ind. 1900). Where the guarantor agrees to make good any deficiency in dividends "below ten per cent. per annum," any dividend in any year in excess of ten per cent. will be applied to make up the deficiency in



bond where it is customary for such companies so to do in order to obtain business.<sup>1</sup>

any other year, there being no provision in the agreement that dividends shall be paid annually. *Fontana v. Pacific, etc. Co.*, 129 Cal. 51 (1900). Although the entire capital stock of a corporation is issued for the equity of redemption in certain steamboats, it may be shown by parol evidence that the corporation assumed the payment of the mortgages on the boats. Such assumption of a debt is legal. *Farmers' Bank, etc. v. Ohio River, etc. Co.*, 108 Ky. 447 (1900). Where a person sells his business to a corporation for the stock of the latter, with the agreement of the latter to indorse the notes of the vendor, such indorsements are legal. *Nat. Bank of Commerce v. Allen*, 90 Fed. Rep. 545 (1898). A carpet and furniture company may indorse the note of a hotel company where the latter is being practically carried by the former. *Hess v. Sloane*, 66 N. Y. App. Div. 522 (1901); *aff'd*, 173 N. Y. 616. A corporation as a member of a co-partnership may be liable on a note given by said co-partnership and indorsed by the corporation. *Johnson v. Weed, etc. Co.*, 103 Wis. 291 (1899). A brewing company has power to guarantee a lease of premises occupied by one of its customers, and containing fixtures mortgaged to the company. *Fuld v. Burr Brewing Co.*, 18 N. Y. Supp. 456 (1892); *Holm v. Claus, etc. Co.*, 21 N. Y. App. Div. 204 (1897); *Koehler, etc. Co. v. Reinheimer*, 26 N. Y. App. Div. 1 (1898). A brewing company cannot become surety on an appeal bond, even

though thereby it continues to sell beer to the appealing party. The company is not liable. *Best, etc. Co. v. Klassen*, 185 Ill. 37 (1900). The payee of a note given by one corporation in payment of a debt due from another corporation, there being no connection or consideration between the two corporations, cannot enforce the note. *Ehrgott v. Topeka Bridge Manufactory*, 16 Kan. 486 (1876); *Rahm v. King Bridge Manufactory*, 16 Kan. 277 (1876). A transfer company cannot guarantee the credit of another person. *Lucas v. White Line Transfer Co.*, 70 Iowa, 541 (1886). A contract between two companies by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contracts, and pay dividends on its stock) is illegal. *James v. Eve*, L. R. 6 H. L. 335 (1873). The amount of indebtedness which may be incurred by a national bank being limited to the amount of its capital stock, its guarantee of a debt, after it has already incurred liabilities to the extent allowed by law, cannot be enforced. *Weber v. Spokane Nat. Bank*, 50 Fed. Rep. 735 (1892). In a suit to enforce a guaranty by one company of dividends on the stock of another company, the charter authority for such guaranty must be set forth; and where the suit is against still another corporation on the ground that the latter had assumed such guaranty, the contract of such assumption must be set forth. Ordinarily such a guaranty

<sup>1</sup> *Central Lumber Co. v. Kelter*, 301 Ill. 503 (1903); *Wheeler, etc. Co. v. Everett Land Co.*, 14 Wash. 630 (1896). A contract of a lumber company organized to buy and sell lumber, by which it guarantees a building contract, is *ultra vires* and cannot be enforced against the corporation upon its insolvency. *In re Smith Lumber Company*, 132 Fed. Rep. 620 (1904). Where a lumber company becomes surety on the bond of a contractor

against mechanics' liens on a building which he is about to build and for which the company is to furnish the lumber, the defense of *ultra vires* is not good. *G. F. Wittmer, etc. Co. v. Rice*, 23 Ind. App. 586 (1900). A lumber selling company cannot claim a lien on a building where it has guaranteed the performance of the contract by the builder. *Interior, etc. Co. v. Prasser*, 108 Wis. 557 (1901).



A national bank cannot agree that a person becoming surety on an attachment bond will be protected by the bank, where the bond is not given for the benefit of the bank.<sup>1</sup> A national bank has no power to guarantee a draft in which it has no interest.<sup>2</sup> Where a national bank in order to obtain payment of a debt due to it, guarantees a still larger sum, it is liable on the guaranty to the extent of the debt so paid to it.<sup>3</sup> Where a debt to a national bank is paid by the bank guaranteeing a loan which its creditor gets from another bank, the guaranty may be *ultra vires* but the first-named bank must account for the money so received by it.<sup>4</sup> But where a bank buys wall paper at a sheriff's sale, and organizes a corporation to sell the paper, all the stock of the corpo-

is not enforceable. *Rhorer v. Middleboro, etc. Co.*, 44 S. W. Rep. 448 (Ky. 1898). A corporation organized to deal in the stock of a stockyard corporation, and hold personal and real estate, may buy competing stockyards; also may buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stockyard company, and to bind stockyard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. *Ellerman v. Chicago Junction, etc. Co.*, 49 N. J. Eq. 217 (1891). Where a company is in financial distress, and its creditors agree to an extension of time provided the company assumes certain private debts of the directors, the company has power to do so, but bad faith may invalidate the transaction. *Stark Bank v. United States Pottery Co.*, 34 Vt. 144 (1861). Where the payment of the coupon is guaranteed, demand of payment at the place where the coupon is payable should be made within a reasonable time after it becomes due. *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868).

<sup>1</sup> A bank is not bound by a guaranty which its cashier makes on a bond and mortgage in which the bank has no interest. *Farmers', etc. Nat. Bank v. Smith*, 77 Fed. Rep. 129 (1896). *Contra*, *Seeber v. Commercial Nat. Bank*, 77 Fed. Rep. 957 (1897). A national bank has no power to guar-

antee the payment of debts where the bank has no interest in the matter. Such a guaranty is not enforceable. *Commercial Nat. Bank v. Pirie*, 82 Fed. Rep. 799 (1897). An agreement of a national bank that it will pay all checks of a person is not enforceable by a party who cashes such checks relying on such agreement, it appearing that the bank had no funds of the former to meet such checks. This is an *ultra vires* contract of guaranty. *Bowen v. Needles, etc. Bank*, 94 Fed. Rep. 925 (1899); *First Nat. Bank v. Amer. Nat. Bank*, 173 Mo. 153 (1903). A national bank cannot certify a check payable if a building contract is not performed, there being no money to respond to the check. *Fidelity, etc. Co. v. National Bank, etc.*, 48 Tex. Civ. App. 301 (1908). Even though a bank has no power to make a guaranty, yet the officer signing the bank's name to such guaranty is not personally liable thereon. *Thilmany v. Iowa, etc. Co.*, 108 Iowa, 357 (1899). See § 682, *supra*. Cf. note 1, p. 2938.

<sup>2</sup> *National Bank, etc. v. Sixth Nat. Bank*, 212 Pa. St. 238 (1905). A bank has no power to guarantee the debt of a third person for his benefit. *Cottondale, etc. Bank v. Oskamp, etc. Co.*, 59 S. Rep. 566 (Fla. 1912). A bank has no power to guarantee a loan by another bank to one of the former's customers. *Third Nat. Bank v. St. Charles, etc. Bank*, 149 S. W. Rep. 495 (Mo. 1912).

<sup>3</sup> *Appleton v. Citizens', etc. Bank*, 190 N. Y. 417 (1907).

<sup>4</sup> *Citizens' Nat. Bank v. Appleton*, 216 U. S. 196 (1910).



ration being owned by the bank, and the bank guarantees debts thereafter incurred by such corporation, the bank is liable on such debts.<sup>1</sup> The vice-president of a trust company has no power to bind it by a contract under seal whereby the trust company guarantees to the owner of certain stocks and bonds that such stocks and bonds can be sold within a specified period at a certain price, the purpose being to protect the price. The authority of the trust company to buy and sell stock and bonds does not authorize it to engage in promoting schemes for the sake of large profits.<sup>2</sup> A bank in loaning money to a person to enable him to buy certain steamboat company stock cannot guarantee that he will suffer no loss by the purchase.<sup>3</sup>

A receiver appointed in a foreclosure suit on a mortgage which is a lien prior to a guaranty may, within a reasonable time after taking possession, refuse to carry out the terms of a lease which the company had entered into, and may refuse to be bound by a guaranty of the bonds of the lessor.<sup>4</sup> Where a guaranty authorized by statute is to be by the company, it may be by the directors without any action of the stockholders.<sup>5</sup> A stockholder who assents to a guaranty cannot afterwards attack it on the ground that the corporation had no power to enter into it.<sup>6</sup> A New Hampshire stockholder in a Kansas corporation may defend against a statutory liability on the stock on the ground that the plaintiff's claim against the corporation is an *ultra vires* guaranty, even though the state court may have decided such guaranty to be valid.<sup>7</sup>

It is a question of considerable doubt as to whether a guaranty on bonds is negotiable, the same as the bonds themselves. But the better opinion is that the negotiability of the instrument guaranteed extends also to the guaranty itself.<sup>8</sup> Where a guaranty on negotiable bonds is

<sup>1</sup> American Nat. Bank v. National Wall Paper Co., 77 Fed. Rep. 85 (1896). A bank may guarantee the interest on the debentures of a company. *Ex parte Booker*, L. R. 14 Ch. D. 317 (1880).

<sup>2</sup> Gause v. Commonwealth, etc. Co., 196 N. Y. 134 (1909).

<sup>3</sup> Barron v. McKinnon, 179 Fed. Rep. 759 (1910).

<sup>4</sup> Ames v. Union Pac. Ry., 60 Fed. Rep. 966 (1894).

<sup>5</sup> Louisville Trust Co. v. Louisville, etc. Ry., 75 Fed. Rep. 433 (1896).

<sup>6</sup> If all the parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a

lease, will not be set aside. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). Where an agricultural society guarantees the bonds of a street railway, a participating stockholder in such society cannot afterwards object. *Thompson v. Lambert*, 44 Iowa, 239 (1876). See also *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890), and §§ 3, 735, *supra*. A guaranty by a paving company that the pavement will be good for ten years cannot be enjoined at the instance of a stockholder where the pavement has been completed. *Fisher v. Georgia, etc. Co.*, 121 Ga. 621 (1905).

<sup>7</sup> *Ward v. Joslin*, 186 U. S. 142 (1902), *aff'g* 100 Fed. Rep. 676.

<sup>8</sup> *Louisville Trust Co. v. Louisville,*



in terms payable to the holder thereof, such guaranty itself is negotiable with the bonds.<sup>1</sup> A *bona fide* purchaser of guaranteed bonds is protected where the corporation had power to give it, even though the power was used improvidently or in bad faith, and even though the proceeds of the bonds were wilfully misapplied.<sup>2</sup>

A guaranty of stock, without specifying the length of time for which the guaranty is to run, continues so long as the stock is outstanding. In case of the insolvency of the guarantor, the guaranty constitutes a claim against it, and the amount of the claim is measured by the par value of the stock as if the guarantor had remained solvent.<sup>3</sup> A guaranty

etc. Ry., 75 Fed. Rep. 433 (1896); Louisville, etc. Ry. v. Louisville T. Co., 174 U. S. 552, 573 (1899); Toppan v. Cleveland, etc. R. R., 1 Flip. 74 (1862); s. c., 24 Fed. Cas. 56. See also § 768, *supra*. Not only the bonds, but the state's indorsement or guaranty on them, are negotiable, and a *bona fide* purchaser of them from a contractor to whom they were fraudulently issued may enforce them. Gilman v. New Orleans, etc. R. R., 72 Ala. 566 (1882). The state's indorsement or guaranty of bonds is negotiable. State v. Cobb, 64 Ala. 127 (1879). "Where the statute confers express authority upon the company to guarantee the bonds of another company a mere failure on the part of the guaranteeing company to pursue the mode specified in the statute will not invalidate such guaranty in the hands of the *bona fide* holder." Atchison, etc. R. R. v. Fletcher, 35 Kan. 236, 248 (1886). For a full statement of the law relative to the negotiability of a guaranty of a note, see Daniels on Negotiable Instruments (4th ed.), §§ 1774-1784. A guaranty indorsed on a negotiable note is generally not negotiable. 1 Am. Lead. Cas. (ed. 1871) 410. *Quære*, whether this is the same as to guaranties of railroad bonds. Arents v. Commonwealth, 18 Gratt. (Va.), 750, 767 (1868). In Codman v. Vermont, etc. R. R., 16 Blatchf. 165 (1879); s. c., 5 Fed. Cas. 1157, where two companies joined in making notes, and then one of these companies indorsed the same and also guaranteed payment, the court, per Wheeler, J., said: "This guaranty is not, in terms, negotiable. By it the

defendant guarantees the payment of the note principal and interest, 'according to its tenor.' The note being negotiable, perhaps these words draw that quality into the guaranty. If they do, the guaranty would seem to be negotiable. Story, Prom. Notes, § 484. If not, in Partridge v. Davis, 20 Vt. 499 (1848), Davis, J., seems to have thought such a guaranty would, in effect, be negotiable; while in Sandford v. Norton, 14 Vt. 228 (1842), and in Sylvester v. Downer, 20 Vt. 355 (1848), the late Chief Justice Redfield was clearly of the opinion that, like ordinary simple contracts, such guaranties would not be negotiable." If a railroad may lease another road, it may guarantee interest on the latter's bonds, such interest being the rent. Though the bonds are negotiable the guaranty is not. If bonds are issued for construction work which is not done, a *bona fide* purchaser of the bonds cannot enforce a guaranty thereof by another corporation. Eastern, etc. Bank v. St. Johnsbury, etc. R. R., 40 Fed. Rep. 423 (1889). As to the negotiability of a guaranty of a note or bond, see also Brandt on Suretyship, §§ 48, 49.

<sup>1</sup> Louisville, etc. Ry. v. Louisville Trust Co., 174 U. S. 552, 573 (1899).

<sup>2</sup> Central Trust Co. v. Columbus, etc. Ry., 87 Fed. Rep. 815 (1898).

<sup>3</sup> Tod v. Kentucky Union Land Co., 57 Fed. Rep. 47 (1893); rev'd on another point in Marbury v. Kentucky Union Land Co., 62 Fed. Rep. 335 (1894). A guaranty by one corporation of dividends on the stock of another corporation, so long as the stock shall be "outstanding," ceases upon



on a bond is transferable, but at common law a suit to enforce it should be brought in the name of the payee of the bond, even though the bond runs to a certain person or bearer.<sup>1</sup>

A guaranty of the bonds or dividends on the stock of a corporation should be written on the bonds or certificates of stock and signed by the guaranteeing party.<sup>2</sup> If the guaranty rests merely on a contract between the two corporations, it may be modified by the corporations;<sup>3</sup> or it may be beyond the power of the bondholder to enforce the guaranty,<sup>4</sup> or the guaranteed company may have difficulty in enforcing the

the dissolution of the latter corporation, even though such dissolution was brought about by the former corporation. *Bijur v. Standard, etc. Co.*, 74 N. J. Eq. 546 (1908). *Cf.* § 642, *supra*. Where the guarantor becomes insolvent, the maker of the bonds being solvent and continuing to pay the coupons, the distribution of the assets of the guarantor will not be delayed or restricted by the possibility of future liability on the guaranty. *Gay Mfg. Co. v. Gittings*, 53 Fed. Rep. 45 (1892).

<sup>1</sup> *Owen v. Potter*, 115 Mich. 556 (1898).

<sup>2</sup> A holder of stock of a railroad corporation, the dividends on which are legally guaranteed by another railroad corporation, such guaranty being indorsed upon the certificate of stock, may sell the same and is entitled to a new certificate running to the purchaser and containing the same guarantee executed afresh. *Marklove v. Utica, etc. R. R.*, 48 N. Y. Misc. Rep. 258 (1905).

<sup>3</sup> If the guaranty is to the corporation, and not to the stockholders severally, the board of directors may reduce the amount of the guaranty. *Beveridge v. New York, etc. R. R.*, 112 N. Y. 1 (1889). Where by the terms of a lease of all the corporate property the rent is to be paid directly to the stockholders as dividends, and a prior mortgage of the lessee is foreclosed, and the lease is not assumed by the receiver, a stockholder of the lessor cannot object to a subsequent arrangement between the lessor and the reorganized company of the lessee by which a certain sum is paid to the lessor to be used for other purposes than dividends. *Central, etc. Co. v. Farmers', etc. Co.*, 112 Fed. Rep. 81,

(1901). Where one corporation has taken a lease of the property of another and guarantees dividends on the stock of the latter, and then acquires a majority of the stock of the latter and proposes to rescind such an agreement, a minority stockholder may enjoin such action. *McLeary v. Erie, etc. Co.*, 38 N. Y. Misc. Rep. 3 (1902).

<sup>4</sup> The agreement of a railroad company to pay the bonds of another railroad company is not enforceable by the bondholders. The court said: "A mere valid promise or undertaking, taken by the company to give it support financially by enabling it to escape default for the non-payment of interest, evidently is not the property which the mortgagee took by force of this indenture, although it was obtained by the mortgagor for its financial relief and support, and its performance would have had the effect to enable it to operate its road." There is no privity of contract between the contracting company and the bondholders in such a case as this. The contract is between the two companies alone. The outside company owed no debt and held no fund in trust for the other company nor for the latter's bondholders. *Metropolitan Trust Co. v. New York, etc. R. R.*, 45 Hun, 84 (1887), holding, however, that a different case is presented where the contract is executed, as where a lease has been made. See also § 831, *infra*. A guaranty that certain construction work will be free from any lien ahead of a specified mortgage does not render the guarantor liable to parties who have furnished materials to the contractor. *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879



contract.<sup>1</sup> An additional obligation in the bond, making it payable in gold, and added after the guaranty was made, binds the company, but not the guarantor.<sup>2</sup> The agreement of a railroad company with another company to pay the interest on the bonds of the latter cannot be enforced by a contractor with the former, who was to build the road for the bonds.<sup>3</sup> The holder of coupons, representing interest upon railroad bonds, has no right of action on an agreement by the lessee of the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them, such holder of coupons being a stranger to the contract and the consideration.<sup>4</sup> A guaranty of the principal and interest of a bond does not follow a coupon which has been detached from the bond.<sup>5</sup> A guaranty of coupons set forth in the bonds themselves may be enforced by the holder, even though the trustee of the mortgage also has power to enforce the guaranty, and even though the mortgage provides that in case the security becomes insufficient the guarantor shall pay certain of the obligations until it becomes sufficient.<sup>6</sup>

(1891). Even though a person turns over his merchandise business for stock of a corporation and agrees that the latter will guarantee a certain debt, yet if in the transaction nothing is said about the debt the corporation is not thereafter liable on it. *Evans v. Johnson*, 149 Fed. Rep. 978 (1906). A creditor of a railway company which has sold all its property to another company for a specified price, the former company agreeing to pay its own debts and such agreement being guaranteed by outside parties, cannot hold such outside parties liable on such guaranty. *Randall v. Detroit, etc. Ry.*, 134 Mich. 493 (1903).

<sup>1</sup> Where one railroad, by contract with another, guarantees the interest on the bonds of the latter, but fails to fulfill its contract, the latter railroad itself cannot enforce the guaranty. The liability to repay attaches at once. In any case, the remedy is not in equity. *Bradford, etc. R. R. v. New York, etc. R. R.*, 123 N. Y. 316 (1890). A guaranty by one company of dividends on the stock of another company is a collateral undertaking. *Miller v. Ratterman*, 47 Ohio St. 141 (1890). A corporation cannot enforce a contract by which the seller of its stock agrees with the purchaser that the corporate accounts will be col-

lected and that the debts do not exceed a certain amount. *Rochester, etc. Co. v. Fahy*, 111 N. Y. App. Div. 748 (1906); *aff'd*, 188 N. Y. 629. A lessor of a railroad, the lease providing for dividends on the lessor's capital stock, may enjoin the lessee from discontinuing the operation of the railroad where such discontinuance would subject the charter of the former to forfeiture. Such injunction may also run against the purchaser of the lease from the lessee who has agreed to abide by the terms thereof. *Southern Ry. v. Franklin, etc. R. R.*, 96 Va. 693 (1899). As to whether the trustee can in the foreclosure suit enforce to the extent of the deficiency a guaranty of the bonds, see *Central Trust Co. v. Indiana, etc. R. R.*, 98 Fed. Rep. 666 (1900). See 108 L. T. Rep. 488 as to right of the guarantor to pay off the bonds.

<sup>2</sup> *Wallace v. Loomis*, 97 U. S. 146 (1877).

<sup>3</sup> *Reynolds v. Louisville, etc. Ry.*, 143 Ind. 579 (1895).

<sup>4</sup> *Freeman v. Pennsylvania R. R.*, 173 Pa. St. 274 (1896). See-§ 831, *infra*.

<sup>5</sup> *Clokey v. Evansville, etc. R. R.*, 16 N. Y. App. Div. 304 (1897).

<sup>6</sup> *Townsend v. Colorado Fuel, etc. Co.*, 16 N. Y. App. Div. 314 (1897).



Where a railroad is leased to another railroad and bonds of the former are issued and sold on the strength of an existing guaranty by the latter, and the latter passes into a receiver's hands, any bondholder may intervene in the receivership proceedings and cause the receiver to pay such interest, even though the contract of guaranty was contained in the lease only, and was, not directly with the bondholders, and even though the bondholders had not applied to the trustee of the mortgage to enforce such guaranty.<sup>1</sup> The guarantor of the payment of bonds

<sup>1</sup> *Mercantile T. Co. v. Baltimore, etc. R. R.*, 94 Fed. Rep. 722 (1899). Where one corporation purchases all the assets of another corporation and assumes the latter's liabilities and guarantees certain dividends on its stock, a holder of such stock may sue the purchasing corporation for such dividends. *Greene v. Middlesborough, etc. Co.*, 61 S. W. Rep. 288 (Ky. 1901). A railroad company that has guaranteed bonds of another company cannot enjoin suits at law on such guarantees on the ground of a multiplicity of suits. *French v. Union Pac. Ry.*, 92 Fed. Rep. 28 (1899). In the case *Kurtz v. Philadelphia & R. R. R.*, 187 Pa. St. 59 (1898), the reorganization of the Reading railroad was attacked by a holder of bonds which had been guaranteed by the insolvent company, there having been a default made in the interest on such bonds. The bondholder claimed that he was entitled to participate in a certain part of the reorganization fund which had been set aside to adjust claims of various outstanding bondholders, creditors, and stockholders, and of commissioners, etc. The court held that the suit would not lie. See 141 N. W. Rep. 407.

Where the guarantor agrees to make good any deficiency in dividends "below ten per cent. per annum," any dividend in any year in excess of ten per cent. will be applied to make up the deficiency in any other year, there being no provision in the agreement that dividends shall be paid annually. *Fontana v. Pacific, etc. Co.*, 129 Cal. 51 (1900). In the case of *Central Georgia Ry. v. Paul*, 93 Fed. Rep. 878 (1899), a general creditor of an insolvent railroad which had been foreclosed was held to have a valid claim against the reorganized company, it

being shown that the stockholders of the old company received in exchange for their stock the stock of the new company. The general creditor in this case was the unregistered holder of the stock of another company, dividends upon which had been guaranteed by the insolvent company and had not been paid. It also appears in this case that a portion of the property of the insolvent corporation was not covered by the mortgage, but was included in the property that was turned over to the reorganized company.

Where one street railway company takes a lease of the street railways of three other companies on an agreement whereby the stock of the latter companies is deposited with a trustee, and the lessee issues "stock trust certificates" therefor, being its obligation to pay a fixed rate of interest per year, with an option on its part to pay the principal sum or not, at its option, at a specified time, the stock being security therefor, to be sold by the trustee in case the principal and interest are not paid, this mode of financing does not create a debt, and hence such certificates are not subject to taxation as a bond and mortgage, the transaction being really a guaranteed dividend or rental. *Commonwealth v. Union, etc. Co.*, 192 Pa. St. 507 (1899). Where a railroad is leased, the lessee agreeing to pay certain dividends on the stock of the lessor, and the lessee becomes insolvent, and afterwards the rental, by order of the court, is paid to the lessor itself, it does not belong to the stockholders of the lessor, but may be used for other purposes of the lessor. *Farrar v. Southwestern R. R.*, 116 Ga. 337 (1902).



"at the time" specified in the bonds is liable at once if the bonds contain a provision that they shall become due at the option of the holders in case the corporation executes a mortgage and such mortgage has been executed.<sup>1</sup> Where the guaranty is not for the yearly payment of a sum equal to a specified percentage on the stock held by the guaranteed party in the corporation, nor on the nominal amount of his stock, but is that the dividends of the corporation shall annually equal that sum, the dissolution of the corporation puts an end to the guaranty. The dissolution in this case was due to acts of the corporation for which all parties were equally responsible.<sup>2</sup> A guaranty of dividends on stocks, so long as the certificates are outstanding, but not to exceed the period for which the company was incorporated, ceases upon the dissolution of the company, even though the guarantor owns a majority of the stock of the company and brings about the dissolution, unless the dissolution was for the purpose of escaping this liability.<sup>3</sup> Where one railroad leases another and guarantees dividends to the stockholders of the latter, but for several years fails to meet the guaranty, a stockholder, who in the meantime disposes of his stock, but retains the "dividends and profits" arising within a certain time, is entitled to the arrears of dividends, even though the same are paid after the time specified in the reservation, and even though by compromise they are only paid in part.<sup>4</sup> Even though the bondholders buy the property at foreclosure sale and afterwards sell it at a profit, the guarantor of the bonds is entitled to credit for only the price realized at the foreclosure sale.<sup>5</sup> Where bondholders of a lessor railroad are entitled to the rent in payment of their coupons, they may enforce the obligation.<sup>6</sup> Even though

<sup>1</sup> Notice by letter by the bondholders' attorney is sufficient if accepted without objection by the guarantor. *Dwight v. Guanajuato, etc. Co.*, 142 N. Y. App. Div. 354 (1911).

<sup>2</sup> *Lorillard v. Clyde*, 142 N. Y. 456 (1894), rev'g 15 N. Y. Supp. 809, and 20 N. Y. Supp. 433.

<sup>3</sup> *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903). A guaranty of dividends for ten years ceases upon the dissolution of the corporation inasmuch as "dividends" are no longer possible. *Columbus T. Co. v. Moshier*, 51 N. Y. Misc. Rep. 270 (1906); aff'd, 121 N. Y. App. Div. 906. A guaranty by one corporation of dividends on the stock of another corporation, so long as the stock shall be "outstanding," ceases upon the dissolution of the latter corporation, even though such dissolution was

brought about by the former corporation. *Bijur v. Standard, etc. Co.*, 74 N. J. Eq. 546 (1908).

<sup>4</sup> *Meldrim v. Trustees, etc.*, 100 Ga. 479 (1897). A guaranty by an outside party that upon the winding up of a corporation the stock should receive so much, passes to a purchaser of the stock, the transfer having been made subject to the agreement. *Bacon v. Grossmann*, 71 N. Y. App. Div. 574 (1902).

<sup>5</sup> *Owen v. Potter*, 115 Mich. 556 (1898).

<sup>6</sup> *Schmidt v. Louisville, etc. R. R.*, 101 Ky. 441 (1897); aff'd, 177 U. S. 230. Where by the terms of a lease the rent is to be used to pay the interest on bonds, the contract may be enforced by the bondholders. *Welden Nat. Bank v. Smith*, 86 Fed. Rep. 398 (1898). Where by the terms of a



a railroad company has guaranteed the bonds of another railroad company, and then sells all its property to a third railroad company, yet the guaranteed bondholders cannot have a receiver appointed of the price received on such sale, nor can they prevent a distribution of the price among the stockholders of the selling company, unless it is shown that thereby the guarantor is made insolvent.<sup>1</sup> An owner of guaranteed bonds cannot pursue the property of the guarantor into the hands of another corporation, before he has exhausted his remedy against the principal debtor.<sup>2</sup> Where a railroad company leases all its property to another company, and by the terms of the lease the lessee is to pay dividends on the stock of the lessor directly to the holders thereof, and the lessee is also to be allowed to place a mortgage upon the property of the lessor, the lessor corporation, which has passed into the hands of a receiver by reason of such mortgage, may file a bill in equity to compel the lessee to account for the funds realized on the sale of the mortgage bonds, and also to compel payment of the guaranteed dividends.<sup>3</sup> After the filing of such a bill a stockholder cannot bring suit to enforce the payment of the guaranteed dividend on his stock.<sup>4</sup> Even though a railroad lease is perpetual and provides that the lessee shall pay certain interest and dividends, yet any saving by reason of a refunding of the bonds of the lessor belongs to the stockholders of the lessor and they may recover such saving as has been made within the time of the statute of limitations, especially where there are directors in common, and the fact that the guaranty of dividends was indorsed on the stock certificates is immaterial.<sup>5</sup> The guarantor of bonds secured by a mortgage of a waterworks company may bring suit to enjoin the

lease of all the corporate property the rent is to be paid directly to the stockholders as dividends, and a prior mortgage of the lessee is foreclosed, and the lease is not assumed by the receiver, a stockholder of the lessor cannot object to a subsequent arrangement between the lessor and the reorganized company of the lessee by which a certain sum is paid to the lessor to be used for other purposes than dividends. *Central, etc. Co. v. Farmers', etc. Co.*, 112 Fed. Rep. 81 (1901). Where a lease gives to the lessor thirty per cent. of the gross earnings, this thirty per cent. is not a rental or a mere obligation to pay, but is impressed with the trust, and having been made payable to the bondholders of the lessor they may collect it from the receiver of the lessee. *Terre Haute, etc. R. R. v. Cox*, 102 Fed. Rep. 825 (1900).

<sup>1</sup> *Guilmartin v. Middle G. & A. Ry.*, 101 Ga. 565 (1897).

<sup>2</sup> *Sawyer v. Atchison*, 129 Fed. Rep. 100 (1904). 87 Atl. Rep. 300.

<sup>3</sup> *Pacific R. R. v. Atlantic & P. R. R.*, 20 Fed. Rep. 277 (1884). See also § 787, *infra*. An owner of bonds which were guaranteed by another company, which latter company has been foreclosed and reorganized, cannot maintain a suit in equity to compel the reorganized company to pay the bonds. His remedy, if he has any, is at law. *Sawyer v. Atchison, etc. R. R.*, 119 Fed. Rep. 252 (1902); *aff'd*, 129 Fed. Rep. 100.

<sup>4</sup> *Reed v. Atlantic & P. R. R.*, 85 Fed. Rep. 692 (1884).

<sup>5</sup> *Ætna Ins. Co. v. Albany, etc. Co.*, 156 Fed. Rep. 132 (1907). See also *Continental Ins. Co. v. N. Y., etc. R. R.*, 187 N. Y. 225 (1907). Sur-



city from violating the contract between the city and the company.<sup>1</sup> The statute of limitations does not begin to run against a guaranty until it ripens into an actual debt.<sup>2</sup>

A few forms of guaranties of bonds and dividends on stock are given elsewhere.<sup>3</sup>

If the guarantor takes up the securities he may enforce their payment as against the company liable thereon, but his rights are second to those of any of the guaranteed bonds not so taken up.<sup>4</sup> Where one

plus earnings under an operating contract with a guaranty of dividends were involved in *Ticonderoga R. R. v. Delaware and Hudson Co.*, 204 N. Y. 588 (1912).

<sup>1</sup> *American, etc. Co. v. Home, etc. Co.*, 115 Fed. Rep. 171 (1902).

<sup>2</sup> *Anglo-American, etc. Co. v. Lombard*, 132 Fed. Rep. 721 (1904).

<sup>3</sup> For forms of guaranties see Vol. V, *infra*.

A guaranty signed by an individual in his own name, followed by the letters "Pt.," may be shown to be the obligation of the corporation only, provided the corporation might execute a guaranty and authorize the president to execute it. *Small v. Elliott*, 12 S. Dak. 570 (1900). See also § 724, *supra*.

<sup>4</sup> Where, the bonds being in default, the trustee foreclosed by taking and retaining possession, and conveyed the property to a new corporation, the bondholders taking stock for their bonds, a guarantor of the bonds who paid some of the old coupons as they became due gets nothing, inasmuch as the whole property was used to pay the guaranteed bonds. *Child v. New York, etc. R. R.*, 129 Mass. 170 (1880). The guaranty was as follows: "In consideration of the provisions of a contract of even date for the use of the Boston, Hartford & Erie Railroad by the Erie Railway Company, the Erie Railway Company hereby agrees with the holder of this bond that the several interest warrants hereto attached shall be paid as they respectively mature. Witness the seal of the Erie Railway Company and the signature of its secretary, at the city of New York, the 8th day of October, A.D. 1867." The contract by which the guaranty was agreed upon contained

the following clause: "And it is further agreed that any interest warrants which the said party of the second part shall be obliged to take up under the provisions of this contract, or the indorsement which may be put on any of said bonds, shall be and remain a valid lien on all the franchises and property named in or secured by said mortgage." A guarantor of bonds which have become due cannot participate in the assets along with the bondholders on coupons which have been paid by the guarantor. The bondholders are to be paid first, since the guarantor is liable to pay them. But where the principal is not due, the guarantor's coupons are to be paid after other outstanding coupons are paid. *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501, 540 (1870), holding also that where the guarantor has paid a part of the securities which were guaranteed, the remaining part is to be paid first, and thus the guarantor is to be repaid and then other creditors come in. The lessees of the guarantor, having taken up coupons which were guaranteed, are "entitled to the same remedies for the collection thereof to which the creditors themselves would have been entitled," and may apply for a receiver under the New Jersey statute. *Pennsylvania R. R. v. Pemberton, etc. R. R.*, 28 N. J. Eq. 338 (1877). As to the guarantor company's right to institute suit to protect its interests, see also *Florida v. Anderson*, 91 U. S. 667 (1875). The guarantor may enforce a mortgage given to protect it. *Macon, etc. R. R. v. Georgia, etc. R. R.*, 63 Ga. 103 (1879). Where railroad bonds are secured by a mortgage on the railroad, and also a mortgage on the property of another corporation, the latter may



company agrees on the face of the bonds of another company to purchase the coupons and bonds as they become due, the former company cannot foreclose until it has fully completed the contract of purchase.<sup>1</sup> A guarantor of the interest on mortgage bonds is not a necessary party to a foreclosure suit, since he is not entitled to subrogation until the whole debt for which he is liable is paid. Otherwise the guaranty would be useless.<sup>2</sup>

Where a company insures to an individual the payment of a debenture held by such individual in case of default on the debenture becoming due, the insuring company is liable, even though, under a clause in the debenture, the other debenture-holders postpone payment.<sup>3</sup>

Where a state guarantees bonds, the guaranty is construed and enforced the same as where the guaranty is by a corporation.<sup>4</sup>

A guaranty by one individual of certain dividends on stock held by another individual is legal and enforceable.<sup>5</sup> An agent employed

be foreclosed before the former where the former would realize nothing. *Chicago, etc. Land Co. v. Peek*, 112 Ill. 408 (1885).

<sup>1</sup> *Pennsylvania R. R. v. Allegheny, etc. R. R.*, 48 Fed. Rep. 139 (1891); *Pennsylvania R. R. v. Allegheny, etc. R. R.*, 42 Fed. Rep. 82 (1890).

<sup>2</sup> *Columbia, etc. Trust Co. v. Kentucky Union Ry.*, 60 Fed. Rep. 794 (1894). The guarantor of mortgage bonds is not a necessary party to a foreclosure suit. "If the guarantor would be subrogated to the rights of the creditor or purchaser, he should pay the debt or offer to redeem." *Owen v. Potter*, 115 Mich. 556 (1898).

<sup>3</sup> *Finlay v. Mexican Inv. Corp.*, [1897] 1 Q. B. 517.

<sup>4</sup> *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501 (1870); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885); *Gilman v. New Orleans, etc. R. R.*, 72 Ala. 566 (1882); *State v. Cobb*, 64 Ala. 127 (1879); *Florida v. Anderson*, 91 U. S. 667 (1875).

<sup>5</sup> See §§ 334, note, 339, *supra*. In a celebrated litigation in New York state it was adjudicated:

First. That such a guaranty is valid and enforceable. *Lorillard v. Clyde*, 86 N. Y. 384 (1881).

Second. That the defendants were liable upon it, during the time the corporation subsisted *de facto*, although there existed cause for its dissolution.

*Lorillard v. Clyde*, 48 N. Y. Super. Ct. 409 (1882); affirmed, 99 N. Y. 196.

Third. That separate actions may be brought on the contract as the installments fall due, and separate recoveries had in each. *Lorillard v. Clyde*, 122 N. Y. 41 (1890).

Fourth. That the plaintiff was in no legal sense a party to an action by the people of the state, and not concluded by the findings therein. *Lorillard v. Clyde*, 48 N. Y. Super. Ct. 409 (1882); affirmed, 99 N. Y. 196.

Fifth. That the dissolution of the corporation put an end to the guaranty. *Lorillard v. Clyde*, 142 N. Y. 456 (1894), rev'g 15 N. Y. Supp. 809, and 20 N. Y. Supp. 433, this decision being due to the peculiar wording of the contract. A guaranty by certain persons that a subscriber for stock would receive eight per cent. dividends thereon for three years may be enforced, even though the stock was not fully paid up during the three years. *Rogers v. Chambers*, 112 Ga. 258 (1900). Stockholders who indorse a bond of a corporation may set up the five years' statute of limitations although the bond was a sealed instrument. Facts connected with the stockholders indorsing the bond may be explained by parol. *Somers v. Florida, etc. Co.*, 50 Fla. 275 (1905). A guarantor of a note cannot defend on the ground that the note is secured by



to sell stock has no inherent power, however, to guarantee dividends

collateral which should first be sold. *Knickerbocker T. Co. v. Coyle*, 139 Fed. Rep. 792 (1905); s. c., 143 Fed. Rep. 587 (1906). In general, see *Sheffield Nickel Co. v. Unwin*, L. R. 2 Q. B. D. 214 (1877), where a release by a corporation of a guaranty of certain profits made to it by a person who had sold property to it was upheld. Where the profits are properly used to pay debts, a guarantor of dividends cannot question the propriety of such use of the profits. *Pratte v. Enslow*, 46 W. Va. 527 (1899). The joint guaranty by several parties of a specified dividend for a specified time on certain stock in order to bring about its sale, together with their agreement to purchase the stock at par at the end of the time, and if they fail to do so to continue to pay the guaranteed dividends, is enforceable against all for the guaranteed dividends for the specified time, but as to the purchase is enforceable against those only upon whom a demand is made that they purchase the stock in accordance with the agreement. *Rogers v. Burr*, 105 Ga. 432 (1898). Even though a corporation becomes insolvent, yet a person who has guaranteed certain dividends on its stock for a specified period cannot be held liable on such guaranty for the whole remaining period before the time for the payment of such dividends has been reached. *Green v. Hart*, 52 La. Ann. 213 (1899). A guaranty by two individuals that ten per cent. dividends shall be paid on all stock of the corporation for the period of ten years does not, at the expiration of two years, become due for the whole ten years, even though the corporation becomes insolvent at the end of the two years. *Hornor v. McDonald*, 52 La. Ann. 396 (1899). A guaranty by the vendor of stock to pay a certain dividend thereon for ten years if the company did not pay such dividend, and also reserving the right to buy back the stock at the end of the five years, may be enforced by the vendee, but the latter can collect the dividends only year by year, even though the company becomes insolvent during the

first year. *Hawks v. Bright*, 51 La. Ann. 79 (1898). A contract guaranteeing a certain dividend over and above certain corporate expenses does not include payment of salaries, etc. *Central, etc. Assoc. v. James*, 81 Ga. 762 (1888). A guaranty upon the sale of stock that certain dividends will be declared is enforceable against the guaranteeing firm, even though they acted as agents for an undisclosed principal. Their obligation is primary, and not that of guarantors for the company. *Kernochan v. Murray*, 111 N. Y. 306 (1888). Where certain stockholders agree with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. *Rogers v. Burr*, 97 Ga. 10 (1895); s. c., 105 Ga. 432. An agreement of a party to pay to a stockholder a sum of money equal to ten per cent. on the par value of certain stock held by the latter, the stockholder agreeing to turn over to the former all dividends received on the stock during the time specified, is valid and may be enforced, although no dividends are declared, and although no certificates of stock are actually issued. *Guy v. Craighead*, 6 N. Y. App. Div. 463 (1896). A guaranty of a person to a purchaser of stock of the latter's money invested is a guaranty against loss and not an agreement to take the stock off the latter's hands. *Norris v. Reynolds*, 131 N. Y. App. Div. 818 (1909). A pledgee of stock guaranteed by an outside party may file a bill to have the same sold, and the purchaser may enforce the guaranty. *Rogers v. Harvey*, 143 Ky. 88 (1911). Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds stock to secure the performance of the guaranty, he cannot afterwards claim that he has a prior lien as pledgee of the stock. *Mercantile Trust Co. v. Atlantic Trust Co.*, 86 Hun, 213 (1895). For subsequent phases of this litigation see *Bracken*



thereon.<sup>1</sup> A guaranty by the vendor of stock that six per cent. dividends will be paid on the stock will be construed as continuing for a reasonable time only, and ceases upon the death of the vendee, unless the guaranty ran to him and his representatives.<sup>2</sup> A guarantee of a certain dividend in connection with a contract that the vendor of stock would take it back at the end of the year at the same price is a guaranty for that year only.<sup>3</sup>

The provision of the statute of frauds relative to answering for the debts, defaults, or miscarriages of another does not apply to a guaranty that there will be a certain dividend on stock purchased.<sup>4</sup>

Various instances of guaranties by individuals are given in the notes below.<sup>5</sup>

*v. Atlantic Trust Co.*, 167 N. Y. 510 (1901). Where a subscriber to stock makes a part payment and then declines to pay the balance, and thereupon a director, to induce him to pay, guarantees to pay a certain dividend and agrees to buy the stock, the director is not bound, since there was no consideration. *Marinovich v. Kilburn*, 153 Cal. 638 (1908).

<sup>1</sup> *Smith v. Tracey*, 36 N. Y. 78 (1867).

<sup>2</sup> *Rotch v. French*, 176 Mass. 1 (1900).

<sup>3</sup> *Tilton v. Whittemore*, 202 Mass. 39 (1909).

<sup>4</sup> *Moorehouse v. Crangle*, 36 Ohio St. 130 (1880). An oral promise by a stockholder that he would repay at any time after one year the amount paid by an individual to the corporation for stock, if the latter did not receive a profit of twenty per cent., is void under the statute of frauds. *Moore v. Vosburgh*, 66 N. Y. App. Div. 223 (1901). The promise of the directors of a corporation, inducing a person to purchase stock from the corporation, that they will pay enough to make the dividend eight per cent. as long as the corporation exists, is not void, under the statute of frauds, and is enforceable. *Crook v. Scott*, 65 N. Y. App. Div. 139 (1901); *aff'd*, 174 N. Y. 520. *Cf.* §§ 339, 340, *supra*.

<sup>5</sup> Where a stockholder has guaranteed the bonds of a corporation and allowed the mortgage to cover some of his own property and the corporation becomes insolvent, other stock-

holders, when sued on their statutory liability, cannot set up that this guaranty and mortgage should first be exhausted before they are held liable. *Winthrop, etc. Bank v. Minneapolis, etc. Co.*, 77 Minn. 329 (1899). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforceable against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. *Kinsman v. Fisk*, 37 N. Y. App. Div. 443 (1899). Where the vendor guarantees that the vendee can sell the stock within a year at a certain price, and the vendee sells it after the year at a less price, he may recover the difference from the vendor. *Lobeck v. Duke*, 50 Neb. 568 (1897). The agreement of a person with a subscriber for stock that he will pay to the latter one hundred cents on the dollar for the stock within ninety days is not enforceable unless the subscriber tenders the stock and demands the money within that time, and a guaranty to save the subscriber harmless from any loss as a stockholder does not guarantee against loss by a decline in the value of the stock itself. *Morris v. Veach*, 111 Ga. 435 (1900). Where an insolvent insurance company buys out a solvent company, and certain individuals guarantee that the obligations of the latter company will



A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists.<sup>1</sup> A corporation which guarantees to the owners of farms a fixed income per acre therefrom is an insurance company.<sup>2</sup> Under the statute authorizing corporations for any lawful "business" or "pursuit," a corporation may be formed to guarantee the bonds of an educational institution, and in any event the stockholders in such corporation cannot question the power of the corporation to make such guaranty.<sup>3</sup>

§ 776. *Debentures*.—In England the securities which are issued by corporations are generally called "debentures." An English debenture is a term which in its widest application includes any instrument issued by a corporation which creates a debt or acknowledges it.<sup>4</sup> But generally it means a bond<sup>5</sup> secured by a mortgage,<sup>6</sup> or by a

be fulfilled, and the latter company is "wrecked," the guarantors are liable. *Mason v. Cronk*, 125 N. Y. 496 (1891). Where one railroad company agrees to expend certain money on another railroad, and the repayment of the money is guaranteed by a third person, such third person cannot repudiate the guaranty after the money has been expended, on the ground that the act was *ultra vires*. *Alexandria, etc. R. R. v. Johnson*, 58 Kan. 175 (1897). In *U. S. Trust Co. v. Western Contract Co.*, 81 Fed. Rep. 454 (1897), bonds and stock were deposited with a railroad corporation to pay the principal and interest on certain other bonds and floating debts of another corporation. After the contract had been partially performed the former corporation became insolvent, and the court passed upon the various rights of the parties.

<sup>1</sup> *Windmuller v. Standard, etc. Co.*, 114 Fed. Rep. 491 (1902); also 115 Fed. Rep. 748. A guaranty by one corporation of dividends on the stock of another corporation, so long as the stock shall be "outstanding," ceases upon the dissolution of the latter corporation, even though such dissolution was brought about by the former corporation. *Bijur v. Standard, etc. Co.*,

74 N. J. Eq. 546, (1908). Cf. note 1, p. 1917, *supra*.

<sup>2</sup> *In re Hogan*, 8 N. Dak. 301 (1899).

<sup>3</sup> *Maxwell v. Akin*, 89 Fed. Rep. 178 (1898).

<sup>4</sup> *Levy v. Abercorris, etc. Co., L. R. 37 Ch. D. 260* (1887). See also *British, etc. Co. v. Inland Rev. Comm'rs*, L. R. 7 Q. B. D. 165 (1881); *Edmonds v. Blaina Furnaces Co., L. R. 36 Ch. D. 215* (1887). Cf. *Topham v. Green-side, etc. Co., L. R. 37 Ch. D. 281* (1887); *2 Ry. & Corp. L. J. 529*.

<sup>5</sup> It is applied to evidences of indebtedness such as a deed under seal. *Ex parte Bradshaw*, L. R. 15 Ch. D. 465 (1879), where the form was that of a bond binding the company "and their successors and their real and personal estate," which was held to be a charge upon the real and personal estate of the company as it existed at the date of winding-up proceedings, but not including unpaid capital; *Re City Bank*, L. R. 3 Ch. 758 (1868), where, however, a deed under seal, payable to order, but purporting to be a debenture, was treated as a mere promissory note; *Ex parte Grissell*, L. R. 3 Ch. D. 411 (1875). Also to a simple promise to pay, with a clause subjecting certain property as security. *Re Marine Mansions Co., L. R.*

<sup>6</sup> *Re Hamilton's Windsor Ironworks*, L. R. 12 Ch. D. 707 (1879); *Wildy v. Mid-Hants Ry.*, 16 W. R. 409 (1868).



clause equivalent to a mortgage inserted in the bond itself.<sup>1</sup> An English debenture, when it is a bond and mortgage combined, and covers land, is an interest in land, and hence a contract for the sale of such a debenture must comply with the statute of frauds applicable to a sale of land.<sup>2</sup>

The power to issue debentures is generally conferred by the charter. Where it is not so conferred it is implied from a general power to borrow money and create debts.<sup>3</sup> Where three companies join in the execution of debentures creating a lien on their property, each will be required

4 Eq. 601 (1867). See also note *infra*. A Lloyd bond is a due-bill or acknowledgment of indebtedness issued under seal by a corporation to the constructors, supply men, etc. *Rapalje*, Law Diet. And see *Re Cork, etc. Ry.*, L. R. 4 Ch. App. 748 (1869). *Cavanagh*, Money Securities (2d ed., p. 355), defines a debenture as "an instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property in favor of a given person, or of a given person and his order or bearer, and constituting a member in a series of instruments, each entitling the original holder thereof to similar rights. Hence a debenture is distinguished (1) from a mortgage, which is an actual transfer of property; (2) from a bond, which does not directly affect property; and (3) from a mere charge on property, which is individualized and does not form part in a series of similar charges. [Citing cases.] Debentures may be issued by a single person, by a partnership, or by a corporation." Debenture stock differs from a pure debenture in that the title of each original holder appears in a registry instead of being represented by an instrument complete in itself, and the stock is capable of being transferred in any amounts, unless limited by corporate regulations. See *Attree v. Hawe*, L. R. 9 Ch. D. 337 (1878).

<sup>1</sup> *Re Marine Mansions Co.*, L. R. 4 Eq. 601 (1867); *Re Panama, etc. Co.*, L. R. 5 Ch. 318 (1870); *Re New Clydach, etc. Co.*, L. R. 6 Eq. 514 (1868). A debenture not making a charge upon property has been held to be a promissory note. *Ex parte Colborne*, L. R. 11 Eq. 478 (1870). But security upon property is not a necessary feature.

*Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887), holding also that it is not necessary that they be issued and numbered *seriatim*; a single debenture may be issued to one man. "In the ordinary acceptance of the term a debenture means any document, binding on an incorporated company, by which it acknowledges a debt to be due and undertakes to pay it." *Romer, Q. C.*, in *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887), where, also, *Chitty, J.*, said: "I find that generally, if not always, the instrument imports an obligation or covenant to pay." The same learned judge in *Levy v. Abercorris, etc. Co.*, L. R. 37 Ch. D. 260 (1888), said that "debenture" is not a term of art, but means a document which acknowledges or creates a debt. In the former case the instrument was a memorandum of agreement acknowledging loans in various amounts set opposite the names of nine persons, covenanting with each of them to pay the same, with interest, at a fixed date, and to pay them ratably in case the whole was not then paid, and pledging as security the "undertaking, property, and effects of every kind," subject to prior charges, and with liberty to the company to sell or pledge the things manufactured by the company in the ordinary course of business until default made.

<sup>2</sup> *Driver v. Broad*, [1893] 1 Q. B. 539, 744. Cf. *Re Hollon*, 69 L. T. Rep. 425 (1893), as to mortmain.

<sup>3</sup> *Re Inns, etc. Co.*, L. R. 6 Eq. 82 (1868); *Bank of South Australia v. Abrahams*, L. R. 6 P. C. 265 (1875), holding that a power to issue debentures after all calls have been fully paid does not warrant making them upon future calls.



to pay such part as it received, although such debentures are *ultra vires*.<sup>1</sup>

In England statutory provisions regulating the issue of debentures must be carefully observed.<sup>2</sup> Debentures in England, covering all the property, etc., of the corporation, are specifically excepted from the bill of sales or chattel mortgage act, requiring registration of bills of sale.<sup>3</sup> A debenture is to be construed according to the language used in it. There are no arbitrary rules of construction peculiar to it alone.<sup>4</sup>

<sup>1</sup> *Re Johnston, etc. Co., Ltd.*, [1904] 2 Ch. 234.

<sup>2</sup> Where the required assent of stockholders is not obtained, the debentures are void. *Fountainaine v. Carmathen Ry.*, L. R. 5 Eq. 316 (1868). Where the issue is made before the whole capital is subscribed, and the statute forbids such issue, the debenture is void. *Chambers v. Manchester, etc. Ry.*, 5 B. & S. 588 (1864). Where the issue is made when the corporate debts are greater than the statute allows, then the debentures are void, and the holders come in as unsecured creditors. *Re Pooley Hall, etc. Co.*, 18 W. R. 201 (1869).

<sup>3</sup> The bills of sale act in England relieves corporations from the necessity of recording debentures. *Read v. Joannon*, L. R. 25 Q. B. D. 300 (1890). Debentures have precedence over a *fi. fa.* *Re Opera*, [1891] 3 Ch. 260. The debentures of none of the incorporated companies in England need be recorded as a chattel mortgage. *Re Standard Mfg. Co.*, [1891] 1 Ch. 627; *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887). A debenture is a document which creates or acknowledges a debt. It need not be recorded in the register's office under the bill of sales act. *Levy v. Abercorris, etc. Co.*, L. R. 37 Ch. D. 260 (1887). *Cf. Topham v. Greenside, etc. Co.*, L. R. 37 Ch. D. 281 (1887). For a review of the long litigation in England as to whether a debenture had to be recorded as a bill of sale (*i.e.*, in America as a chattel mortgage), see 8 Ry. & Corp. L. J. 222. This question was finally settled in England by act of parliament declaring that debentures of corporations need not be recorded under the bill of sales act. A debenture on the whole property,

with a clause that no prior mortgage or charge should be made, is not good as against an assignment by the company of money due from an insurance company, where such assignee gave notice to the insurance company before that company had notice of the debenture. *English, etc. Trust v. Brunton*, [1892] 2 Q. B. 1. A substitution of property under a debenture as allowed by the English statute was involved in *Cunard, etc. Co. Ltd. v. Hepwood*, [1908], 2 Ch. 564.

<sup>4</sup> *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887); *Ex parte Cox*, 13 L. R. Ir. 174 (1884), and *Re Panama, etc. Ry.*, L. R. 5 Ch. 318 (1870), holding that debentures secured by the "undertaking and all sums arising therefrom" are a charge upon all the property of the corporation, past and future, and are entitled to be paid before the general creditors. The former case gives the form of the indenture. *Re Marine Mansions Co.*, L. R. 4 Eq. 601 (1867), to same effect, but not a charge on the capital stock; also *Re Colonial, etc. Corp.*, L. R. 15 Ch. D. 465 (1879); *Re New Clydach, etc. Co.*, L. R. 6 Eq. 514 (1868), where debentures purporting to be an assignment of the undertaking, and charging all the real and personal property, were held valid upon all personal properties existing at the date of the debentures, but not upon property subsequently acquired. A debenture on all the property does not necessarily cover uncalled subscriptions. *Re Streatham, etc. Co.*, [1897] 1 Ch. 15; *Bloomer v. Union, etc. Co.*, L. R. 16 Eq. 383 (1873), holding that book debts were charged; *Ex parte Grissell*, L. R. 3 Ch. D. 411 (1875), where a charge upon all the funds, property,



Many of the rules of law applicable to other evidences of corporate indebtedness apply also to this class of obligations.<sup>1</sup> A provision

and effects which the company held or possessed, or should hold or be possessed of, was held valid; *Hodson v. Tea Co.*, L. R. 14 Ch. D. 859 (1880), where debentures containing an assignment of chattels, with a provision that the corporation shall retain possession until twenty-one days after default, were held a lien, though winding-up proceedings had been begun before they became due; *Re Herne Bay Water Works Co.*, L. R. 10 Ch. D. 42 (1878), holding that debenture-holders, not being in the position of ordinary mortgagees, may have a receiver appointed, but cannot institute winding-up proceedings; *Wildy v. Mid-Hants Ry.*, 16 W. R. 409 (1868), holding that the holder of a debenture secured by mortgage has a title prior to that of a subsequent judgment creditor, and may file a bill to protect his security, though his claim is not due; *Ex parte Pitman*, L. R. 12 Ch. D. 707 (1879), holding that the debenture does not prevent the company from selling property and dealing with it without regard to the debenture. To same effect, *Wheatley v. Silkstone, etc. Co.*, L. R. 29 Ch. D. 715 (1885), where a mortgage given subsequent to the indentures took precedence over them; *Re Florence, etc. Co.*, L. R. 10 Ch. D. 530 (1878); *Moor v. Anglo-Italian Bank*, L. R. 10 Ch. D. 681 (1879). But as soon as winding-up proceedings are commenced, then the lien of the debenture-holders attaches, and the unsecured holders are paid after the debenture-holders. *Re Panama, etc. Mail Co.*, L. R. 5 Ch. App. 318 (1870). To same effect. *Re Horne*, L. R. 29 Ch. D. 736 (1885); *Hodson v. Tea Co.*, L. R. 14 Ch. D. 859 (1880). A purchaser of land from the company may, before taking title, require proof of no default as to the debentures. *Re Horne*, L. R. 29 Ch. D. 736 (1885). A floating debenture does not prevent the company from paying a debt to a director just before a winding-up is commenced. *Wilmott v. London Celuloid Co.*, L. R. 34 Ch. D. 147 (1886).

A pledge or mortgage of a specific piece of corporate property to obtain new money takes precedence of a general debenture lien, although the debenture was prior in time. *Ward v. Royal Exchange, etc. Co.*, 58 L. T. Rep. 174 (1887). A debenture is not a lien on the proceeds from superfluous land sold by the company. *Re Hull, etc. Ry.*, L. R. 40 Ch. D. 119 (1888). In England any loan by a corporation in excess of the amount expressly authorized by its charter is void, but the company may be held liable for such part of the money as they properly used to pay other debts. *Wenlock v. River Dee Co.*, L. R. 38 Ch. D. 534 (1888).

<sup>1</sup> *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642 (1870), holding that a defense of illegal issue cannot be made by a corporation against the suit of an innocent holder of assignable debentures; *Fountaine v. Carmathen Ry.*, L. R. 5 Eq. 316 (1868), holding that when issued for an insufficient consideration they are still good to the extent of the value of the consideration; *Re Northern Assam Tea Co.*, L. R. 10 Eq. 458 (1870), to the effect, that when held by a member of a corporation subject to a lien for money due to it, the lien is released by a transfer to which the company has consented; *Agar v. Athenæum Life, etc. Co.*, 3 C. B. (N. S.) 725 (1858), holding that the fact that due formality was not observed in borrowing the money for which debentures are issued is no defense to a suit upon them; *Crouch v. Credit Foncier, etc.*, L. R. 8 Q. B. 374 (1873), holding that debentures under seal, though payable to bearer, are not negotiable; *Re Brunton's Claim*, L. R. 19 Eq. 302 (1874), holding that a company cannot set up equities against a debenture bond after accepting notice of its assignment; *Potteries, etc. Ry. v. Minor*, L. R. 6 Ch. 621 (1871), holding that obtaining judgment upon debentures does not change the status of the holder; he is still bound by the acts of a majority of his fellow-



in an English debenture that a majority of the holders of debentures may "sanction any modification or compromise of the rights of the

holders under the Railway Companies Act of 1867; *Price v. Great Western Ry.*, 16 M. & W. 244 (1847), holding that if the principal of debentures remains unpaid after maturity it bears interest though all coupons have been promptly paid.

A debenture-holder may apply for a receiver whenever the company ceases to be a going concern. *Hubbuck v. Helms*, 56 L. T. Rep. 232 (1887). See *Blaker v. Herts, etc. Co.*, L. R. 41 Ch. D. 399 (1889). A debenture-holder cannot have a receiver of all the railway property appointed merely because there is a default. He must first get judgment and execution at law. He differs from a mortgagee. *Imperial, etc. Assoc. v. Newry, etc. Ry.*, 2 Ir. Rep. Eq. 524 (1868). A debenture which in effect is a mortgage on the tolls and income of a pier company cannot enjoin a general creditor from selling out the land by levy of execution. *Perkins v. Deptford, etc. Co.*, 13 Sim. 277 (1843). The court will appoint a receiver at the instance of debenture-holders if the corporation is insolvent, even though neither the principal nor interest is due. *McMahon v. North Kent Ironworks*, [1891] 2 Ch. 148. Debentures in excess of the amount authorized by statute are void. *Fountaine v. Carmathen Ry.*, L. R. 5 Eq. 316 (1868). Where some debentures have been paid, new ones may be issued to that amount and not be in excess of the statutory limit. *Fountaine v. Carmathen Ry.*, L. R. 5 Eq. 316 (1868). After a receiver has taken possession, a debenture-holder cannot obtain priority over other holders by getting a judgment at law and issuing execution thereon. *Bowen v. Brecon Ry.*, L. R. 3 Eq. 541 (1867). Nor can a general creditor interfere by execution on property in the receiver's possession. *Russell v. East Anglian Ry.*, 3 Macn. & G. 104 (1850). A debenture is more of a bond than a mortgage. Subsequent mortgagees may obtain a priority on lands in Italy, where the law of notice of prior liens does not

prevail. *Norton v. Florence, etc. Co.*, 26 W. R. 123 (1877). "All that debenture-holders can claim is the actual fruit resulting from the carrying on of the business of the company — namely, the tolls, rates, and duties which may be earned by the company through their availing themselves of their privilege of becoming carriers, and the rent which may be paid by other companies for the use of their lines." *Norton v. Florence, etc. Co.*, 26 W. R. 123 (1877); also *Gardner v. London, etc. Ry.*, L. R. 2 Ch. 201 (1867). A mortgage on the undertaking does not cover the property belonging to the company as common carriers of passengers or goods for hire, nor the soil of the railway itself. "The railway acts have been prepared on the model of the canal acts, in which the principal object of the company was the proprietorship of the canal, and the profits derived from the use of it by the public in general." *Hart v. Eastern, etc. Ry.*, 7 Exch. 246 (1852). A debenture covering the undertaking "is a lien similar to an income mortgage." *Gardner v. London, etc. Ry.*, L. R. 2 Ch. App. 201 (1867). In *Re Panama, etc. Co.*, L. R. 5 Ch. 318 (1870), the court held that the debenture in that case was a mortgage security and came in ahead of general creditors. The word "undertaking" does not cover and include land so as to sustain ejectment. *Myatt v. St. Helens, etc. Ry.*, 2 Q. B. 364 (1841). Concerning a receiver under debentures, see *Gardner v. London, etc. Ry.*, L. R. 2 Ch. 201 (1867). Debenture-holders may be given power to appoint a receiver to take possession of everything whenever certain things happen. *Re Pound*, 62 L. T. Rep. 137 (1889). A mortgage on the "undertaking" covers after-acquired personality. *Re Panama, etc. Co.*, L. R. 5 Ch. 318 (1870). See also, in general, *Jones, Corp. Bonds, etc.*, §§ 381-425. An English mortgage covers only the tolls and income. *Bowen v. Brecon, etc. Ry.*, L. R. 3 Eq. 541 (1867).



debenture-holders against the company or against the property" is valid, and such a compromise is binding on the minority.<sup>1</sup> A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of a *bona fide* mortgagee without notice of such debentures and such contract.<sup>2</sup> Thus a pledge may have priority over a debenture, even though the latter provides no charge shall be made having priority over the debentures.<sup>3</sup> Under some debentures the debenture does not become a lien until a receiver is applied for.<sup>4</sup> A mortgage may be prior in right to debentures outstanding at the time of the mortgage.<sup>5</sup> An English debenture attaches to the debts owing to the company at the time of the appointment of a receiver.<sup>6</sup> A floating debenture may not have precedence over remittances which have been pledged in advance.<sup>7</sup> A floating charge in England must be recorded.<sup>8</sup> An ordinary debenture

<sup>1</sup> *Sneath v. Valley Gold*, [1893] 1 Ch. 477.

<sup>2</sup> *Re Castell, etc. Lim.*, [1898] 1 Ch. 315.

<sup>3</sup> *Re Valletort, etc. Co.*, [1903] 2 Ch. 654.

<sup>4</sup> *Governments, etc. Co. v. Manila, etc. Ry.*, [1895] 2 Ch. 551; *aff'd*, [1897] A. C. 81.

<sup>5</sup> *Government, etc. Co. v. Manila Ry.*, [1897] A. C. 81. Where the sheriff levies on the property, a debenture-holder may pay the amount claimed by the sheriff in order to dispose of the execution, and then apply to the court to require the sheriff to return the money, the debenture in this case being what is called a floating security, although the court said that there was no clear definition of such a security. *Taunton v. Sheriff of Warwickshire*, [1895] 1 Ch. 734; *aff'd*, [1895] 2 Ch. 319.

<sup>6</sup> *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93. Debentures whereby a charge in the nature of what is called a floating security over all a company's property is given to the debenture-holders allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture-holders; or, in other words, such debentures constitute a charge, but give a license to the company to carry on its business. So long as the debentures remain a mere

floating security, that is to say, so long as the license to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security; the court holding that, so long as the company continues its business and no steps are taken to wind it up or to get a receiver appointed, a debenture-holder cannot require a particular debtor to apply his debt on the debentures, nor can he prevent a garnishment from coming in ahead of the debentures. *Robson v. Smith*, [1895] 2 Ch. 118. Even though a judgment for salary has been used to garnishee funds belonging to the company, yet the debenture as a floating charge may be given a preference. *Cairney and Davies v. Back*, 96 L. T. Rep. 111 (1906).

<sup>7</sup> *Re Arauco Co.*, 79 L. T. Rep. 336 (1898).

<sup>8</sup> *Illingworth v. Houldsworth* [1904] A. C. 355. In this case the court in its opinion described the difference between a floating charge and a specific charge. A "floating charge" is explained in *Yorkshire, etc. Ass'n*, [1903] 2 Ch. 284.



ture does not prevent a corporation selling its entire assets to another company in exchange for securities of the latter.<sup>1</sup> The right to transfer debentures on the books of the company is not stopped by a judgment by a debenture-holder in behalf of all or by a winding-up order, and a *bona fide* purchaser of the debentures is protected, even where he purchased after such judgment.<sup>2</sup> Under a debenture the company may sell a part of its business free from the debenture, if the debenture does not provide against it.<sup>3</sup> A debenture may have priority over an execution.<sup>4</sup> But money paid to the sheriff while in possession of the property, belongs to the judgment creditor, and not to the debenture holders.<sup>5</sup> First debentures have priority over second debentures, although some of the first are issued after the second are out.<sup>6</sup> In England a receiver and manager will be appointed in behalf of debenture-holders when the company is insolvent and executions are about to be levied.<sup>7</sup>

The power of the corporation to pledge or mortgage unissued debentures as collateral security for money advanced has been conceded.<sup>8</sup> It has been held legal to issue them at a discount.<sup>9</sup>

The English debentures are negotiable or non-negotiable according to the language used in them.<sup>10</sup>

In the United States, as in England, a debenture is "a writing ac-

<sup>1</sup> *Re Borax Co.*, [1901] 1 Ch. 326.

<sup>2</sup> *Re Goy & Co.*, [1900] 2 Ch. 149.

<sup>3</sup> *Re Vivian & Co.*, [1900] 2 Ch. 654.

In England it is legal to allow the trustees of debentures to concur in selling or otherwise dealing with the mortgaged property. *Dawson v. Braime's, etc. Ltd.*, 97 L. T. Rep. 83 (1907).

<sup>4</sup> *Davey & Co. v. Williamson, etc. Ltd.*, [1898] 2 Q. B. 194.

<sup>5</sup> *Robinson v. Burnell's, etc. Bakery, Ltd.*, [1904] 2 K. B. 624.

<sup>6</sup> *Lister v. Lister & Son*, 68 L. T. Rep. 826 (1893). *Cf.* § 762, *supra*.

<sup>7</sup> *Edwards v. Standard, etc. Syndicate*, [1893] 1 Ch. 574. In England a receiver may be appointed before default in the interest on debentures where the company is clearly insolvent. *Re Victoria Steamboats*, [1897] 1 Ch. 158. In England a receiver and manager may be appointed at the instance of a debenture-holder on the ground that the company's assets are not sufficient to pay the debentures and executions are about to be levied, even though there has been no default on the debentures. *Re London, etc. Co.*, [1905] 1 Ch. 576.

<sup>8</sup> *Re Regents' Canal, etc. Co.*, L. R. 3 Ch. D. 43 (1876).

<sup>9</sup> See § 766, *supra*; *Campbell's Case*, L. R. 4 Ch. D. 470 (1876).

<sup>10</sup> For instances of negotiable debentures, see *Re Imperial Land Co.*, L. R. 11 Eq. 478 (1870); *Re Blakely, etc. Co.*, L. R. 3 Ch. 154 (1867); *Higgs v. Northern Assam Tea Co.*, L. R. 4 Exch. 387 (1869); *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). For instances of non-negotiability see *Re Natal, etc. Co.*, L. R. 3 Ch. 355 (1868); *Athenæum, etc. Soc. v. Pooley*, 3 De G. & J. 294 (1858); *Crouch v. Credit Foncier, etc.*, L. R. 8 Q. B. 374 (1873). Debentures may be negotiable as to the company, but not as against other debenture-holders. So held where debentures were issued after a winding-up was commenced. *Mowatt v. Castle, etc. Co.*, L. R. 34 Ch. D. 58 (1886). If the debentures are not negotiable, the company may of course set up defenses against any holder. *Athenæum, etc. Soc. v. Pooley*, 3 De G. & J. 294 (1858). Debentures in England, corresponding in form to bonds here, are not negotiable instruments. *Crouch v. Credit Foncier, etc.*, L. R.



knowledging a debt."<sup>1</sup> A bequest of stocks does not carry debentures, even though the debentures after a period were to be convertible into stock.<sup>2</sup> A so-called debenture was quite common before the business reverses of 1893. Its character was usually as follows: Certain corporate assets, generally railroad bonds or stock, or real-estate mortgages or municipal bonds, or water-works bonds, are deposited with trustees to secure the debenture-holders. The debenture itself is a bond or note of the corporation, reciting on its face that it, with other similar debentures, is secured by the property so deposited in the hands of the trustees. Such a debenture as this is practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities. This form of securities has been quite extensively issued by railroads, where the parent company owns the stock or bonds of many branch or leased lines and wishes to raise money on them on long time. Such debentures are legal. They are substantially a borrowing of money and delivering of bonds or stock as collateral security.<sup>3</sup>

8 Q. B. 374 (1873); *Re Imperial Land Co.*, L. R. 11 Eq. 478 (1870); *Re Natal, etc. Co.*, L. R. 3 Ch. 355 (1868); *Re Rhos, etc. Co.*, 17 W. R. 343 (1868). Where debentures run to a person or his assigns, and he assigns them with the concurrence of the company, the company cannot then set off against them a debt owed by him to it. *Higgs v. Northern Assam Tea Co.*, L. R. 4 Exch. 387 (1869). Debentures payable to bearer are negotiable, and in the winding up may be enforced by the holders free from equities between the company and the original purchasers. Purchasers after the winding up commenced, but in ignorance of it, are also protected. *Re Imperial Land Co.*, L. R. 11 Eq. 478 (1870). But they may be made negotiable by being payable "to the order of," etc. *Re General Estates, etc. Co.*, L. R. 3 Ch. 758 (1868). Although debenture bonds payable to certain persons or bearer, or to bearer alone, are not negotiable and cannot be sued upon at law by bearer, yet he may enforce them in equity on the winding up. *Re Blakely, etc. Co.*, L. R. 3 Ch. 154 (1867). Debentures under seal have been held in England to be merely notes. *Re General Estates, etc. Co.*, L. R. 3 Ch. 758 (1868).

<sup>1</sup> *People v. Miller*, 180 N. Y. 16 (1904).

<sup>2</sup> *Connecticut, etc. Co. v. Chase*, 75 Conn. 683 (1903).

<sup>3</sup> See §§ 317, 464, *supra*, and § 852, *infra*. For a case involving the rights and duties of a trustee holding mortgages as security for debentures, the corporation itself having become insolvent, see *Girard Trust Co. v. McKinley, etc. Co.*, 135 Fed. Rep. 180 (1905). The character of such a transaction is well shown in the case *Ward v. Johnson*, 95 Ill. 215 (1880). Here a bank in the course of its business, and out of moneys received from depositors, loaned large sums of money, taking promissory notes from the borrowers secured by first mortgages upon real estate in Chicago. In pursuance of a resolution of the board of directors of the bank creating an "investment department" of the business, these notes and collateral mortgages were assigned to one Chandler in trust for the purpose of conducting the business of said "investment department." Said trustee was authorized to countersign and issue certificates in sums of \$100 or over to all applicants applying therefor, but in an amount not exceeding the face value of the notes held by him as trustee. Said certi-



Questions relative to the rights, duties, powers, and liabilities of a trustee, or third person holding securities as collateral for the payment of other securities, are considered elsewhere.<sup>1</sup>

The *simon-pure* English debenture — the debenture which is in itself both bond and mortgage combined, without any recording under

cates bore interest at the rate of seven and three-tenths per cent., payable quarterly, and were redeemable by said trustee upon the application of the bearer, either in notes secured by mortgage of equal face value with such certificates, or in cash, at the option of the trustee. The certificates recited that they were secured by bond and mortgage collaterals held in trust, secured upon real estate. The money received by the trustee from the sale of the certificates was by him turned over to the officers of the bank, and by them used to pay depositors, and for all the other purposes for which the bank used money. *Held*, that the trust fund in the hands of the receiver should be applied to the payment of the investment certificates; and that the bank, after receiving large sums of money on the "investment certificates," which money went into its general business, and after having had the full benefit of the contract with the certificate-holders, will not be allowed to interpose the defense of *ultra vires* to defeat the execution of the trust. A subscription for debenture bonds to be paid for in assessments as the company might require cannot be enforced for the benefit of corporate creditors, the bonds not having been delivered. *Pettibone v. Toledo, etc. R. R.*, 148 Mass. 411 (1889). A trust agreement securing debentures based upon mortgages and notes deposited was construed in *Smith v. New Hampshire T. Co.*, 68 N. H. 424 (1896). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings all claims are allowed as of the same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall

purchase such securities at a price named. *Bank Com'r's v. New Hampshire, etc. Co.*, 69 N. H. 621 (1899). Where mortgages are deposited as security for debentures and the corporation issuing the debentures passes into the hands of a receiver, the interest received on the mortgages will be applied to the debentures, even though the corporation might have had a right to use the same if it had remained solvent. *Real Estate Trust Co. etc. v. New England L. & T. Co.*, 93 Fed. Rep. 701 (1899). A debenture is not necessarily a secured claim. It may be merely a writing acknowledging a debt. *Barton, etc. Bank v. Atkins*, 72 Vt. 33 (1899). Bonds issued on shares of stock were involved in *Clarke v. Central R. R. etc. Co.*, 50 Fed. Rep. 338 (1892). In this case, on the final hearing, the bill was dismissed. See *Clarke v. Richmond, etc. Co.*, 62 Fed. Rep. 328 (1894). A third mortgage may be secured by such prior bonds as are delivered up by the parties in exchange for the third-mortgage bonds, under an agreement that such prior bonds are not to be considered paid. *Poland v. Lamoille, etc. R. R.*, 52 Vt. 144 (1879). For a case involving the priority of one class of debentures as against another, see *American, etc. Co. v. Northwestern, etc. Co.*, 166 Mass. 337 (1896).

An example of the new form of debentures secured by a trust deed was that of the Chicago Great Western Ry. Co. There the company secured payment of interest on the debenture stock, and a fair accounting for the preferred, by executing a deed of trust to a trust company.

Another form of debenture is what is known as a "collateral trust indenture." For form of such a collateral trust indenture, see Vol. V, *infra*. See 21 How. 414.

<sup>1</sup> See § 317, ch. XIX, *supra*.



the mortgage acts, and without any delivery of the property — has not been adopted in America. Under the statutes of some of the states a mortgage lien would be good against the company itself, even though it was not recorded, and even though possession was not taken.<sup>1</sup> But in most states it would, under the statutes, be held to be illegal and void as against the rights of other corporate creditors.<sup>2</sup> A debenture which is a mortgage on everything, but which expressly allows the company to sell any part until the mortgagee should take possession, may be void as to other creditors.<sup>3</sup> The English statute making English debentures a floating charge on a shifting property of the corporation does not apply to land in the United States as against a *bona fide* mortgagee of such land.<sup>4</sup> A so-called bond giving the holder an interest in surplus profits and in the surplus capital on dissolution has some features of stock, and hence it cannot be given a lien ahead of corporate creditors.<sup>5</sup> Stock issued as “preferred debenture shares of the capital stock” under the New York statute is a legal contradiction on its face, and in regard to taxation will be construed as being preferred stock.<sup>6</sup> Even though a corporate obligation to pay money is drawn in the shape of a certificate of stock, yet it is not *quasi*-negotiable like a certificate of stock.<sup>7</sup>

§ 777. *Debenture stock secured by an American mortgage.* — “Debenture stock” is an English term. It does not mean shares of stock as in America, but means a debt, an absolute obligation to pay principal and interest at fixed times. English debenture stock is somewhat similar to a registered United States bond. It sometimes is and sometimes is not secured by a mortgage.<sup>8</sup> An American mortgage may be so drawn as to secure American bonds and also English debenture stock. The Commercial Cable Company mortgage executed in 1897

<sup>1</sup> Such a security was enforced as against the company in *White Water, etc. Co. v. Valette*, 21 How. 414 (1858).

<sup>2</sup> The danger and insufficiency of the English debenture as regards corporate property located in America appears in *Re Empire Min. Co.*, L. R. 44 Ch. D. 402 (1890), where the precedence of attachments over the debentures was admitted. A corporation is bound by its president's agreement borrowing money and turning over to the lender the accounts receivable and giving the lender a lien upon present and future assets, such agreement having been carried out for a year, but such agreement may be void under the bankruptcy act,

where possession is taken within four months prior to the bankruptcy. *Mathews v. Hardt*, 79 N. Y. App. Div. 570 (1903).

<sup>3</sup> *Orman v. English, etc. Inv. Trust*, 61 Fed. Rep. 38 (1894). Cf. §§ 811, 852, *infra*.

<sup>4</sup> *Pearson v. Harris*, 200 Fed. Rep. 10 (1912).

<sup>5</sup> *Cass v. Realty, etc. Co.*, 148 N. Y. App. Div. 96 (1911); *aff'd*, 206 N. Y. 649.

<sup>6</sup> *People v. Miller*, 180 N. Y. 16 (1904).

<sup>7</sup> *Amer. Ex. etc. Bank v. Woodlawn Cemetery*, 194 N. Y. 116 (1909).

<sup>8</sup> See § 14, *supra*, for a definition of debenture stock.



accomplished that result.<sup>1</sup> Moreover, it is possible to provide in such a mortgage that the bonds and debenture stock shall be interchangeable, so that the whole mass of debt may flow from the bonds into debenture stock, or from debenture stock into bonds, according as England or America furnishes the best market.

§ 778. *Mode of authorizing, drafting, signing, sealing, and acknowledging corporate obligations to pay money — Liability of the corporation and the corporate officers on irregularly executed instruments — Charter provisions as to authorizing the instruments.* — These subjects are considered elsewhere.<sup>2</sup>

<sup>1</sup> This Commercial Cable Company mortgage is on all the company's telegraph and cable lines in America and Europe, including the telegraph lines of the Postal Telegraph Company. The mortgage runs for five hundred years, thereby making it practically a perpetual investment. It secures \$20,000,000 of bonds and debenture stock, all bearing the same rate of interest, — four per cent. The bonds may at any time be returned to the company and debenture stock obtained in place thereof, at the rate of £206 for every \$1,000 of bonds. The bonds are listed on the New York Stock Exchange; the debenture stock on the London Stock Exchange. The aggregate amount of bonds and de-

benture stock combined is always exactly \$20,000,000. The debenture stock is drawn in accordance with English forms; is issued in amounts of one pound sterling and upwards; is intended solely for the English market, and contains the necessary English features of being practically a perpetual investment, issued in small or large denominations to suit the investor, and having an English place of issue and transfer. A copy of the certificate issued to represent the debenture stock is found in Vol. V, *infra*.

<sup>2</sup> See §§ 721-725, *supra*. As to requirements that the stockholders shall authorize the issue of bonds, see also § 808, *infra*, and § 725, *supra*.



## CHAPTER XLVII.

### MORTGAGES—POWER TO ISSUE AND FORM THEREOF.

#### A. POWER TO MAKE MORTGAGES.

- § 779. Mortgages may be executed and given by corporations—Mortgages by insolvent corporations.
780. A railroad corporation has no implied power to mortgage its railroad.
781. Mortgage on the superfluous land and on the personal property of a railroad corporation.
782. Express authority to mortgage and ratification by the legislature of unauthorized mortgages.
783. Construction of various provisions authorizing mortgages—The mortgagee takes title subject to charter provisions.
784. Purchase-money mortgages need not be expressly authorized.
785. Power to again mortgage after a mortgage has been given.
786. Power to mortgage the whole gives power to mortgage a part.
787. Mortgage to secure future advances, contracts, dividends, etc.—After-acquired property.
788. Who may attack the validity of a mortgage.
789. Purchase-money mortgage issued to an insolvent vendor.
790. The franchise to be a corporation cannot be mortgaged, but the right to operate the road and collect toll may be mortgaged.
791. Mortgages to directors.
792. Forfeiture of the charter—Effect upon a mortgage.
793. Waiver of a part or all of a mortgage and bonds—Mortgages to a state.

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808. The board of directors authorize the execution of mortgages—A stockholders' meeting is not necessary—Statutes requiring stockholders' consent—Waiver of such consent or ratification without formal consent—Estoppel, by recitations in mortgage, as to formalities of authorization.
809. Ratification of an unauthorized mortgage—The resolutions authorizing the mortgage.



§ 810. Signing, sealing, acknowledging and delivering the mortgage.

§ 811. Recording of a mortgage — Release and discharge of mortgage — Decree canceling mortgage.

The corporation of the eighteenth century was carried on by capital furnished by the stockholders. The corporation of the nineteenth century was more often carried on by capital furnished by mortgage bondholders. Prior to the year 1830, when the era of steam railroads began, corporation bonds secured by a mortgage deed of trust were unknown. After that date, however, the vast capital required for the development of the American continent led the American mind to invent the modern corporation mortgage and bond. European investors could be induced to purchase American railroad bonds bearing a high rate of interest and secured by a mortgage, but European investors could not be induced to purchase American stock. The American, on the contrary, ready as usual to take desperate risks in the hope of great gains, was quick to hazard his slender capital in the stock itself, especially of railroads in the undeveloped west and on to the Pacific coast. Great captains of industry arose, such as Vanderbilt and Huntington, who had no capital, but had force and daring, coupled with a genius for building, consolidating, stocking, and bonding great systems of railroads. The power to mortgage gave them the power to raise money, and the power to raise money gave them the power to make America what it is to-day. It is said that Napoleon asked Talleyrand the question "What is America?" and Talleyrand replied "A body without bones." An American has remarked that since that time the bones have been formed and they are bones of steel. They are the railroads of the country, built chiefly from railroad bonds, secured by a mortgage.

In England railroad mortgage bonds of the American type are unknown. The English railroad builder had no occasion to seek far and wide for his capital. Hence he had no occasion to give a mortgage on his railroad, his franchises, and his own future. An English railroad debenture cannot be foreclosed. It is a mortgage, not on the railroads, but on the income only. A receivership may be granted, but not a foreclosure of the property.

American railroad mortgage bonds, being a lien on the property itself, have been the subject of a bewildering maze of litigation in the American courts during the past thirty years. The character of such bonds has already been considered in the preceding chapter. The character of the mortgage securing the bonds is the subject of this chapter.



## A. POWER TO MAKE MORTGAGES.

§ 779. *Mortgages may be executed and given by corporations — Mortgages by insolvent corporations.* — A corporation, other than a railroad corporation, may mortgage its real estate and personal property for the purpose of securing its bonds or other evidences of indebtedness, unless there is some provision in its charter expressly prohibiting or regulating this right. The right to mortgage is a natural result of the right to incur an indebtedness.<sup>1</sup>

<sup>1</sup> Barry v. Merchants' Exch. Co., 1 Sandf. Ch. 280 (1844), where mortgages designed to secure future advances expected to be made upon bonds, such advances being intended for use in the erection of an exchange building at a cost of twice the amount of the capital stock of the company, was held to be valid; Thompson v. Lambert, 44 Iowa, 239 (1876), where it was said that corporate powers in this respect are as extensive as those of an individual; Hunt v. Memphis Gaslight Co., 95 Tenn. 136 (1895); Bell, etc. Co. v. Kentucky, etc. Co., 50 S. W. Rep. 2 (Ky. 1899); Curtis v. Leavitt, 15 N. Y. 9 (1857); White Water, etc. Co. v. Vallette, 21 How. 414 (1858), a canal company; Aurora, etc. Soc. v. Paddock, 80 Ill. 263 (1875); Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620 (1863), holding that, if not upon its face beyond the corporate authority, a contract will be presumed to be valid; Dimpfell v. Ohio, etc. Ry., 9 Biss. 127 (1879); s. c., 7 Fed. Cas. 722; aff'd, 110 U. S. 209, holding that the laches of stockholders may render valid a mortgage executed by a corporation without due authority when the bonds secured by it are in the hands of bona fide purchasers; Third Avenue Sav. Bank v. Dimock, 24 N. J. Eq. 26 (1873), in which the court said that a defense to a bill of foreclosure that a corporation in making the loan was acting *ultra vires* was "unconscionable"; Darst v. Gale, 83 Ill. 136 (1876); Craven County Com'rs v. Atlantic, etc. R. R., 77 N. C. 289 (1877); Pierce v. Emery, 32 N. H. 484 (1856); Shaw v. Norfolk R. R., 71 Mass. 162 (1855); Burt v. Rattle, 31

Ohio St. 116 (1876), a manufacturing company; Pennock v. Coe, 23 How. 117 (1859); Richards v. Merrimack, etc. R. R., 44 N. H. 127 (1862); Miller v. Chance, 3 Edw. Ch. 399 (1840), holding also that a mortgage executed by a majority of a board of trustees excluding the members *ex officio* is valid; Farmers' Loan, etc. Co. v. Hendrickson, 25 Barb. 484 (1857); King v. Merchants' Exch. Co., 5 N. Y. 547 (1851); Leavitt v. Blatchford, 17 N. Y. 521 (1858); Parish v. Wheeler, 22 N. Y. 494 (1860), where a mortgage including property purchased in excess of the powers of the corporation was held binding upon such property. A private corporation may borrow money and give a mortgage to secure its payment. Eastman v. Parkinson, 133 Wis. 375 (1907). A mining company may give a mortgage. Copper, etc. Co. v. Costello, 11 Ariz. 334 (1908).

A mortgage on real estate may be given by a corporation to secure past-due debts. Martin v. Niagara, etc. Mfg. Co., 44 Hun. 130 (1887); aff'd, 122 N. Y. 165, 171, criticizing Carpenter v. Black Hawk, etc. Co., 65 N. Y. 43 (1875). In general see also *Re Patent File Co.*, L. R. 6 Ch. App. 83 (1870); *Re General, etc. Assur. Co.*, L. R. 14 Eq. 507 (1872), an insurance company; *Re General South Amer. Co.*, L. R. 2 Ch. D. 337 (1876); Wood v. Whelen, 93 Ill. 153 (1879), where a gas company was, however, given express authority; Lehman v. Tallassee, etc. Co., 64 Ala. 567 (1879), where express authority was given; West v. Madison County Agric. Board, 82 Ill. 205 (1876), a county fair company; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548 (1883), a water com-



The power of the ordinary business corporation to give a mortgage is a most necessary power. A denial of this power would re-

pny; Australian, etc. Co. v. Mounsey, 4 K. & J. 733 (1858), a navigation company; Thomas v. Citizens' Ry., 104 Ill. 462 (1882), holding that where a corporation has power to borrow money (after complying with certain conditions) and secure the same by mortgage upon its property, such corporation, after having received the loan on security of its mortgage, will not be allowed to avoid liability by questioning its own power to make the mortgage, or by showing an irregular or defective execution of the power. Nor will a subsequent judgment creditor or a purchaser at execution sale on a judgment subsequent to the mortgage stand in any other or better position than the company. Susquehanna, etc. Co. v. General Ins. Co., 3 Md. 305 (1852); Bardstown, etc. R. R. v. Metcalfe, 4 Metc. (Ky.) 199 (1862); Coe v. Johnson, 18 Ind. 218 (1862); Jones v. Guaranty, etc. Co., 101 U. S. 622 (1879), holding that power to mortgage to carry on business implies power to mortgage to secure money to be advanced; Memphis, etc. R. R. v. Dow, 19 Fed. Rep. 388 (1884). See also 120 U. S. 287, 300 (1887), holding that lawful power to purchase a franchise implies the power to mortgage it to secure the purchase-money; Hopson v. Aetna Axle, etc. Co., 50 Conn. 597 (1883), where a mortgage given to directors to secure them for their guaranty of corporation paper was held valid; Scott v. Colburn, 26 Beav. 276 (1858), holding that power to borrow on mortgage includes power to mortgage to secure a bill given for an existing debt; Talladega Ins. Co. v. Peacock, 67 Ala. 253 (1880); Commonwealth v. Smith, 92 Mass. 448 (1865). In this case a statute was held to have taken away the power to mortgage. To same effect, Richardson v. Sibley, 93 Mass. 65 (1865). *Contra*, Steiner's Appeal, 27 Pa. St. 313 (1856), holding that special authority from the legislature is necessary.

A corporation may give a mortgage to raise an attachment which was

levied on land prior to its purchase by the corporation. Leonard, etc. Co. v. Bank of America, 86 Fed. Rep. 502 (1898). The mortgage may be given in order to secure the carrying out of a contract. Mason v. York, etc. R. R., 52 Me. 82 (1861). A mortgage is valid as against the corporation giving it, although the officers give to the mortgagee their individual notes as additional security and cause the corporation to issue stock to themselves without payment, which they deposit also as collateral with the mortgagee. The giving of a mortgage is not an increase of indebtedness such as is prohibited by the Pennsylvania constitution. Powell v. Blair, 133 Pa. St. 550 (1890). Bonds secured by a mortgage on land of a turnpike company are valid and the mortgage may be foreclosed. The defense that the mortgage was unauthorized by statute is not good. Moreover, delay is fatal. Browning v. Mullins, 13 S. W. Rep. 427 (Ky. 1890). A trading corporation has implied power to borrow money and give a mortgage therefor. Wood v. Meyer, 7 S. Rep. 359 (Miss. 1890). "Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money or their debts." Carpenter v. Black Hawk, etc. Co., 65 N. Y. 43, 48 (1875). "By the common law the power to alien and mortgage lands in the course of its business inhered in corporations capable of acquiring and holding them, as in natural persons, as an incident of ownership." Rochester Sav. Bank v. Averell, 96 N. Y. 467, 472 (1884); Re Nash Brick, etc. Co., 3 Nova Scotia Dec. 254 (1873). Where all the directors and all the stock except one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. Witter v. Grand Rapids, etc. Co., 78 Wis. 543 (1891). Concerning questions relative to mortgages made to secure the payment of preferred dividends, see ch. XVI, *supra*. The directors of a trading



strict the operations of corporations to such an extent as to discourage the transaction of business by or through corporations. It is a power dangerous but necessary. It often leads to insolvency, and often it saves an enterprise from insolvency. It is a power that exists by implication of law, and it is also held to arise from the right to purchase or sell land.<sup>1</sup> A corporation may of course mortgage or pledge personal property for the payment of loans.<sup>2</sup> But inasmuch as an iron

company have implied power to borrow money and give mortgages upon the property of the company in furtherance of its objects. *General Auction, etc. Co. v. Smith*, [1891] 3 Ch. 432. A gas company may borrow money and give a mortgage. *Hays v. Galion Gas, etc. Co.*, 29 Ohio St. 330 (1876); *Detroit v. Mutual Gas Light Co.*, 43 Mich. 594 (1880). A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of a *bona fide* mortgagee without notice of such debentures and such contract. *Re Castell, etc. Lim.*, [1898] 1 Ch. 315. It is no defense to a mortgage that it was given by a trust or combination in restraint of trade. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). A private corporation as mortgagor cannot question its power to mortgage nor the power of the lender to take the mortgage where the money has been paid and is still held by the mortgagor. *Savings & T. Co. v. Bear Valley, etc. Co.*, 112 Fed. Rep. 693 (1902). Where the property of an irrigation company, by the terms of its organization, belongs to the owners of land who participate in taking the water therefrom, a mortgage on such property by the company is not valid. *New La Junta, etc. Co. v. Kreybill*, 17 Colo. App. 26 (1901). A pledge or mortgage by a manufacturing company of all its assets to secure depositors in a savings bank branch of its business, in accordance with a statute, was involved in *Newton v. Eagle, etc. Co.*, 101 Fed. Rep. 149 (1897). An electric light and power company may mortgage its property without express authority from the legislature so to do, especially where it is organized under the act authorizing incorporation for

any lawful business, even though it is using streets under licenses granted by municipalities. *American, etc. Co. v. General Electric Co.*, 71 N. H. 192 (1901). *Ultra vires* as a defense to a mortgage must be pleaded. *United States, etc. Co. v. McClure*, 42 Oreg. 190 (1902).

<sup>1</sup> *Jackson v. Brown*, 5 Wend. 590 (1830); *Gordon v. Preston*, 1 Watts (Pa.) 385 (1833); *Watts's Appeal*, 78 Pa. St. 370 (1875); *Taber v. Cincinnati, etc. R. R.*, 15 Ind. 459 (1860); *McAllister v. Plant*, 54 Miss. 106 (1876); *West v. Madison County Agric. Board*, 82 Ill. 205 (1876). A purchaser at a judicial sale with notice of a prior incumbrance, who is neither a stockholder nor creditor, cannot question the power of the corporation to make the prior mortgage. *Darst v. Gale*, 83 Ill. 136 (1876).

<sup>2</sup> *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *Garrett v. May*, 19 Md. 177 (1862), where the income of a railroad was pledged to secure bonds; *Clark v. Titcomb*, 42 Barb. 122 (1864); *Shears v. Jacob*, L. R. 1 C. P. 513 (1866); *Leo v. Union Pac. Ry.*, 17 Fed. Rep. 273 (1883), holding that power to pledge securities is included in the power to sell them; *Clark v. Titcomb*, 42 Barb. 122 (1864); *Nelson v. Eaton*, 26 N. Y. 410 (1863), cases of a pledge by an insurance company; *Combination Trust Co. v. Weed*, 2 Fed. Rep. 24 (1880), where a pledge of unissued stock to secure a loan was held lawful. See also § 465, *supra*; *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190 (1881), holding lawful a pledge of the bonds of the corporation to secure a corporate debt; *Castle v. Lewis*, 78 N. Y. 131 (1879), in which property was assigned to secure a loan previously advanced to the corporation. A corporation may lease its



and steel manufacturing company has no power to operate a public or private warehouse, warehouse receipts issued by such a corporation on its own property are not protected like the ordinary warehouse receipts, and corporate creditors who hold such receipts are not protected thereby, and the transaction may not amount to a pledge.<sup>1</sup>

The power of an insolvent corporation to give a mortgage to some of its creditors and thereby prefer them to others is denied in some of the states, but at common law this power undoubtedly exists.<sup>2</sup>

If a mortgage is prohibited it is void.<sup>3</sup> Sometimes mortgages by corporations are prohibited by statute, unless a part or all the stockholders assent to the giving of the mortgage.<sup>4</sup> Where the statutes authorize a religious corporation to mortgage its property upon an order of the court, this prohibits a mortgage unless such order is made.<sup>5</sup>

Although the statutes limit the amount of debt to secure which a mortgage may be given, yet a mortgage may be valid although it exceeds the amount specified in the statute.<sup>6</sup> A mortgage by a corporation to secure its own debts and debts of one of its stockholders may be legal as to the former, and illegal as to the latter.<sup>7</sup> A mortgage may

property for one hundred years and then give a mortgage on its interest. The lessee had agreed in advance to pay the interest on the bonds. *First Nat. Bank v. Sioux City, etc. Co.*, 69 Fed. Rep. 441 (1895); *aff'd*, 173 U. S. 99. A railroad mortgage on all real and personal property may be valid though not in conformity with the general chattel mortgage act in respect to acknowledgment. *Cooper v. Corbin*, 105 Ill. 224 (1883).

<sup>1</sup> *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560 (1898).

<sup>2</sup> See § 691, *supra*. Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration. *Grant v. Lowe*, 89 Fed. Rep. 881 (1898).

<sup>3</sup> *Union Trust Co. v. New York, etc. R. R.*, 17 Weekly L. Bull. 176, holding that a mortgage in which the directors are interested contrary to statute is void where the statute so prescribes. Where by statute mortgages on land in more than one county

are void, a railroad mortgage is void, and the bondholders are merely unsecured creditors. *Farmers' L. & T. Co. v. Oregon, etc. Ry.*, 24 Fed. Rep. 407 (1885).

<sup>4</sup> See § 808, *infra*.

<sup>5</sup> *Dudley v. Congregation, etc. St. Francis*, 138 N. Y. 451 (1893).

<sup>6</sup> See § 760, *supra*.

<sup>7</sup> *Hatch v. Johnson L. & T. Co.*, 79 Fed. Rep. 828 (1895). Where a railroad company contracts to give a mortgage to secure bonds to be given to the contractor, the bonds and mortgage are enforceable, although the bonds were issued by another company, and were secured by a mortgage on the property of the company which made the contract. It was an equitable mortgage if nothing more, and prior in right to other liens. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). A street-railway company and a land company cannot legally join in the execution and issue of bonds and mortgages on the property of both, even though the proceeds are used to pay the debts of the latter and to construct the railway of the former. But each is liable on the bonds to the extent of the proportion of the money received by it.



be for a period of time extending beyond the corporate existence of the mortgagor.<sup>1</sup>

§ 780. *A railroad corporation has no implied power to mortgage its railroad.* — Unless the charter or the statutes of the state expressly give this power, such a mortgage is void.<sup>2</sup>

This is the rule laid down in a few cases and in the *obiter dicta* of many cases, and it is the law. Nevertheless there are many decisions which question it and some which declare that it is not the law.<sup>3</sup>

*Northside Ry. v. Worthington*, 88 Tex. 562 (1895). Even though a corporation, as the owner of an undivided interest in land, mortgages it to secure the debt of an individual, the owner of the remaining interest in the land cannot question the title of a purchaser at foreclosure sale on the ground that the mortgage was *ultra vires*. *Collins v. Rea*, 127 Mich. 273 (1901). See also § 775, *infra*.

<sup>1</sup> See § 641, *supra*. A city may grant to a street railway the right to construct and operate its lines of railway for a period longer than the duration of the charter of the corporation. *Detroit v. Detroit, etc. Ry.*, 184 U. S. 368 (1902).

<sup>2</sup> "A railroad corporation cannot mortgage its franchise and railroad without the authority of the legislature, as shown by previous leave or subsequent ratification." *Daniels v. Hart*, 118 Mass. 543 (1875). See also dictum in *Platt v. Union Pac. R. R.*, 99 U. S. 48, 57 (1878); *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130, 399 (1871), and English cases cited; *Susquehanna, etc. Co. v. Bonham*, 9 Watts & S. (Pa.) 27 (1845); *Steiner's Appeal*, 27 Pa. St. 313 (1856); *Wood v. Bedford, etc. R. R.*, 8 Phila. 94 (1871); *Winchester, etc. Turnp. Co. v. Vimont*, 5 B. Mon. (Ky.) 1 (1844); *State v. Morgan*, 28 La. Ann. 482 (1876). Substantially the same question arises and the same reasoning applies in the sale, lease, or consolidation of railroads, concerning which see ch. LIII, *infra*. A statute prescribing that no mortgage shall be executed unless it secures existing debts invalidates a mortgage which does not include such debts. If the bonds are invalid the mortgage falls with them. *Commonwealth v. Smith*, 92

Mass. 448 (1865). The statutes of Massachusetts prohibit mortgages by street railways unless especially allowed by their charters. *Richardson v. Sibley*, 93 Mass. 65 (1865). A cemetery corporation in Minnesota is a quasi-public corporation and cannot mortgage its land except by express authority. The mortgage is void. *Wolford v. Crystal Lake Cem. Assoc.*, 54 Minn. 440 (1893). In England there can be no foreclosure of a street-railway mortgage, the court holding that the mortgage can cover only the "undertaking," i.e. the right to continue the business and take the profits, and that consequently there can be no foreclosure of the *corpus* of the property. This is the established policy of England, not only as to street railways, but as to steam railroads and water-works. *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, applying to street railways the cases of *Gardner v. London, etc. Ry.*, L. R. 2 Ch. App. 201 (1867); *Blaker v. Herts, etc. Waterworks Co.*, L. R. 41 Ch. D. 399 (1889); and overruling *Bartlett v. West, etc. Tramways Co.*, [1894] 2 Ch. 286. See also § 892, notes, *infra*.

<sup>3</sup> See *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388, 391 (1884). In New Hampshire, in 1857, the United States circuit court, after stating that in England a railway, and the right to own and operate a railway, could not be sold or mortgaged unless the party owning and operating it was expressly authorized to sell or mortgage it, proceeded to say: "The franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent



An injunction will be granted at the instance of a stockholder to

with their being assignable." The court said there was great doubt about the inherent power to mortgage or sell, but in this case the mortgage had been recognized by the legislature, and hence was valid. *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857). The franchise to be a corporation cannot be mortgaged. But the "franchises to build, own, and manage a railroad and to take tolls thereon are not necessarily corporate rights" and may be mortgaged. *New Orleans, etc. R. R. v. Delamore*, 114 U. S. 501 (1885), a street-railway case. A railroad corporation has implied power to mortgage its property and franchises to secure bonds given in payment for rails. *Miller v. Rutland, etc. R. R.*, 36 Vt. 452, 488 (1863). A railroad corporation has implied power to mortgage its property and franchises, excepting the franchise to be a corporation. *Bardstown, etc. R. R. v. Metcalfe*, 4 Met. (Ky.) 199 (1862); *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878). See also *Pollard v. Maddox*, 28 Ala. 321 (1856); *McAlister v. Plant*, 54 Miss. 106 (1876). In Alabama it has been held that "corporations created for the construction of railroads, in the absence of limitation or restraint by statute, have power to borrow money and make bonds, bills, or promissory notes for its repayment; and also power to mortgage its property, real or personal, as a security for such evidence of debt," and that it has these powers incidentally and without express enactment. *Kelly v. Alabama, etc. R. R.*, 58 Ala. 489 (1877). See also *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 729 (1877) (rev'g court below), a dictum, the court saying: "It cannot be successfully contended, in the face of many decisions to the contrary, both in England and America, of courts of the highest authority, that a statutory corporation is incapable of mortgaging its property, unless its incapacity to do so is either expressly declared or is to be gathered by implication from the terms of the act of incorporation. In other words, no

enabling power is requisite to confer the authority to mortgage, but *prima facie* every corporation must be taken to possess it." In *Arthur v. Commercial, etc. Bank*, 17 Miss. 394 (1848), an assignment of a railroad for the benefit of creditors was held to be valid except as objected to by the state.

In *Shepley v. Atlantic, etc. R. R.*, 55 Me. 395, 407. (1867), the court said in regard to this doctrine as follows:

"The whole argument seems to have no greater force than this: that it is dangerous to the public interests to have the powers and privileges conferred by a railroad franchise transferred from the original corporators to a new body. But when we consider how little importance is attached to the persons of the original corporators, how soon death must, and other circumstances may, remove them from all participation in the affairs of the road, how constantly those who have the active management of it are in fact being changed, we shall see how little practical merit this argument has. At the beginning the corporators undoubtedly have a controlling influence, but afterwards the directors are elected by the stockholders and are often changed. Is there any reason to suppose that if a mortgage should, by foreclosure, transfer the franchise to new hands, that as capable men would not be appointed to manage the road as before? Would not the bondholders be as interested in and as capable of appointing suitable managers as the stockholders? Does any one fear that the public interest would not be as safe with the former as the latter? Why, then, is it dangerous to the public interests to allow such a transfer?"

"We confess that, after giving the matter much thought, the doctrine that all railroad mortgages made without the consent of the legislature are illegal and void because they may operate as a permanent transfer of the corporate powers from the original corporators to another body seems to us to have little to commend it and much to condemn it."



prevent the corporation from giving a mortgage which would be *ultra vires*.<sup>1</sup>

§ 781. *Mortgage on the superfluous land and on the personal property of a railroad corporation.*—A railroad corporation may, without express authority so to do, mortgage such of its land and property as is not necessary to the operation of the road.<sup>2</sup> Hence the mortgage may be valid as to the property which the corporation is authorized to mortgage, and invalid as to the rest.<sup>3</sup> The question of what personal property a mortgage covers is considered elsewhere.<sup>4</sup>

§ 782. *Express authority to mortgage and ratification by the legislature of unauthorized mortgages.*—Generally the charters of the corporations or the statutes of the state authorize railroad corporations to mortgage their railroads, property, and franchises. Where a railroad company has given a mortgage without authority so

And in Maine it is held that the general policy of the state in allowing mortgages by railroads is sufficient. *Kennebec, etc. R. R. v. Portland, etc. R. R.*, 59 Me. 9 (1871). See also *Morrill v. Noyes*, 56 Me. 458 (1863).

<sup>1</sup> *McCalmont v. Philadelphia, etc. R. R.*, 7 Fed. Rep. 386 (1881).

<sup>2</sup> *Platt v. Union Pac. R. R.*, 99 U. S. 48, 57 (1878). A railroad company may, without express authority, mortgage lands which "were not acquired to enable the corporation to carry on the business which it was chartered to do for the benefit of the public, nor needed or used for that purpose. Their alienation in no wise impaired or affected the usefulness of the company as a railroad, or its ability to exercise any of its corporate franchises." A railroad company having power to acquire land for depots and warehouses, and to sell or lease them to other companies, may mortgage them. *Hendee v. Pinkerton*, 96 Mass. 381 (1867). A mortgage may be made on lands not used for permanent way, station-houses, and station grounds, without express authority. *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 735 (1877), citing *Tucker v. Ferguson*, 22 Wall. 527, 572 (1874); *Farnsworth v. Minnesota, etc. R. R.*, 92 U. S. 49 (1875). The company may, without express authority, mortgage ordinary real estate not used in

the business, but received in payment for subscriptions to stock. *Taber v. Cincinnati, etc. Ry.*, 15 Ind. 459 (1860). A railroad may mortgage its personal property not affixed to the road, though used in the operation of it. *Pierce v. Emery*, 32 N. H. 484 (1856). Express power to mortgage the lots and such property as a dock company acquires under a statute does not prevent the company's giving a mortgage on other property owned by the company. *McCormick v. Parry*, 7 Ex. 355 (1852).

<sup>3</sup> If the mortgage is authorized and valid on any part of the property which it purports to cover, it is not wholly void, but is void only as to the remaining property. *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 734 (1877), reversing the court below. See also *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). A lessor railroad may give a mortgage on the cash rental to which it is entitled, and may take the bonds secured by such mortgage. *Hazard v. Vermont, etc. R. R.*, 17 Fed. Rep. 753 (1883). If the mortgage covers property which the company is authorized to mortgage, and also property which it is not authorized to mortgage, it is good as to the former. *Hendee v. Pinkerton*, 96 Mass. 381 (1867).

<sup>4</sup> See § 852, *infra*.



to do, the legislature may subsequently ratify and validate the mortgage.<sup>1</sup>

§ 783. *Construction of various provisions authorizing mortgages — The mortgagee takes title subject to charter provisions.* — If the charter authorizes the corporation to sell, this is sufficient authority to mortgage. Power to sell implies the power to mortgage,<sup>2</sup> and power to "pledge" the property gives power to mortgage.<sup>3</sup> But power to mortgage the real estate does not give power to mortgage the franchises.<sup>4</sup> Power to give "such securities in amount and kind" as the company sees fit gives power to mortgage.<sup>5</sup>

The general power of a corporation to mortgage its property is not abridged or destroyed by a special authority to make a mortgage for a particular purpose.<sup>6</sup>

<sup>1</sup> A mortgage which is prohibited by statute may subsequently be validated by statute. *Gross v. U. S. Mortgage Co.*, 108 U. S. 477 (1883); *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858); *Howe v. Freeman*, 80 Mass. 566 (1860). The power to mortgage may be given after the mortgage is executed, and such mortgage may be validated. *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870); *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857); *Kennebec, etc. R. R. v. Portland, etc. R. R.*, 59 Me. 9 (1871); *Shepley v. Atlantic, etc. R. R.*, 55 Me. 395 (1867); *Shaw v. Norfolk, etc. R. R.*, 71 Mass. 162 (1855); *Richards v. Merrimack, etc. R. R.*, 44 N. H. 127 (1862), where the ratification was by authorizing the trustees in the mortgage to sell the road. The ratification cannot cure the defect that the vendor of the property to the corporation objects to the deed, the vendor being a corporation, and there being dissenting stockholders. *Mayor, etc. v. Knoxville, etc. R. R.*, 22 Fed. Rep. 758 (1884). See also § 808, *infra*.

<sup>2</sup> Express power given to sell gives also power to mortgage. *Willamette, etc. Co. v. Bank, etc.*, 119 U. S. 191 (1886); *McAllister v. Plant*, 54 Miss. 106 (1876); *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 736 (1877); *Branch v. Atlantic, etc. R. R.*, 3 Woods, 481 (1879); s. c., 4 Fed. Cas. 12, and 106 U. S. 468. Power to "transfer" the property gives power to mortgage it. *Dunham v. Isett*, 15

*Iowa*, 284 (1863). Power to "transfer all its property, rights, privileges, and franchises" gives power to mortgage. *East Boston, etc. R. R. v. Eastern R. R.*, 95 Mass. 422 (1866). Power to mortgage gives power to sell at foreclosure sale the right of way, franchises, etc. *New Orleans, etc. R. R. v. Delamore*, 114 U. S. 501 (1885). Under the general statutes authorizing every corporation to mortgage its real and personal property, a street-railway company may mortgage its street railway. *Hovelman v. Kansas City H. R. R.*, 79 Mo. 632 (1883).

<sup>3</sup> "The power to pledge the franchises and rights of the corporation implies as incident thereto the power to pledge everything that may be necessary to the enjoyment of the franchise and upon which its real value depends." *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857); *Mobile, etc. R. R. v. Talman*, 15 Ala. 472 (1849).

<sup>4</sup> *Randolph v. Wilmington, etc. R. R.*, 11 Phila. 502 (1876); s. c., 20 Fed. Cas. 264.

<sup>5</sup> *Pierce v. Milwaukee, etc. R. R.*, 24 Wis. 551 (1869). See *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857), holding that power to mortgage the franchise implies the power to pledge everything that may be necessary to the enjoyment of it.

<sup>6</sup> *Allen v. Montgomery R. R.*, 11 Ala. 437, 454 (1847); *Mobile, etc. R. R. v. Talman*, 15 Ala. 472 (1849). Cf. *Alta, etc. Co. v. Alta, etc. Co.*, 78 Cal. 629 (1889); *Bickford v. Grand Junction,*



Power to mortgage in order to carry out the purposes of the incorporation authorizes a mortgage to buy rolling-stock and build branch lines.<sup>1</sup>

Although the statutes authorize a mortgage for certain purposes only, yet, if the bonds are used for other purposes, *bona fide* purchasers are protected.<sup>2</sup> The general rule is that the negotiability of the bonds gives negotiability to the mortgage securing the bonds.<sup>3</sup> A provision in an act of Congress authorizing a bridge that all railroads shall have the right to run their trains over such bridge is binding on prior and subsequent mortgages given by the company which constructed the bridge and is also binding on purchasers at the foreclosure sale under any such mortgage.<sup>4</sup>

§ 784. *Purchase-money mortgages need not be expressly authorized.* — A railroad corporation having power to purchase a railroad has implied power to give a purchase-money mortgage in the transaction.<sup>5</sup> A purchase-money mortgage may be created by the provisions

etc. Ry., 1 Can. Sup. Ct. 696 (1877), reversing the court below (Grand Junction, etc. Ry. v. Bickford); *Uncas Nat. Bank v. Rith*, 23 Wis. 339 (1868), holding that power to mortgage the franchise does not exclude other forms of security. Where statutory power is given to a railroad corporation to issue bonds to aid in the construction and equipment of the road, and to secure the same by mortgage, the corporation is not limited in the amount of its mortgage, but only as to the purposes thereof. A second mortgage may also be made. A reorganized company may succeed to these same powers. *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883). A corporation may give a mortgage to secure an ordinary debt, even though the charter expressly authorizes it to give a mortgage to secure bonds. *Brown v. Citizens', etc. Co.*, 72 N. J. Eq. 437 (1907).

<sup>1</sup> *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). Power to mortgage the entire property and franchise has been held not to give power to mortgage the income, rents, and profits. *Georgia S. & F. Ry. v. Barton*, 101 Ga. 466 (1897), the court holding also that power to one corporation to enjoy all the rights and privileges granted to another does not give to the former a power of mortgage which was given to the latter.

<sup>2</sup> See §§ 764, 767, *supra*.

<sup>3</sup> See § 768, *supra*, for the decisions *pro* and *con* on this subject.

<sup>4</sup> *Mason City, etc. R. R. v. Union Pacific R. R.*, 124 Fed. Rep. 409 (1903); *aff'd*, 199 U. S. 160. Where a city, in order to get water-works, causes a corporation to be organized and to issue mortgage bonds to pay for the water-works, and the city buys its stock, but prior to the execution of the mortgage a taxpayer's suit was commenced to enjoin the project, and this suit finally succeeds, a foreclosure of the mortgage is subject to the invalidity of the project, yet the mortgage is good as to property not attached to city property. *City of Laporte v. Northern T. Co.*, 187 Fed. Rep. 20 (1911).

<sup>5</sup> *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884), a case arising in the New York circuit. In the same case from the Arkansas circuit, 120 U. S. 287 (1887), the supreme court sustained the same doctrine by sustaining the mortgage as given, not under the statutory authority to secure "money borrowed," but as a common-law mortgage. See p. 300. Where one road has been leased to another, the two roads may subsequently be consolidated, and consolidated mortgage bonds issued, of which a part shall go to the former



of the deed of conveyance requiring further payments from the vendee.<sup>1</sup> Under a statutory power to execute a mortgage to secure money borrowed, a purchase-money mortgage may be executed.<sup>2</sup>

§ 785. *Power to again mortgage after a mortgage has been given.* — Where power is given to make a mortgage to complete a railroad and such mortgage is not given, and the railroad is completed, the power is no longer available.<sup>3</sup> But where a corporation has power to give mortgages, a consolidated company made up of the former and of other companies succeeds to that power.<sup>4</sup> A corporation in purchasing property which is subject to a mortgage may give its own mortgage in cancellation of the old mortgage. This is not a guarantee of a debt.<sup>5</sup>

§ 786. *Power to mortgage the whole gives power to mortgage a part.* — If a railroad company has power to mortgage its whole road, this gives it power to mortgage a part of the road.<sup>6</sup>

§ 787. *Mortgage to secure future advances, contracts, dividends, etc. — After-acquired property.* — A mortgage may be given to secure future sums to be paid by the mortgagee to the corporation.<sup>7</sup> Where

lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor the court will not disturb it. *Hazard v. Vermont, etc. R. R.*, 17 Fed. Rep. 753 (1883). The priority of purchase-money mortgages over other liens is considered in ch. L, *infra*.

<sup>1</sup> A purchase-money mortgage may be contained in the deed, by which the vendor is to be paid a certain sum or shares of stock in lieu thereof. *Pinch v. Anthony*, 90 Mass. 536 (1864). A purchase-money mortgage may be contained in the deed, by which mortgage the vendee and mortgagor must complete the road and issue certain stock to the vendor. *Tennessee, etc. R. R. v. East Alabama, etc. Ry.*, 73 Ala. 426 (1882). A purchase-money mortgage based on an old contract may be given, even though the corporation is insolvent when the mortgage is given. *Stokes v. Detrick*, 75 Md. 256 (1892). Where a purchase-money mortgage is given as security for bonds, but the vendor rejects the bonds and they are used for other purposes, the vendor loses his lien. *Rice's Appeal*, 79 Pa. St. 168 (1875). See also in general, § 855, *infra*.

<sup>2</sup> *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904).

<sup>3</sup> *East Tennessee, etc. Ry. v. Frazier*, 139 U. S. 288 (1891).

<sup>4</sup> *Mead v. New York, etc. R. R.*, 45 Conn. 199 (1877); *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883).

<sup>5</sup> *Citizens', etc. Bank v. Globe, etc. Works*, 155 Mich. 3 (1908).

<sup>6</sup> *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32; *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. Rep. 696 (1877), reversing the court below. But see *quære* in *East Boston, etc. R. R. v. Eastern R. R.*, 95 Mass. 422 (1866), and a dictum to the contrary in *East Boston, etc. R. R. v. Hubbard*, 92 Mass. 459, note (1865). See also ch. LIII, *infra*, concerning the sale of part of a railroad under a power to sell the whole. "If they could mortgage the whole they could mortgage a part." *Chartiers Ry. v. Hodgins*, 85 Pa. St. 501, 506 (1877). Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an action on a subscription. *Chartiers Ry. v. Hodgins*, 85 Pa. St. 501 (1877). See also *Jones, Corp. Bonds*, § 13.

<sup>7</sup> *Jones v. Guaranty, etc. Co.*, 101



a mortgage secures bonds, only a part of which are issued at the time of the execution of the mortgage, it seems that the amount of bonds issued or to be issued should be fixed.<sup>1</sup> The mortgage need not necessarily be to secure the payment of money. It may be to secure the performance of a contract,<sup>2</sup> or the payment of preferred dividends,<sup>3</sup> or ordinary dividends on a sale of the corporate property.<sup>4</sup> A so-called bond giving the holder an interest in surplus profits and in the surplus capital on dissolution has some features of stock, and hence it cannot be given a lien ahead of corporate creditors.<sup>5</sup> A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guarantee certain debts of the company.<sup>6</sup>

U. S. 622 (1879); *Sabin v. Columbia Fuel Co.*, 25 Oreg. 15 (1893). Where the mortgagee has the option to make future advances or not, each advance is as upon a new mortgage; but where the mortgagee is bound to make the advances, the lien therefor relates back to the date of the mortgage and is superior to liens or conveyances subsequent to that mortgage. *Tompkins v. Little Rock, etc. Ry.*, 15 Fed. Rep. 6 (1882).

<sup>1</sup> In the case *Flynn v. Coney Island, etc. R.R.*, 26 N. Y. App. Div. 416 (1898), the court in a dictum said that in a mortgage securing bonds, a part of which bonds were to be issued in the future, it is necessary that the mortgage fix a limit on the amount of bonds to be issued, "for otherwise no bondholder could know the extent or sufficiency of his security." It is of course familiar law that a mortgage running to a single creditor may secure future advances, even though the amount of such future advances is not specified. *Brown v. Keifer*, 71 N. Y. 610 (1877); *Robinson v. Williams*, 22 N. Y. 380 (1860); *Ackerman v. Hunsicker*, 85 N. Y. 43 (1881).

<sup>2</sup> *Vaupell v. Woodward*, 2 Sand. Ch. 143 (1844). The mortgage may be to secure not only the bonds, but also the performance by the corporation of a construction contract which it has let. But the terms of the mortgage may make the bonds a prior lien to the contract, so that the mortgage secures first the bonds and then the contract. *Mason v. York, etc.*

*R.R.*, 52 Me. 82 (1861). A mortgage may be given by a corporation to become due when the corporation ceases to carry on the purpose for which it was incorporated. *Canandaigua Academy v. McKechnie*, 90 N. Y. 618 (1882).

<sup>3</sup> See § 271, *supra*.

<sup>4</sup> Where, under special charter power, the company constructs a new road, and by a trust deed sets aside a certain proportion of the entire gross receipts of the company for dividends on the stock issued on the new line, a receiver of the company will be compelled to pay the amount called for by such a trust deed. *Re Eastern, etc. Ry.*, L. R. 45 Ch. D. 367 (1890); *Proffitt v. Wye Valley Ry.*, 64 L. T. Rep. 669 (1891). See also § 775, *supra*. Where a mortgage is connected with a lease of property in such a manner as to obligate the lessee to apply the income to the interest and a sinking fund, but a foreclosure takes place, the lessee cannot stop the foreclosure, even though the lessee owns all the bonds, inasmuch as the stockholders of the mortgagor company have an interest in the suit. A stockholder will not be allowed to intervene so long as the trustee continues to prosecute the suit. *Phillips v. Southern, etc. R.R.*, 110 Ky. 33 (1901).

<sup>5</sup> *Cass v. Realty, etc. Co.*, 148 N. Y. App. Div. 96 (1911); *aff'd*, 206 N. Y. 649.

<sup>6</sup> *Re Pyle Works*, [1891] 1 Ch. 173. See also §§ 692, 693, *supra*.



The power of a corporation to give a mortgage to secure bonds issued by another corporation would seem to exist where the power exists to guarantee the payment of such bonds.<sup>1</sup>

A mortgage may cover property subsequently acquired by the company.<sup>2</sup> A chattel mortgage given by a corporation may be reformed so as to include after acquired property as originally contemplated.<sup>3</sup>

The question of whether the priority of liens may be tried in the foreclosure suit is considered elsewhere.<sup>4</sup>

§ 788. *Who may attack the validity of a mortgage.* — This subject is considered elsewhere.<sup>5</sup>

§ 789. *Purchase-money mortgage issued to an insolvent vendor.* — Where a corporation sells all its property to another corporation without authority so to do, or where an insolvent copartnership sells all its property to a corporation, and in either case the vendor takes its pay in the stock and bonds of the vendee, the tendency of the law is to set aside the transaction, except where the rights of *bona fide* parties have intervened.<sup>6</sup>

A consolidated road may make a mortgage which will take precedence over the unsecured debts of one of the consolidating companies.<sup>7</sup>

<sup>1</sup> Concerning the power to guarantee, see § 775, *supra*. Under the Ohio statutes a coal company may guarantee the bonds of a railroad company and may give a mortgage to secure such a guaranty. *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898).

<sup>2</sup> See ch. L, *infra*.

<sup>3</sup> *Marine Savings Bank v. Norton*, 160 Mich. 614 (1910).

<sup>4</sup> See § 842, *infra*.

<sup>5</sup> See § 848, *infra*.

<sup>6</sup> See ch. XL, *supra*, on this subject.

<sup>7</sup> *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). This is no more than any one of the old companies might have done. *Tysen v. Wabash Ry.*, 11 Biss. 510 (1883); s. c., 15 Fed. Rep. 763. But where the unsecured debts consist of bonds which the consolidated company agrees to "protect," these constitute an equitable lien on the property of the old company. *Tysen v. Wabash Ry.*, 11 Biss. 510 (1883). The case *Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien

on the property of the old company, and were prior in right to the mortgage bonds of the consolidated company; refusing to follow *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). Then see *Compton v. Jesup*, 167 U. S. 1 (1897). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587) and a state court has held directly to the contrary. (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895).



§ 790. *The franchise to be a corporation cannot be mortgaged, but the right to operate the road and collect toll may be covered by an authorized mortgage.*—The usual power to mortgage the property and franchises does not include the franchise to be a corporation. It refers to the franchise and right to operate the road and collect freight and fares.<sup>1</sup>

“The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment.”<sup>2</sup> Hence, the purchasers of a road on foreclosure

<sup>1</sup> Pullan v. Cincinnati, etc. R. R., 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32. A mortgage authorized on the “means, property, and effects” covers the franchise or privilege, enabling the mortgagee to have the same use and beneficial enjoyment of the property which the company had, but does not cover the franchise to be a corporation. Meyer v. Johnston, 53 Ala. 237 (1875); s. c., 64 Ala. 603; Arthur v. Commercial, etc. Bank, 17 Miss. 394 (1848); Carpenter v. Black Hawk, etc. Co., 65 N. Y. 43 (1875), holding that including this franchise without authority does not invalidate the mortgage as to the other property. In Pierce v. Emery, 32 N. H. 484, 512 (1856), the view is taken that the franchise to be a corporation passed also under the mortgage, but this certainly is not the law. The attempt to cover the franchise to be a corporation is nugatory, but does not invalidate the mortgage. Butler v. Rahm, 46 Md. 541 (1877). The right to mortgage the road carries with it the right to mortgage the use of the road, although the latter is a franchise. The franchises to be a corporation and to exercise the power of eminent domain do not pass, however. Coe v. Columbus, etc. R. R., 10 Ohio St. 372, 386, 390 (1859). The legislature may of course authorize a mortgage on the franchise to be a corporation. St. Paul, etc. R. R. v. Parcher, 14 Minn. 297 (1869). Atkinson v. Marietta, etc. R. R., 15 Ohio St. 21 (1864), holds that a judicial sale under a mortgage which includes the franchise without authority does not invest purchasers with any corporate capacity whatever. The mortgage

does not cover the power to exercise the right of eminent domain. Coe v. Columbus, etc. R. R., 10 Ohio St. 372 (1859). Power to mortgage the property makes the mortgage of a railroad company valid, although the mortgage also seeks to cover the franchise. Gloninger v. Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891). The mortgage on the franchises covers them “so far as necessary to make the other property and effects conveyed by it productive and profitable.” Meyer v. Johnston, 53 Ala. 237, 324, 327 (1875); s. c., 64 Ala. 603. The word “property” includes also the franchises. Wilmington R. R. v. Reid, 13 Wall. 264 (1871). At an early day a dictum by Lord Coleridge was to the effect that a mortgagee, even if he took possession, could not operate the road; but this is now clearly not the law. Myatt v. St. Helen’s, etc. Ry., 2 Q. B. 364 (1841). An irrigation company has two franchises; one the franchise to be a corporation and the other the franchise exercised in operating the plant, and the latter franchise is located where the plant is located. San Joaquin, etc. Co. v. Merced County, 2 Cal. App. 593 (1906).

<sup>2</sup> “The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad



sale succeed, not to the right to be a corporation, but to the right to maintain and operate the road.<sup>1</sup> A judicial sale of the franchise of a

could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises." The court held that the purchasers at a foreclosure sale of a railroad might organize a corporation to operate the railroad, but that such new corporation did not succeed to an exemption from taxation which the old corporation possessed. *Memphis, etc. R. R. v. Railroad Com'rs*, 112 U. S. 609, 619 (1884). The purchasers of a road at foreclosure sale do not succeed to the corporate capacity and franchise of the old corporation. *Metz v. Buffalo, etc. R. R.*, 58 N. Y. 61 (1874); *Wellsborough, etc. Co. v. Griffin*, 57 Pa. St. 417 (1868). See also an able article on Foreclosure of Railway Mortgages by R. Mason Lisle, in *Am. L. Rev.*, Dec. 1886; *People v. Cook*, 110 N. Y. 443 (1888). A mortgage does not cover the corporate franchise. *City Water Co. v. State*, 88 Tex. 60 (1895).

<sup>1</sup> A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railway; the latter may be mortgaged without the former and may pass to a purchaser at a foreclosure sale. *Memphis, etc. R. R. v. Railroad Com'rs*, 112 U. S. 609, 619 (1884); *Bruffett v. Great Western R. R.*, 25 Ill. 353 (1861); *Commonwealth v. Tenth, etc. Turnp. Co.*, 59 Mass. 509 (1850); *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205 (1834); *Vilas v. Milwaukee, etc. Ry.*, 17 Wis. 497 (1863); *Smith v. Chicago, etc. Ry.*, 18 Wis. 17 (1864); *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857); *Common-*

*wealth v. Central, etc. Ry.*, 52 Pa. St. 506 (1866); *State v. Sherman*, 22 Ohio St. 411 (1872); *Commonwealth v. Smith*, 92 Mass. 448 (1865). See also cases in ch. LII, *infra*, to the effect that the purchaser at foreclosure sale is not liable for the debts of the old company. A purchaser of a railroad at foreclosure sale does not succeed to any corporate franchise, but succeeds to the right to operate the road and collect tolls. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). Where a water-works contract between the company and the city is mortgaged, and the mortgage is foreclosed, a purchaser at the sale may transfer the same to a foreign corporation, and the latter may own the property and enforce the contract. *State v. Topeka, etc. Co.* 61 Kan. 547 (1900). Purchasers at the sale succeed to all the rights of the company in the deeds of the right of way from property owners. *Pollard v. Maddox*, 28 Ala. 321 (1856). The purchasers at a foreclosure sale are "invested with the franchise of maintaining, operating, and making profit from the use of the road, according to the grant made," but they do not succeed to the corporate existence of the foreclosed company, and hence they operate the road as individuals. *Atkinson v. Marietta, etc. R. R.*, 15 Ohio St. 21 (1864). Upon the foreclosure sale of a railroad an individual may purchase it, but unless a statute authorizes him to operate or sell it he is "in the awkward predicament of owning a property which it was not certain he could use or sell." *People v. Brooklyn, etc. R. R.*, 89 N. Y. 75, 84 (1882). A mortgage on a gas plant carries with it to the purchaser at foreclosure sale the right to operate the plant. *Pumphrey v. Threadgill*, 9 Tex. Civ. App. 184 (1894). On an execution sale of a street railroad franchise, as authorized by statute, an individual may purchase and then operate the road. "There is no more difficulty in allowing individuals to exercise these



bank does not transfer to the purchaser an exemption of the bank from taxation.<sup>1</sup> And the words "franchises, rights and privileges" do not necessarily include an exemption from taxation.<sup>2</sup> A mortgage of a railroad covers the right to operate the road, even though the statute authorizing the mortgage does not mention the franchises.<sup>3</sup> Power to mortgage gives power to have a foreclosure sale, and such mortgage may cover municipal grants and all franchises, excepting the franchise to be the corporation.<sup>4</sup>

§ 791. *Mortgages to directors.* — Under certain circumstances and certain restrictions the mortgage may be given to a director of the corporation to secure a debt due to him,<sup>5</sup> but not to a director if the corporation is insolvent.<sup>6</sup>

§ 792. *Forfeiture of the charter — Effect upon a mortgage.* — A forfeiture of the charter of a company at the instance of the state does not invalidate or affect an existing mortgage on the company's property;<sup>7</sup> but a lapse of the charter by reason of a failure to do certain

powers than corporations, and the use of them for a brief period in no way interferes with the protection of the franchise in perpetuity. There might be difficulties in managing larger enterprises, and different rules have been applied to them. But there are no difficulties in the way of private management of a street railway, and there is no reason why the statute which by its language includes them should be made to exclude them." *McKee v. Grand Rapids, etc. Ry.*, 41 Mich. 274 (1879). See also §§ 892, 913, *infra*.

<sup>1</sup> *Mercantile Bank v. Tennessee*, 161 U. S. 161 (1896).

<sup>2</sup> *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174 (1896). See also § 572*b*, *supra*.

<sup>3</sup> *Chadwick v. Old Colony R. R.*, 171 Mass. 239 (1898).

<sup>4</sup> *Vicksburg v. Waterworks Co.*, 202 U. S. 453 (1906). Where a city made a grant to a waterworks company, the prices to be as agreed between the company and the consumers, but not to exceed certain rates, the city cannot thereafter reduce the rates below such specified rates, and a purchaser of the plant at foreclosure sale is entitled to equal protection. *Omaha Water Co. v. City of Omaha*, 147 Fed. Rep. 1 (1906).

<sup>5</sup> See § 692, *supra*.

<sup>6</sup> See § 692, *supra*.

<sup>7</sup> *People v. O'Brien*, 111 N. Y. 1 (1888). See also § 641, *supra*. A purchaser at a mortgage sale of lands mortgaged by a railroad is protected, although the lands were to be forfeited if the road was not completed within a certain time, and the road was not completed. No forfeiture had been declared in this case. *Mower v. Kemp*, 42 La. Ann. 1007 (1890). A waterworks company's charter will not be forfeited because another company has purchased a majority of its stock and illegally placed a mortgage upon its property. *Commonwealth v. Punxsutawney, etc. Co.*, 197 Pa. St. 569 (1901). Where in a charter granted by congress to a railroad corporation for a bridge the right is retained to congress to alter, amend or repeal, and thereafter another act of congress provides that such bridge shall be open for the use of other railroads on a reasonable compensation, and thereafter a mortgage given by the corporation is foreclosed, the purchaser takes the bridge, subject to the obligation to allow other railroads to use the bridge, even though the mortgage was executed before the second statute was enacted. The court came to this conclusion without stopping to inquire whether the foreclosure and sale "was anything more



work within a certain time may destroy the franchises, even as covered by the mortgage.<sup>1</sup>

§ 793. *Waiver of a part or all of a mortgage and bonds — Mortgage to a state.* — A mortgage may be waived entirely, or may be waived so as to allow a later mortgage to take priority. This is sometimes done by a state which holds a first mortgage on a railroad and wishes to enable the company to borrow more money.<sup>2</sup>

Although a state issues its bonds in aid of a railroad, and then takes a mortgage on the railroad as security for the state, yet a holder of the state bonds is not subrogated to the mortgage and cannot enforce it. The state may waive the mortgage.<sup>3</sup> Sometimes a part of the

than a reorganization under the form of a judicial proceeding," nor whether, if it were a *bona fide* sale to an independent third party, the sale took the property out of the jurisdiction of congress. *Union Pacific Co. v. Mason City Co.*, 199 U. S. 160 (1905).

<sup>1</sup> Where by the charter all rights are to be forfeited unless the road is completed within a certain time, and it is not so completed, and the state forfeits all its rights and turns them over to another company, a mortgage of the old company falls also. *Silliman v. Fredericksburg, etc. R. R.*, 27 Gratt. (Va.) 119 (1876). See also *Farnsworth v. Minnesota, etc. R. R.*, 92 U. S. 49, 66 (1875), and § 638, *supra*. Where the company's charter limits the time within which it must complete the road, and it is liable not to do so, the trustee of the mortgage may have a receiver appointed for the purpose of completing the road. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. Where a city, in order to get water-works, causes a corporation to be organized and to issue mortgage bonds to pay for the waterworks, and the city buys its stock, but prior to the execution of the mortgage a taxpayer's suit was commenced to enjoin the project, and this suit finally succeeds, a foreclosure of the mortgage is subject to the invalidity of the project, yet the mortgage is good as to property not attached to city property. *City of Laporte v. Northern T. Co.*, 187 Fed. Rep. 20 (1911).

<sup>2</sup> *Murdock v. Woodson*, 2 Dill. 188 (188)

(1873); s. c., 17 Fed. Cas. 1017; aff'd, 22 Wall. 351, *Woodson v. Murdock*, 22 Wall. 351 (1874); *Darby v. Wright*, 3 Blatchf. 170 (1854); s. c., 6 Fed. Cas. (1187). The waiver may be to take effect only upon a consolidation. *Gibbes v. Greenville, etc. R. R.*, 13 S. C. 228 (1879). The state may, instead of waiving its mortgage, allow new investors to be subrogated to its security. Where the first-mortgage bondholders (the state in this instance) agree that the interest on new bonds to be issued shall be paid before the former take anything, this agreement constitutes an equitable mortgage on the property, and to that extent displaces the first mortgage. A foreclosure by a mortgagee second to the first mortgage, but prior to the new bonds mentioned above, must take this equitable mortgage into consideration. *Ketchum v. Pacific R. R.*, 4 Dill. 78 (1876); s. c., 14 Fed. Cas. 425; affirmed, *Ketchum v. St. Louis*, 101 U. S. 306 (1879). See also § 816, *infra*, and § 756, *supra*.

<sup>3</sup> State aid bonds secured by a lien on the railroads to the state give no right to holders to enforce that lien. The state may release the lien. *Tennessee Bond Cases*, 114 U. S. 663 (1885); *Cunningham v. Macon, etc. R. R.*, 156 U. S. 400 (1895); *McKittrick v. Arkansas Cent. Ry.*, 152 U. S. 473 (1894). Although bonds issued by a state in order to pay its subscription to stock of a railroad recite that the state holds the stock as security therefor, yet the state cannot



bondholders waive their priority of lien. This does not decrease or increase the rights of the other bondholders secured by the same mortgage.<sup>1</sup>

#### B. FORM AND PROVISIONS OF THE MORTGAGE DEED OF TRUST

§ 794. *The mortgage may be a deed of trust — Mortgages created by statute — Equitable mortgages.* — The mortgage of a corporation need not be in any particular form.<sup>2</sup> It may be in the form of a

be compelled by suit to apply its stock and dividends to the payment of such bonds. *Christian v. Atlantic, etc. R. R.*, 133 U. S. 233 (1890), overruling *Swazey v. North Carolina R. R.*, 1 Hughes, 17 (1874); s. c., 23 Fed. Cas. 518. Concerning subrogation herein, see § 765, *supra*; also, *Railroad v. Schutte*, 103 U. S. 118 (1880); *Chamberlain v. St. Paul, etc. R. R.*, 92 U. S. 299 (1875); *Stevens v. Louisville, etc. R. R.*, 3 Fed. Rep. 673 (1880); *aff'd*, 114 U. S. 664; *Colt v. Barnes*, 64 Ala. 108 (1879); *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850; *Gilman v. New Orleans, etc. R. R.*, 72 Ala. 566 (1882); *Forrest v. Luddington*, 68 Ala. 1 (1880); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885); *Branch v. Macon, etc. R. R.*, 2 Woods, 385 (1875); s. c., 4 Fed. Cas. 15; *Clews v. Brunswick, etc. R. R.*, 54 Ga. 315 (1875); *Western N. C. R. R. v. Drew*, 3 Woods, 692 (1879); s. c., 29 Fed. Cas. 744; *State v. Florida, etc. R. R.*, 15 Fla. 690 (1876); *State v. Jacksonville, etc. R. R.*, 16 Fla. 708 (1878); *Hand v. Savannah, etc. R. R.*, 12 S. C. 314 (1879); s. c., 17 S. C. 219; *Gibbes v. Greenville, etc. R. R.*, 13 S. C. 228 (1879). State bonds in aid of a railroad, to be repaid by the railroad by an annual tax, are not a lien on the railroad as against a purchaser thereof at a foreclosure sale. *Tompkins v. Little Rock, etc. Ry.*, 125 U. S. 109 (1888); *aff'd*, 18 Fed. Rep. 344. See s. c., 15 Fed. Rep. 6; 120 U. S. 160, *rev'g* 21 Fed. Rep. 370.

<sup>1</sup> Such of the bondholders as desire may agree that their bonds shall be subject to a new lien that is later than their mortgage, but their agreement of course does not bind bondholders who do not assent thereto. The agreement is given in full in this

case. But in such a case the non-assenting stockholders cannot claim that the other bonds are paid. The secondary lienholders succeed to the rights of the first-mortgage bondholders who have waived their rights. *Poland v. Lamaille, etc. R. R.*, 52 Vt. 144 (1879). By unanimous consent a judgment on a claim may be allowed to be paid in priority to the mortgage bondholders. *Central Trust Co. v. Wabash, etc. R. R.*, 24 Fed. Rep. 98 (1885). Construction work may be entitled to payment in preference to mortgage bonds, if the bondholders request, direct, or promise payment for the work. This would be by estoppel. But mere acquiescence does not raise an estoppel *in pais*. *Re Kelly*, 5 Fed. Rep. 846 (1881). See also § 765, *supra*, on subrogation. Although the holders of coupons waive default and agree to give time, yet, the agreement being without consideration, they may change their minds and insist upon payment or a foreclosure for non-payment of the interest. *Union Trust Co. v. St. Louis, etc. Ry.*, 5 Dill. 1 (1878); s. c., 24 Fed. Cas. 710. A proxy authorized to vote at a corporate meeting is not authorized to vote to discharge a mortgage, which secures the stockholder (who gave the proxy) as a creditor of the corporation. *Moore v. Ensley*, 112 Ala. 228 (1896).

<sup>2</sup> *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). "The mode in which the mortgage lien shall be created is left to the company." *Hubbell v. Syracuse Ironworks*, 14 N. Y. Supp. 345 (1891). A corporation may give a mortgage by conveying land to a person as trustee, without specifying the character of the trust. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). Warehouse receipts issued by



deed of trust to trustees for the benefit of the bondholders,<sup>1</sup> or it may be a mortgage made directly to one or more bondholders.<sup>2</sup> Sometimes a mortgage is created by the words of a statute, and no formal instrument of mortgage is necessary.<sup>3</sup>

An equitable mortgage or a specific lien on property intended to be mortgaged arises from an agreement to give a mortgage or from a defectively executed mortgage or from any imperfect attempt to mortgage or appropriate specific property in payment of a particular debt.<sup>4</sup> An equitable mortgage exists where no formal mortgage has been executed, but a contract or the relations between the parties call for a mortgage.<sup>5</sup> Such a mortgage may exist where the bond and mort-

a glass manufacturing company do not create a lien on the property mentioned in the receipts. *Bell, etc. Co. v. Kentucky, etc. Co.*, 48 S. W. Rep. 440 (Ky. 1898); s. c., 106 Ky. 7.

<sup>1</sup> See ch. XLVIII, *infra*, concerning this form of mortgage.

<sup>2</sup> See § 812, *infra*.

<sup>3</sup> *Wilson v. Boyce*, 92 U. S. 320 (1875); *Tompkins v. Little Rock, etc. Ry.*, 15 Fed. Rep. 6 (1882); *U. S. v. Union Pac. R. R.*, 91 U. S. 72 (1875); *Cincinnati v. Morgan*, 3 Wall. 275 (1865), holding, however, that the lien does not exist where the statute does not clearly create it; *Woodson v. Murdock*, 22 Wall. 351 (1874); *Murdock v. Woodson*, 2 Dill. 188 (1873); s. c., 17 Fed. Cas. 1017; *aff'd*, 22 Wall. 351; *Spence v. Mobile, etc. Ry.*, 79 Ala. 576 (1885); *Whitehead v. Vineyard*, 50 Mo. 30 (1872); *Colt v. Barnes*, 64 Ala. 108 (1879). In this case the state indorsed railroad bonds and created a statutory mortgage to secure the indorsement. The court held that the holders of the bonds were entitled to the benefit of the mortgage. A statutory mortgage of a railroad to the state may entitle the state to control the income, although no foreclosure has been commenced. *Macalester v. Maryland*, 114 U. S. 598 (1885). A statutory mortgage not otherwise recorded was involved in *South Dakota v. North Carolina*, 192 U. S. 286 (1904). A mortgage by statute alone is valid. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. Where a large loan is made by a county to a railroad under

a statute providing that the gross earnings of the railroad company should be received by a state officer and the interest on said loan be paid therefrom, an equitable assignment exists, and all subsequent mortgages are subject to such loan. *Ketchum v. St. Louis*, 101 U. S. 306 (1879). A statute giving a city power to loan money to a railroad, and to take a mortgage or other security for payment, and making such lien a first lien, does not render a pledge of stock which is made by the railroad to the city, to secure the debt, a first lien over mortgages given by the railroad company to others. *Cincinnati v. Morgan*, 3 Wall. 275 (1865). A mortgage created by statute and not evidenced by any corporate writing was involved in *Cunningham v. Macon, etc. R. R.*, 156 U. S. 400 (1895). Concerning a waiver of such a mortgage by the state, see § 793, *supra*.

<sup>4</sup> Hence where one railroad in 1887 agreed to and did construct another railroad in consideration of twenty-year mortgage bonds of the latter to be issued and in further consideration of a ten-year contract of operation, the former railroad may maintain a suit to have the mortgage executed and the bonds issued, even though the twenty years have nearly expired. *Baltimore, etc. R. R. v. Berkeley, etc. R. R.*, 168 Fed. Rep. 770 (1909).

<sup>5</sup> A contract to make a mortgage and issue bonds may be enforced where the company has received the consideration therefor, even though the statute requires the assent of two



gage are both contained in one instrument and that instrument is not recorded as a mortgage.<sup>1</sup> A mortgage not under seal may still be a good mortgage in equity.<sup>2</sup> A contract of a corporation to give a mortgage on its property is a lien in equity superior to other creditors of the corporation, where such contract has been performed by the party entitled to the mortgage, and especially where an attempted execution of the mortgage has been made.<sup>3</sup> The bondholders of a parent com-

thirds of the stockholders. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). An oral agreement to give a contractor a mortgage will be sustained only where it is clearly proven. *Waco, etc. R. R. v. Shirley*, 45 Tex. 355 (1876). An agent's agreement, based on a resolution authorizing a pledge of the real and personal estate of said company, is an equitable mortgage and may be enforced. *Mobile, etc. R. R. v. Talman*, 15 Ala. 472 (1849). See also *Ketchum v. St. Louis*, 101 U. S. 306 (1879). Although a contractor who is to take stock and bonds in payment assigns his contract to a trustee and issues debenture bonds against it, and also assigns scrip certificates of the company, exchangeable for mortgage bonds on completion of the work, yet no equitable lien on the property of the company is thereby created. *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896).

<sup>1</sup> Bonds without a mortgage may be construed to be a mortgage under the terms of the bonds themselves, and a court of equity will so enforce them. *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858). A bond, though not directly providing for a lien, yet clearly intending it, was held to be a mortgage, the court saying that any writing showing the intent is sufficient. *Dundas v. Desjardins Canal Co.*, 17 Grant's Ch. (U. C.) 27 (1870). Where preferred stock is issued reciting that it is a lien on all the property of the corporation after the second mortgage, the lien will be upheld by the court as against subsequent mortgages and general creditors, although such lien was not secured by any mortgage. The trustees in the subsequent deed of trust knew of and acquiesced in the priority of the preferred stock lien, and the deed

itself recognized it. This bound the stockholders. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 355 (1878); s. c., 22 Fed. Cas. 274. Cf. ch. XVI, *supra*. In *Holroyd v. Marshall*, 10 H. L. Cas. 191, 223 (1862), the court said: "Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgage over a judgment creditor, though without notice, may now be considered to be firmly established," and such priority is sustained. There need not be a formal deed of conveyance, provided the statute of frauds is satisfied. To same effect as regards an unrecorded charge upon the property, *Re General South Amer. Co.*, L. R. 2 Ch. D. 337 (1876). The English debentures are a common instance of a bond and mortgage contained in one instrument. They, however, are expressly excepted from the recording acts. A combination of a bond and mortgage in one instrument by reason of a charter provision to that effect is found in the original Pacific Railroad bonds. See *United States v. Stanford*, 161 U. S. 412, 427 (1896). See also § 776, *supra*.

<sup>2</sup> *Pullis v. Pullis Bros. etc. Co.*, 157 Mo. 565 (1900). See also §§ 721, 722, *supra*.

<sup>3</sup> *Hamilton T. Co. v. Clemes*, 163 N. Y. 423 (1900). A contract calling for a mortgage, the money having been paid to the corporation therefor, will be considered a mortgage as against other creditors, especially where an informal mortgage has been executed. *Stiwell v. Webb, etc. Co.*, 79 Ark. 45 (1906). In the case *Yazoo, etc. R. R. v. Martin*, 94 Miss. 700 (1908), where income bonds were executed and issued, the income to be ascertained after paying the interest on all other bonds, a suit had been



pany, the money of which is used to aid subsidiary companies, cannot claim a prior lien on the property of the subsidiary companies as against mortgages given by the latter.<sup>1</sup> Where mortgage bonds are issued to acquire new property and the court holds that the mortgage did not authorize their issue for that purpose, the owners of the bonds are entitled to an equitable lien on the property.<sup>2</sup>

Where a mortgage covers bonds to be thereafter delivered, and instead of such delivery the mortgagor deposits the bonds as security with the United States government, and then makes another mortgage covering such bonds, the first mortgagee is entitled to the bonds upon their being released by the United States government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second mortgage have passed into *bona fide* hands.<sup>3</sup> Where stock is issued to a city by a street railway company in payment for its street rights, a provision in the grant of the street rights, that in case the company became indebted the city should have a lien on the company's franchise and property, does not give the city a lien in preference to creditors of the company, but only in preference to other stockholders.<sup>4</sup>

§ 795. *Character of the various provisions in a corporate mortgage deed of trust—The granting clause.*—A railroad mortgage generally contains many provisions which do not appear in the ordinary mortgage. Each of these provisions has a history, and each has grown out of emergencies, necessities, and difficulties in protecting the rights of both the corporation mortgagor and the bondholders who are secured by the mortgage. Some of the most important of these provisions are here referred to.

The deed of trust should convey a fee to the trustee, and should carefully specify all the property that it is intended to cover.

A formal and palpable omission of technical words in the mortgage, such as the words of inheritance, will be supplied by the court under its power to reform an instrument.<sup>5</sup>

started by income bondholders to modify the bonds so that they should be subject only to the first mortgage bonds, and that suit was compromised by a supplemental mortgage being executed to the effect that the income bonds were subject only to the first mortgage bonds, but the supplemental mortgage did not change the phraseology of the income bonds and the court held that the income bonds did not become second only to the first mortgage bonds, even though there was stamped on the income mortgage

bonds a statement that they were secured by such supplemental mortgage.

<sup>1</sup> *Gay v. Hudson River, etc. Co.*, 190 Fed. Rep. 773 (1911).

<sup>2</sup> *Orriek v. Fidelity, etc. Co.*, 113 Md. 239 (1910).

<sup>3</sup> *Central T. Co. v. West India, etc. Co.*, 169 N. Y. 314 (1901). Cf. § 852, *infra*, and § 317, *supra*.

<sup>4</sup> *Guaranty, etc. Co. v. Galveston, etc. R. R.*, 107 Fed. Rep. 311 (1901).

<sup>5</sup> The lack of words of inheritance in the mortgage, it being to the



§ 796. *Provision that the mortgagor may retain possession until default.* — At common law a mortgagee was entitled to the immediate possession of the mortgaged premises, although there had been no default. Consequently a provision was usually inserted in the mortgage that until default the mortgagor might retain possession. The statutes of many of the states now give this right to the mortgagor. Nevertheless it is customary to insert such a provision in corporation mortgages.<sup>1</sup> A mortgage purporting to cover municipal bonds not yet delivered does not sustain a suit by the trustee to obtain such bonds upon foreclosure of the mortgage.<sup>2</sup>

§ 797. *Provision that the mortgagor will pay the bonds and coupons, and waiver of statutory provisions as to redemption, stays, valuation, etc.* — This is one of the common and elementary provisions in a railroad deed of trust. The effect of statutory provisions is considered elsewhere.<sup>3</sup> If there is no express covenant to pay the bonds, such a covenant cannot be read into the mortgage.<sup>4</sup>

§ 798. *Provision giving power to the corporation to sell old material and parts of the property free from the mortgage.* — This power is often reserved so that the company may sell old material the same as it would if the mortgage did not exist. Sometimes the power is reserved also to sell or take up any part of the line that proves to be valueless; also to sell portions of the plant and use the proceeds in

trustees and their successors merely, is no bar to foreclosure. The court in the foreclosure suit will reform the instrument. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879); *Randolph v. New Jersey, etc. R. R.*, 28 N. J. Eq. 49 (1877). A deed to a corporation may convey a fee, though it does not use the words "successors and assigns." *Wilkes-Barre v. Wyoming, etc. Soc.*, 134 Pa. St. 616 (1890). Even a mortgage of real estate by an insolvent corporation may be reformed so as to include words of inheritance where such words are omitted by mistake. *Miller v. Savage*, 60 N. J. Eq. 204 (1900).

<sup>1</sup> At common law the mortgagee is entitled to possession at once. *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). The clause that the mortgagee has the right to possession, etc., until default in the payment of principal or interest adds nothing to the rights of the mortgagor. It is merely declarative of the law. *Dow v. Memphis, etc. R. R.*, 20 Fed. Rep. 260

(1884). Where the clause providing for the retention of possession by the mortgagor is not broad enough to cover land not used for railroad purposes, the mortgagee may take possession of such land before default in the terms of the mortgage. *Youngman v. Elmira, etc. R. R.*, 65 Pa. St. 278 (1870). A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state. *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78 (1900). See also § 852, *infra*.

<sup>2</sup> *Farmers' L. & T. Co. v. Board of Sup'rs, etc.*, 93 Fed. Rep. 579 (1899). See also § 852, *infra*.

<sup>3</sup> See § 841, *infra*, as to redemption.

<sup>4</sup> *United States v. Stanford*, 69 Fed. Rep. 25 (1895); *aff'd*, 161 U. S. 412.



replacing it.<sup>1</sup> Even though there is no clause to that effect in a mortgage, a railroad company has implied power to sell old rolling-stock and replace it by new.<sup>2</sup> And even though an income mortgage does not authorize a release of property not needed, yet a court of equity may authorize it, and the bondholders need not be made a party to the proceeding.<sup>3</sup> A mortgage on a railroad applies, even after consolidation with another railroad, to new equipment to replace old equipment.<sup>4</sup>

There is sometimes a provision for selling some of the property and applying the proceeds to the bonds.<sup>5</sup> A mortgage of railroad property often contains a provision authorizing the trustee to release portions

<sup>1</sup> See cases in § 852, *infra*. A provision authorizing the mortgagor to sell out worn-out machinery and replace the same with the proceeds is legal, such a mortgage not being on ordinary goods. *Wylly-Gabbett Co. v. Williams*, 53 Fla. 872 (1907). A release by the trustee of a portion of the property from the lien of the mortgage, in accordance with express authority given by the deed of trust, was involved in *Fidelity Trust Co. v. National, etc. Co.*, 89 S. W. Rep. 718 (Ky. 1905). The broad provision in a mortgage that the company "may dispose of any property, real or personal, . . . and make and execute titles for the same," is construed to authorize the sale of only such property as is not needed for operating the road, such as surplus lands and property not in use or required for use on the road. *Spence v. Mobile, etc. Ry.*, 79 Ala. 576 (1885).

In *Butler v. Rahm*, 46 Md. 541 (1877), the provision was as follows: "Nothing herein contained shall prevent the said company, before default in the payment of any of the said bonds or the interest due thereon, from selling, hypothecating, or otherwise disposing of any of their said property, real or personal, not necessary in their judgment for the use of the said road, nor from collecting and applying any money due to the said company from any source whatever, provided said application shall not be to the prejudice of any holder of any of the said bonds."

The court, in holding that this provision was not fraudulent, said:

"However suspicious the power here

given might be in the case of a mortgage of ordinary goods, the very nature of this corporation, its business, the means and power necessary to keep it up, the wear and tear of its iron, ties, and rolling-stock, the constant necessity of replacing injured or worn-out appurtenances with new, forbids the inference of a fraudulent purpose which might arise from such a provision under other circumstances. The power retained is manifestly in the interest of the mortgagees, and is restricted by express language to be exercised in such manner as not to prejudice in any manner the rights of the bondholders. If the provision is in the interest of the bondholders, as it transparently is, it is also for the same reasons in the interest of the other creditors and cannot be regarded as fraudulent."

Where a railroad mortgage covers lands also, and provides that the mortgagor may sell the lands and pay over the proceeds to the trustee of the deed in trust "after deducting the expenses of executing this trust," the mortgagor may deduct the expense of making the sales and also the taxes. *Nickerson v. Atchison, etc. R. R.*, 17 Fed. Rep. 408 (1881).

<sup>2</sup> *Union T. Co. v. Morrison*, 125 U. S. 609 (1888).

<sup>3</sup> *Mayor, etc. v. United Rys., etc. Co.*, 108 Md. 64 (1908).

<sup>4</sup> *National Bank, etc. v. Wilmington, etc. Ry.*, 81 Atl. Rep. 70 (Del. 1911).

<sup>5</sup> As to selling land, see *Little Rock, etc. Ry. v. Huntington*, 120 U. S. 160 (1887). For a provision that failed, see *Chicago, etc. R. R. v. Pyne*, 30 Fed. Rep. 86 (1887).



of the property from the mortgage, provided the proceeds from the sale of such portion so released is paid to the trustee or is reinvested in the property. This provision is strictly construed, and the trustee is not allowed to extend or vary its terms.<sup>1</sup> Where a mortgage secured by stock as collateral expressly authorizes the trustee to release the collateral and accept other security in lieu thereof upon the consent of the majority in interest of the bondholders, a minority bondholder cannot complain of such substitution unless he proves that the bondholders as a whole will be injured.<sup>2</sup> And where the trustee is given power to sell parts of the property and reinvest the proceeds, he may sell free from redemption rights. Such a provision is not a form of foreclosure.<sup>3</sup> A mortgage covering land, but giving power to the mortgagor to sell the land free from the mortgage, may be illegal as to existing creditors, but legal as to subsequent creditors.<sup>4</sup> A trust mortgage on personalty giving the mortgagor power to sell or dispose of the mortgaged property, and the income and proceeds thereof, without reinvesting them or redeeming the bonds or replacing the property or developing the business or management, gives him power to dispose of the property without restraint, and hence is illegal both as to present and future personal property, so far as creditors are concerned.<sup>5</sup> A debenture which is a mortgage on everything, but which

<sup>1</sup> Where the mortgage is secured by land also, which the trustee is authorized to release upon the price thereof being paid to the trustee, the trustee must apply the fund in strict accordance with the terms of the mortgage, otherwise he will be liable; but even though the trustee has made a serious mistake in waiving rights under the mortgage and declining to pay a bondholder, yet, if he acted in good faith, judgment will be against him as trustee and not personally. *Hollister v. Stewart*, 111 N. Y. 644 (1889), holding also that the trustee will not be removed, but will be required to furnish indemnity for the past and security for the future.

A provision in a mortgage that the trustee shall release such part of the premises as the mortgagor may sell, a part of the purchase price to be paid to the trustee, does not require the trustee to release where the sale is not made in such manner as to insure to the trustee the part which goes to him. *Weir v. Iron, etc. Co.*, 27 Colo. 385 (1900).

<sup>2</sup> *Ikelheimer v. Consolidated, etc. Co.*, 59 Atl. Rep. 363 (N. J. 1904).

<sup>3</sup> *Thompson v. Ellenz*, 58 Minn. 301 (1894).

<sup>4</sup> *Central Trust Co. v. East Tennessee Land Co.*, 71 Fed. Rep. 353 (1895). A provision in the mortgage that the company may sell its property free from the mortgage, if other property is substituted so as not to decrease the security, is valid. *Rawlings v. New Memphis, etc. Co.*, 105 Tenn. 268 (1900). See also § 852, *infra*.

<sup>5</sup> *Zartman v. First, etc. Bank*, 109 N. Y. App. Div. 406 (1905); *aff'd*, 189 N. Y. 267. A chattel mortgage by a shipbuilding company on its shipbuilding materials with permission to use and replace the same is void. *In re Marine, etc. Co.*, 135 Fed. Rep. 921 (1905). A provision allowing a sale free from the mortgage of real estate not needed by the corporation, the proceeds to be invested in other property to be held subject to the mortgage, does not render the mortgage void as against creditors. The same



expressly allows the company to sell any part until the mortgagee should take possession, may be void as to other creditors.<sup>1</sup>

§ 799. *Provision relative to taxes, insurance, liens, and maintenance.* — A clause is usually inserted that the company must pay all taxes levied on the property, and shall pay all liens and maintain the rolling stock and road.<sup>2</sup> A foreclosure may be commenced and receiver appointed for non-payment of taxes, general insolvency being alleged.<sup>3</sup> A default by the corporation in paying taxes on its capital stock may be a default under the mortgage, and payment of the taxes after foreclosure is commenced does not stop the foreclosure.<sup>4</sup> Where the president of the mortgagor corporation allows the property to be sold for non-payment of taxes and buys in the property himself, the mortgagee may recover such property from him.<sup>5</sup>

Mortgage bondholders may have an equitable lien on the proceeds of insurance policies on corporate property by virtue of a stipulation in the mortgage to that effect.<sup>6</sup> A mortgagee cannot claim insurance money collected by a receiver who was not appointed at its instance.

rule is true also as to personal property. *Hasbrouck v. Rich*, 113 Mo. App. 389 (1905). The provision allowing the sale of old materials to be replaced by new does not allow a sale of old rails as part payment for new rails to take their place, unless the new rails are actually substituted. *United States, etc. Co. v. Western, etc. Co.*, 109 S. W. Rep. 377 (Tex. 1908).

<sup>1</sup> *Orman v. English, etc. Inv. Trust*, 61 Fed. Rep. 38 (1894). See also § 798, *supra*.

<sup>2</sup> A clause that the company shall pay the semi-annual interest "without any deduction . . . for or in respect of any taxes" is insufficient, as regards the old government tax of five per cent. The company under such a provision was held not liable to pay that tax. *Haight v. Railroad*, 6 Wall. 15 (1867). The covenant of a corporation in its bonds to pay any tax on the mortgage or bonds cannot be enforced by the state if the tax itself is unlawful. *Musgrove v. Baltimore, etc. Co.*, 111 Md. 629 (1909).

<sup>3</sup> A bondholder may commence foreclosure before there is any default in interest, where there is a default in the payment of taxes and the company is insolvent. The trustees were made defendants, and a request to

them to foreclose was alleged. A receiver was appointed. *Putnam v. Jacksonville, etc. Ry.*, 61 Fed. Rep. 440 (1893). See also § 836, *infra*. A provision in a mortgage by which the trustee is bound to release such part of the premises as the mortgagor may sell, a portion of the purchase price to be paid to the trustee, is not enforceable after a default by the mortgagor in paying taxes, as required by the mortgage. *Weir v. Iron, etc. Co.*, 27 Colo. 385 (1900).

<sup>4</sup> *Union T. Co. v. Belvedere, etc. Co.*, 105 Md. 507 (1907). A provision in a lease that the lessee should pay taxes is not broken if the lessee in good faith litigates the taxes instead of paying them. *Pennsylvania, etc. Co. v. New York City Ry.*, 176 Fed. Rep. 471 (1910); s. c., 193 Fed. Rep. 287.

<sup>5</sup> *Appleton, etc. Co. v. Central Trust Co., etc.*, 93 Fed. Rep. 286 (1899).

<sup>6</sup> *Chicago, etc. Bank v. Bentz*, 59 Fed. Rep. 645 (1893). An insurance provision in a mortgage that the mortgagee shall be entitled to the benefit of the insurance, is not an assignment of the policy of insurance in violation of its terms. *Humboldt, etc. Co. v. Ashley Silk Co.*, 185 Fed. Rep. 54 (1911).



The mortgagee's remedy is against the corporation for impairment of the security.<sup>1</sup> A mortgagor is not bound to insure the property for the benefit of the bondholders, unless the mortgage expressly requires him to do so, and the trustee is not bound to obtain such insurance where the mortgage merely provides that the trustee should not be liable for not obtaining insurance, but authorizes the trustee to demand such insurance; hence, if the mortgagor sells the property, the purchaser may insure in his own name, and the mortgagee is not entitled to such insurance, even though the property is burned. Such also would be the case even if the mortgagor expressly obligated himself to insure.<sup>2</sup> Betterments as used in a mortgage may include much more than repairs or replacements.<sup>3</sup>

§ 800. *Provision for declaring the principal sum due upon a default in interest — Provision that the trustee shall foreclose upon the request of a certain proportion of the bondholders.* — The important provision that the principal sum may be declared due upon default in the payment of interest corresponds to a similar provision found in most real-estate mortgages. There are many ways in which this provision may be worded. The right to declare the principal sum due may be left to the discretion of the trustee, or to a special proportion of the bondholders, or to each bondholder for himself. It may provide that the right may be exercised only after a certain time has elapsed after default in the interest, or that it may be exercised at once. Or it may declare that upon default in the payment of the interest the principal shall at once become due. Various provisions and the decisions thereon are considered in the notes below.<sup>4</sup> Where the holders of the

<sup>1</sup> Nessler v. Industrial, etc. Co., 65 N. J. Eq. 491 (1903).

<sup>2</sup> Farmers', etc. Co. v. Penn., etc. Co., 103 Fed. Rep. 132 (1900). Where the mortgagee sells the property subject to the mortgage, insurance taken out by the purchaser on the property belongs to the purchaser in case of a fire, and not to the mortgagee. Farmers', etc. Co. v. Penn., etc. Co., 186 U. S. 434 (1902), aff'g 103 Fed. Rep. 132.

<sup>3</sup> Central, etc. Ry. v. Central Trust Co., 135 Ga. 472 (1910).

<sup>4</sup> Where the mortgage provides that upon default "the principal of all the said bonds shall, at the election of the trustees, become immediately due and payable," and the trustees have not so elected, the court cannot, in a proceeding against the company as an insolvent corporation, order the rail-

road to be sold free from all incumbrances. Not even a statute passed after the mortgage was given can authorize such a sale. Randolph v. Middleton, 26 N. J. Eq. 543 (1875), reversing 25 N. J. Eq. 306. See also § 837, *infra*. In Chicago, etc. R. R. v. Fosdick, 106 U. S. 47, 74 (1882), the trustee was authorized to declare the principal sum due after six months after default. Such a provision is legal (p. 77), but is strictly construed, and, if the written request of a majority of the bondholders is necessary, it must be obtained. If the bond differ from the mortgage in regard to this provision the bond controls. Railway Co. v. Sprague, 103 U. S. 756 (1880). Cf. § 764, *supra*. In Wood v. Consolidated, etc. Co., 36 Fed. Rep. 538 (1888), the provision was that the principal sum became due at the option



bonds have consented to extend the time of payment of interest, the trustee cannot foreclose the mortgage for non-payment of the interest,

of the holder where the interest was demanded and remained in default for ninety days. If the statute authorizing the mortgage says that the principal shall not become due for thirty years, a provision in the mortgage for its becoming due six months after default in the interest is void. *Howell v. Western R. R.*, 94 U. S. 463 (1876). Where the bond provides that the principal shall become due as provided in the mortgage, and the mortgage provides that upon default for six months after demand the principal sum shall become due, and that upon the written request of a majority in interest of the bondholders the trustee shall foreclose, the six months' default after demand is not sufficient to authorize a suit by a bondholder for the principal and interest of his bonds. The request of a majority is construed to apply to declaring the principal due as well as to foreclosing. *Batchelder v. Council, etc. Co.*, 131 N. Y. 42 (1892). "The terms of the deed of trust ought to be very clear to justify the court in holding that there could be no sale, even for interest," until the bonds become due. *Wilmer v. Atlanta, etc. Ry.*, 2 Woods, 447, 455 (1875); s. c., 30 Fed. Cas. 80. Where one fifth of the bondholders in interest may declare the whole sum due in thirty days after default, the trustee need not join with them in so declaring. *American, etc. Co. v. Kentucky, etc. Co.*, 51 Fed. Rep. 826 (1892). A provision in a bond that it shall become due after six months' default in interest applies to that bond and not to other bonds. An acceptance of interest subsequently waives the default. A decree of foreclosure should declare due only those bonds upon which default occurred. *Alabama, etc. Mfg. Co. v. Robinson*, 56 Fed. Rep. 690 (1893). A bondholder cannot declare his bond due for non-payment of interest, where the mortgage requires one third of the bondholders in interest to so declare. *American Nat. Bank v. American, etc. Co.*, 19 R. I. 149 (1895). Where the mortgage bonds

may be declared due by writing executed by the holders of one third of the bonds, the signature of a bondholder by attorney is good, even though the power of attorney was not obtained until afterward. *Farmers' L. & T. Co. v. Memphis, etc. R. R.*, 83 Fed. Rep. 870 (1897). Where the principal sum may be declared due upon the trustee taking possession or upon a sale by him, it cannot be declared due except upon the occurrence of one of those events. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). Where, upon ninety days' default in interest, the holder may declare the whole sum due, a court will not relieve the corporation from payment. *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888). When a mortgage provides that the principal shall become due for the purposes of foreclosure upon a default in interest continuing for sixty days, the trustees in the mortgage may proceed for the collection of the whole amount of principal and interest by bill in equity, without a formal declaration of the maturity of such principal. *Morgan's, etc. Co. v. Texas, etc. Ry.*, 137 U. S. 171 (1890). The court will not sustain a declaration that the whole sum is made due, where there was trickery, or where the mortgagor was ready and willing to pay. *Union, etc. Ins. Co. v. Union, etc. Co.*, 37 Fed. Rep. 286 (1889). The bondholder may enforce the unpaid coupons without electing to declare the principal due. *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883). A clause in the mortgage "that in case default shall be made for the space of four months in the payment of semi-annual interest due or to become due upon either of said bonds, then, and in that case, the whole principal sum mentioned in all and each of said bonds shall forthwith become due and payable," has the effect not to give the several bondholders action upon it for the principal of the bonds, but to give the trustees, with whom, in trust for the bondholders, the covenant was made, a



even though such foreclosure is based on the principal of the bonds which have been declared due in accordance with the terms of the mortgage by such holders.<sup>1</sup>

A provision that the bond shall become due after thirty days in default in the payment of any coupon is self-executing.<sup>2</sup> But where after six months' default the principal is to become due by the terms of the bonds, it is doubtful whether at the end of the six months the bonds become past due so as to render the bonds non-negotiable. They certainly do not where the defaulted interest is afterwards paid.<sup>3</sup> Where the mortgage provides that the bonds shall become due in case of an execution issuing against the company and being unpaid, it is legal for a holder of coupons to obtain judgment and issue such execution, and the mortgage may thereby become due, even though the judgment on the coupons was obtained by consent for the purpose of having the mortgage become due.<sup>4</sup> A bondholder may detach a past-due coupon and

right of action upon it so that through foreclosing the mortgage it might be a more complete security to the bondholders with such a clause than it would be without it. *Mallory v. West Shore, etc. R. R.*, 35 N. Y. Super. Ct. 174 (1873). A provision in the trustee's certificate to the effect that "the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months" does not enable a bondholder to sue for the principal where the terms of the mortgage are inconsistent with such a right to sue. *Mallory v. West Shore, etc. R. R.*, 35 N. Y. Super. Ct. 174 (1873). The provision authorizing the trustee to sell, and from the proceeds to pay principal and interest of the bonds, does not enable the bondholder to declare the principal due because of a default of the company on the interest. Nevertheless, the court will order the whole railroad to be sold, inasmuch as it would be disastrous to sell only a part of it. *McFadden v. May's Landing, etc. R. R.*, 49 N. J. Eq. 176 (1891). Where the mortgage provides that upon default in the interest for ninety days the principal may at the option of the holders of the bonds be declared due, such option when exercised by a majority in interest of the bondholders is effective. *Atlantic T. Co. v. Crystal Water Co.*, 72 N. Y. App. Div.

539 (1902). Where the principal is to become due thirty days after default in the payment of interest and after demand thereof, a written demand is sufficient, even though the coupons are not presented. *Security, etc. Co. v. New Jersey, etc. Co.*, 57 N. J. Eq. 603 (1899). After the principal sum has been declared due interest continues thereon, until decree, at the rate specified in the bonds themselves, but the interest on past-due coupons is the legal rate of interest. All bondholders are bound by the decree in determining the amount of interest allowed. *Farmers' L. & T. Co. v. Northern, etc. Ry.*, 94 Fed. Rep. 454 (1899). *Cf.* § 771, *supra*.

<sup>1</sup> *Arnot v. Union Salt Co.*, 186 N. Y. 501 (1906).

<sup>2</sup> *Rumsey v. People's Ry.*, 154 Mo. 215 (1899). A provision in a mortgage for the principal sum becoming due on non-payment of interest applies to the bonds, even though such provision is not contained in the bonds themselves. The two instruments are construed as one. *Security, etc. Co. v. New Jersey, etc. Co.*, 57 N. J. Eq. 603 (1899).

<sup>3</sup> *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); *aff'd, sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899).

<sup>4</sup> *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900).



bring a separate suit upon it, and is not restrained by a provision in the bond and mortgage relative to the trustees acting to have the bonds declared due in case of default.<sup>1</sup> Where the mortgage provides that a majority in interest of the bondholders shall control they may ask the bankruptcy court to sell the property free from the lien.<sup>2</sup>

Although a trustee is given power to declare the principal sum due upon default in interest, yet he must not do so for the benefit of junior securities, or to aid a reorganization. The court will review his action.<sup>3</sup> A provision that the trustee shall, after six months' default and after a request from one fourth in interest of the bondholders, foreclose, does not prevent the trustee foreclosing at once upon default in interest, and a prohibition against a bondholder foreclosing before the six months does not apply to the trustee.<sup>4</sup> Where a request to the trustee to fore-

<sup>1</sup> *Mack v. American, etc. Co.*, 79 N. J. L. 109 (1909).

<sup>2</sup> *Re Chambersburg Silk, etc. Co.*, 190 Fed. Rep. 411 (1911).

<sup>3</sup> *Bound v. South Carolina Ry.*, 50 Fed. Rep. 853 (1892).

<sup>4</sup> *Farmers' L. & T. Co. v. Chicago, etc. R. R.*, 61 Fed. Rep. 543 (1894). A provision that no foreclosure shall be had except by the trustee, unless he refuses to foreclose on a reasonable request of a bondholder, and a further provision that he must foreclose on the request of a certain proportion of the bondholders, does not prevent the trustee foreclosing without any request at all. *New York Security, etc. Co. v. Lincoln Street Ry.*, 74 Fed. Rep. 67 (1896). After default the trustee may foreclose for non-payment of interest, even though the mortgage provides that he may foreclose on demand of a certain number of bondholders after three months' default. *Guardian, etc. Co. v. White Cliffs, etc. Co.*, 109 Fed. Rep. 523 (1901). A provision in a mortgage authorizing trustees to sell without judicial proceedings and without appraisement, is valid, and no request of the bondholders need be had, even though the mortgage authorized such sale upon the request of a certain proportion of the bondholders or without such request. *Etna, etc. Co. v. Marting, etc. Co.*, 127 Fed. Rep. 32 (1904). A provision that only the trustee shall foreclose, unless he refuses to do so, does not limit his power to foreclose. *New*

*York Security, etc. Co. v. Lincoln Street Ry.*, 77 Fed. Rep. 525 (1896). Where a trustee begins foreclosure by reason of a request, and the request was insufficient, it is doubtful whether the suit can be maintained as being brought under the inherent power of the trustee to commence the suit. *Farmers', etc. T. Co. v. New York, etc. Ry.*, 150 N. Y. 410, 438 (1896). Where the mortgage provides that, after six months' default, then, upon the request of one third in amount of the bonds, the trustee shall proceed at law or in equity to enforce the security, this provision is construed to apply to taking possession or to a sale without foreclosure suit. It does not prevent a foreclosure suit at once. That right "cannot be absolutely abrogated," and it is doubtful as to how far it can even be restricted. *Mercantile Trust Co. v. Chicago, etc. Ry.*, 61 Fed. Rep. 372 (1893). In *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886), this clause giving the various remedies of the bondholders and trustees came before the court, and it was held that the right of the trustees to foreclose was in no wise restricted or affected by provisions for declaring the whole debt due after six months' default, and for foreclosure by the trustees at the request of a majority of the bondholders after six months' default, and for the control of the foreclosure proceedings by a majority of the bondholders. A provision in the mortgage that the trust-



close with indemnity is first required, a bondholder must show that he offered indemnity or that some excuse existed before he sues for foreclosure.<sup>1</sup> The right of a court to sell the whole property on a default in interest is considered elsewhere.<sup>2</sup>

§ 801. *Provision for a waiver of default.* — Occasionally a provision is found in a mortgage by which a specified proportion of the bondholders may waive the right to declare the principal sum due upon a default in the payment of the interest. The courts, however, do not favor this power, inasmuch as it puts the minority bondholders in the power of the majority.<sup>3</sup> A provision in a mortgage that a cer-

tee should not take possession until six months' default after written demand of payment applies only to the provision allowing the trustee to sell the property, and does not apply to his general right to file a bill for foreclosure. Such a bill will lie immediately upon default in payment of interest, without the necessity of giving notice and waiting six months. *Farmers' L. & T. Co. v. Winona, etc. Ry.*, 59 Fed. Rep. 957 (1893). See also *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882), to same effect, and §§ 803, 804, *infra*. Although the trustees foreclose without being requested so to do by one third of the stockholders, as provided in the mortgage, yet, if more than one third put their bonds in evidence in the suit, this cures the defect. Moreover, the foreclosure was good as to the unpaid interest in any event, and the amount claimed could be reduced if necessary. *Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882).

<sup>1</sup> *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896). A request to the trustee to foreclose is valid if made by the requisite number of holders of bonds, where the bonds are *prima facie* valid. *Central Trust Co. v. Cincinnati, etc. Ry.*, 169 Fed. Rep. 466 (1908).

<sup>2</sup> See § 836, *infra*.

<sup>3</sup> In regard to the provision authorizing a certain proportion of the bondholders to waive default, the court, in *Hollister v. Stewart*, 111 N. Y. 644, 655 (1889, affirming 37 Hun, 645), said: "It is easy to see that discretion to waive a default sustained by a majority in interest of the bondholders might

prudently and safely be given to the trustees as to covenants for assurance, and to furnish an inventory, and the like, while it is scarcely possible to suppose that the enormous discretion of waiving every default of interest or principal was intended to be conferred. Stockholders of the company buying a trifling excess over half of the bonds could, with aid of the trustees, practically annul and cancel the whole debt, and take to themselves the entire net earnings of the company. We are confident that the language of the subdivision, taken exactly as it stands in the record, does not refer to a default in principal or interest, but relates wholly to the other covenants to be kept and performed by the mortgagor." The provision in a mortgage that a majority of the bondholders may waive a default in payment of interest does not authorize a waiver of payment before the default has occurred. *McClelland v. Norfolk, etc. R. R.*, 110 N. Y. 469 (1888), holding also that where the bonds and mortgage provided that a majority of the bondholders might postpone payment of the bonds and coupons, the bonds and coupons do not become due at a fixed time and are not negotiable. A provision that a majority may stop a proposed sale of the property by the trustees does not apply to a suit to foreclose. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). Where a mortgage provides that the bondholders, by a three-fourths vote of those present at a meeting called for that purpose, might compromise or adjust any claim or grant an extension of the debt or release property



tain portion of the bondholders in interest may modify the bond or mortgage, and postpone the payment of interest, will not be sustained by the courts where such proportion of the bondholders modify the mortgage so as to compel the minority bondholders to sell their bonds.<sup>1</sup> The bonds and coupons of an unincorporated joint-stock association may be negotiable, even though they provide against personal liability of the stockholders, and even though the trustee of the mortgage securing their payment may with the consent of a majority of the bondholders in interest waive default in payment of the coupons.<sup>2</sup>

§ 802. *Provision for the remedy of entry by the trustee or of a receivership upon default.* — A receivership is often obtained in connection with a suit in equity for the foreclosure of the mortgage.<sup>3</sup> The remedy of entry by the trustee is not often resorted to in these days on account of the danger of financial loss to the trustee.<sup>4</sup> This subject is treated elsewhere.<sup>5</sup>

§ 803. *Provision giving power of sale to the trustee upon default* — *This is a cumulative remedy and does not prevent foreclosure instead.* — This is one of the most important provisions in the mortgage. It is one of the modes in which the mortgagee may foreclose the mortgage. It corresponds to the provision usually contained in the ordinary mortgage on real estate, and hence its history is bound up with the history of mortgages themselves. The mortgage may provide for any mode of sale, even without notice, unless the statutes of the state prescribe otherwise.<sup>6</sup> Sometimes it provides that the trustee shall take possession and operate the road or take possession and sell the property, as he thinks best.<sup>7</sup> All these provisions relative to the trustee's entering into possession of the property and holding it or

covered by the mortgage and the bonds are about to become due, and by such three fourths vote the bondholders extend the time of payment three years and also authorize the further issue of bonds to be equally secured by the mortgage, such acts are legal, being honest and *bona fide*, and with a view to preserving and improving the security. *Walker v. Elmore's, etc. Co.*, 85 L. T. Rep. 767 (1902).

<sup>1</sup> *Hackettstown Nat. Bank v. Yuengling Brewing Co.*, 74 Fed. Rep. 110 (1896). See also, on this subject, § 807, *infra*.

<sup>2</sup> *Hibbs v. Brown*, 112 N. Y. App. Div. 214 (1906); *aff'd*, 190 N. Y. 167.

<sup>3</sup> See ch. LI, *infra*. Where a railroad is leased and then the company

makes a mortgage, a receiver thereafter appointed cannot take possession of the road as against the lessee, the latter's rights being prior to the mortgage, even though the lease gives the net earnings of the road to the lessor. *Louisville, etc. R. R. v. Eakin*, 100 Ky. 745 (1897).

<sup>4</sup> Where the right of the trustee to take possession exists upon a vote of a majority of the bondholders declaring the whole debt due, such declaration must be made before the trustee can take possession by reason of this particular clause. *Union T. Co. v. Missouri, etc. Ry.*, 26 Fed. Rep. 485 (1880).

<sup>5</sup> See §§ 822, 823, *infra*.

<sup>6</sup> On this subject see § 824, *infra*.

<sup>7</sup> See § 824, *infra*.



selling it do not affect or take away the right of the trustee to foreclose the mortgage whenever there is a default in the payment of the principal or interest. The power of sale is an additional or alternative remedy. It is not an exclusive remedy. The trustee may foreclose, the same as though there were no provisions in the mortgage for the trustee's selling or taking possession.<sup>1</sup>

§ 804. *Provisions unreasonably limiting the right to foreclose.*— Occasionally such a provision is inserted. But it is illegal and void. It is an attempt to contract away the established legal remedies which every man is entitled to. A provision forbidding a foreclosure unless a certain proportion of the bondholders request it is illegal and void.<sup>2</sup> Even a provision limiting the right to foreclose until a certain time elapses

<sup>1</sup> See § 824, *infra*.

<sup>2</sup> A provision in a mortgage that the trustee shall not foreclose, but shall take possession, etc., upon the request of a certain proportion of the bondholders, is void as "attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts." *Guaranty Trust Co. v. Green Cove R. R.*, 139 U. S. 137 (1891), distinguishing *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47, 74 (1882), and following *Morgan's Steamship Co. v. Texas, etc. Ry.*, 137 U. S. 171 (1890). The right to foreclose cannot be absolutely abrogated. *Mercantile Trust Co. v. Chicago, etc. Ry.*, 61 Fed. Rep. 372 (1893). A provision that the trustee may sell, but shall not foreclose by suit, may be valid so far as property outside of the court's jurisdiction is concerned, but not as regards property within the jurisdiction. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). A condition in a trust deed given to secure the bonds of a corporation, providing that the bondholders shall not bring suit without notice in writing to the trustee, nor without a request to the trustee to sue, made by the holders of one fifth of the outstanding bonds, is binding upon the bondholders in the absence of proof showing fraud or mismanagement on the part of the corporation. *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262 (1893). A provision requiring a request on the part of one fourth of the bondholders in interest

before foreclosure is commenced will be disregarded by the court where a party charged with fraud owns more than three fourths of the bonds. *Linder v. Hartwell R. R.*, 73 Fed. Rep. 320 (1896). The majority bondholders may be admitted to set up that there can be no foreclosure without the consent of the majority. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). Although the mortgage provides, before foreclosing, that the trustee must be requested to foreclose by a majority of the bondholders, yet, if the position of trustee is vacant, a holder of a majority of the bonds may begin foreclosure without any request. *Wheelright v. St. Louis, etc. Transp. Co.*, 56 Fed. Rep. 164 (1893). But where the trustee is authorized, upon a default in the interest, to foreclose for the principal sum upon the written request of a majority of the bonds, he cannot foreclose for the *principal* except upon this written request being made. *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882). But he may foreclose for the interest. *Central T. Co. v. Texas, etc. Ry.*, 23 Fed. Rep. 846 (1885); *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886). So also a bondholder when the trustee refuses. *Beekman v. Hudson, etc. Ry.*, 35 Fed. Rep. 3 (1888). A provision that foreclosure shall only be on a request of a certain portion of the holders of the bonds is legal. *Hasbrouck v. Rich*, 113 Mo. App. 389 (1905).



will be strictly construed by the court.<sup>1</sup> A provision that the only method of enforcing a mortgage shall be by a public sale by the trustee is void and does not prevent a suit in equity to foreclose.<sup>2</sup> A mortgage may provide that the company shall be sued on the bonds only after the mortgage security has been exhausted.<sup>3</sup>

§ 805. *Provision exempting the trustee from liability.*—A provision is generally inserted exempting the trustee from any and all liability except for his own wilful misconduct or gross negligence.<sup>4</sup> A provision in a mortgage that the trustee shall deliver the bonds only for certain purposes and upon certain written statements of such purposes, followed by a provision that the trustee shall not be bound to inquire into the actual application of the bonds or funds, prevents a bondholder from holding the trust company liable for failure of the mortgagor railroad company to apply the bonds to the purposes indicated, especially where suit is brought more than twenty years after the act, it being shown that the trust company did require written statements before issuing the bonds.<sup>5</sup>

<sup>1</sup> Where a mortgage authorizes entry by the trustee after six months' default in interest, and also sale by advertisement after a similar default, and also a foreclosure, "upon default being made as aforesaid," the court will hold that foreclosure may commence immediately upon default without waiting for six months to elapse. *Mercantile Trust Co. v. Missouri, etc. Ry.*, 36 Fed. Rep. 221 (1888). The case is within the rule laid down in *Railroad v. Fosdick*, 106 U. S. 47 (1882). The charter provision that "foreclosure" shall not take place until after ninety days' notice by publication applies not to the suit to foreclose, but to the subsequent foreclosure itself. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). See also § 800, *supra*, and §§ 825, 836, *infra*; *Seibert v. Minneapolis, etc. Ry.*, 52 Minn. 148 (1893); s. c., 58 Minn. 39. The provision that there shall be no foreclosure until six months after default is for the benefit of the corporation and cannot be raised by creditors. *Central T. Co. v. Worcester, etc. Co.*, 110 Fed. Rep. 491 (1901). Where a debenture contains a provision that the holder shall not commence any action to enforce the mortgage securing the debenture until six months after he had served notice on the

trustee to commence such action, the courts will enforce such provision. *Stewart, etc. Co. v. British, etc. Assoc.*, 79 L. T. Rep. 494 (1898). Foreclosure cannot be commenced two months after default in the payment of interest where the mortgage provided for six months before such suit be commenced. *Union Trust Co. v. Chattanooga, etc. Ry.*, 101 Tenn. 297 (1898).

<sup>2</sup> *Reinhardt v. Interstate, etc. Co.*, 71 N. J. Eq. 70 (1906).

<sup>3</sup> *Pennsylvania Steel Co. v. New York City Ry.*, 189 Fed. Rep. 661 (1911).

<sup>4</sup> The decisions on this subject are given in § 815, *infra*. See also § 622*h*, *supra*.

<sup>5</sup> *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), aff'g *Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App. Div. 473 (1901), involving the same mortgage that was passed upon in *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169. The lower federal court held that a bondholder may hold the trustee liable for certifying to bonds and delivering them to the mortgagor, where the mortgage restricted the purposes for which the mortgagor was to use such bonds, and the trustee knew that the mortgagor had not com-



§ 806. *Provision for appointing a new trustee.*—The deed of trust should provide for the appointment of a new trustee in case of the death, resignation, or removal of the trustee named in the deed. The decisions on this subject are given elsewhere.<sup>1</sup>

§ 807. *Miscellaneous provisions.*—Any additional provision, which may be agreed upon by the parties, and which is not contrary to public policy or beyond the powers of the corporation, may be inserted in the mortgage. Thus, there may be provisions for converting the bonds into stock;<sup>2</sup> for limiting the purposes for which the bonds may be issued;<sup>3</sup> for allowing a subsequent mortgage to be prior in right of payment;<sup>4</sup> that a sinking fund shall be established;<sup>5</sup> that personal lia-

plied with this provision in regard to a part of the bonds already issued; that the general provision exempting the trust company from liability and also releasing it from any obligation to inquire into the application of the bonds is no defense, inasmuch as the mortgage provided that the trustee should issue the bonds only on orders declaring the purposes for which the mortgagor proposed to use them; that the trustee must use such care as a mortgagee would use in making such advances; that the mortgagee is not a necessary party to such a suit, but the suit must be brought by a bondholder, not for himself alone, but in behalf of all bondholders; and that the statute of limitations may be a bar. *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5 (1899); s. c., on appeal, 107 Fed. Rep. 169 (1901).

<sup>1</sup> See § 819, *infra*.

<sup>2</sup> See § 283, *supra*.

<sup>3</sup> Even though a mortgage provides that the trustee shall certify and deliver the bonds or the proceeds thereof, only upon a written statement by the mortgagor declaring the purpose for which said bonds or proceeds are to be used, the trustee is not liable for failure to require such written statement, where the trustee has not expressly agreed to carry out that provision. Moreover, a suit by a bondholder against the trustee for failure to carry out that provision must be commenced within ten years from the time of the breach thereof. *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), *aff'g* *Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App.

Div. 473; s. c., *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169. See also § 764, *supra*.

<sup>4</sup> The mortgage may provide that thereafter another and new mortgage may be made prior in right of payment to the mortgage first mentioned. *Campbell v. Texas, etc. R. R.*, 2 Woods, 263 (1872); s. c., 4 Fed. Cas. 1188.

<sup>5</sup> Where the mortgage provides that a certain amount annually shall be paid by the company as a sinking fund to buy the bonds with at once, until the bonds are above 110, and then only the interest on the bonds already purchased is to be added to the sinking fund, the latter clause will be enforced, and a stockholder cannot enjoin it. *Wilds v. St. Louis, etc. R. R.*, 102 N. Y. 410 (1886). It is no defense to an action by a bondholder to reach a sinking fund that the corporation holding the fund had no charter right to act as custodian, and that such custodian had illegally guaranteed the bonds. *Central, etc. Co. v. Farmers', etc. Co.*, 116 Fed. Rep. 700 (1901), holding also that where one railroad is custodian of the sinking fund of another railroad, and both become insolvent, the bondholders of the latter have a claim prior in right to deficiency judgments in foreclosure against the former; *aff'd*, 114 Fed. Rep. 263. Where a sinking fund provision that the mortgagor may stop increasing it when all the bonds have been purchased or the money in the hands of the trustees equals the principal and interest of the outstanding bonds, it is unnecessary to increase the sinking fund to provide



bility of the stockholders is waived;<sup>1</sup> that bonds may be paid and canceled by annual drawings;<sup>2</sup> that the trustee may purchase the property for the bondholders at a foreclosure sale; a covenant for further assurance; for allowing bondholders to turn in their bonds in payment for the property purchased at the foreclosure sale;<sup>3</sup> for the taking up, paying, and canceling bonds secured by underlying mortgages.<sup>4</sup> Where a

for future interest. *Lehigh Valley Coal Co. v. Girard Trust Co.*, 231 Pa. St. 239 (1911). A court of equity has jurisdiction to construe the powers and duties of the trustee and also control his discretion where he is abusing it in the purchase of bonds for a sinking fund as provided in the mortgage. *Struthers, etc. Co. v. Union, etc. Co.*, 227 Pa. St. 29 (1910). Where a sinking fund provision of a mortgage is not being carried out, the mortgagor may file a bill for an accounting without foreclosing or taking possession or applying for a receiver. *New York T. Co. v. Michigan Traction Co.*, 193 Fed. Rep. 175 (1912). Even though the sinking fund provides that the trustees shall buy bonds at the lowest price, yet the trustee need not buy a small number of the bonds at a low price when he can buy a larger number at a higher price, the net result being a lower price for all the bonds purchased. *National Trust Co. v. Whicher*, [1912] A. C. 377. A sinking fund provision may amount to a lottery and be illegal. See § 762, *supra*. 156 N. Y. App. Div. 182.

<sup>1</sup> Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint-stock association shall not be personally liable. *Hibbs v. Brown*, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void.

<sup>2</sup> Although the sinking fund and redemption clause provides for annual payments and they are not made, yet they may be made subsequently by the corporation. *Missouri, etc. Ry. v. Union Trust Co.*, 156 N. Y. 592 (1898),

holding also that where a sinking fund is provided for and bonds are to be drawn by lot for redemption each year, the mortgagor cannot buy a part of the bonds and exclude those bonds from the aggregate number of bonds included in the drawing by lot. A sinking fund provision that a certain percentage of the outstanding bonds should be paid annually to the trustee means a percentage of all the bonds originally issued where it is also provided that all the bonds shall be redeemed at maturity and such construction would coincide with that result. *Columbia, etc. Co. v. Knickerbocker Trust Co.*, 152 N. Y. App. Div. 5 (1912). The right of a corporation mortgagor to pay off its mortgage cannot be defeated by the fact that it has pledged some of the bonds and given to the pledgee an option to purchase all of the bonds, full payment of the pledgee of the amount borrowed, with interest, being tendered. Any other construction would be an illegal clog on the equity of redemption. *Jarrah, etc. Corp. v. Samuel*, [1902] 2 Ch. 479; *aff'd*, [1903] 2 Ch. 1. 156 N. Y. App. Div. 168.

<sup>3</sup> See § 887, *infra*.

<sup>4</sup> Where a mortgage provides for a portion of the bonds secured thereby to be issued to retire certain other bonds, the mortgagor is entitled to the issue on presenting such other bonds, irrespective of whether it purchased them from the sinking fund, or from surplus earnings, or from the sale of the new issue of bonds. *Beech Creek, etc. Co. v. Knickerbocker Trust Co.*, 127 N. Y. App. Div. 540 (1908). Where a portion of second mortgage bonds are by the terms of the mortgage deposited with the trustee to be delivered to the company in exchange for prior bonds when purchased by the company, the company may cancel such prior bonds before delivering them to the trustee. The "funding" of the



company executes a mortgage and bonds to take up in part preëxisting bonds and in part to pay for improvements, and then it consolidates with another company and the consolidated company claims the right to continue to issue such new bonds, the trustee may apply to the court for instructions, all necessary parties being brought in. The court will not allow a further issue of bonds for property acquired by the consolidated company, but will allow issues to take up previous existing bonds.<sup>1</sup> The holders of mortgage bonds cannot claim the right to exchange the same for new bonds, even though the mortgage securing the new bonds provides for such exchange.<sup>2</sup> A mortgage may provide that the company shall be sued on the bonds only after the mortgage security has been exhausted.<sup>3</sup> Where a corporation issues several million dollars of bonds, secured by a mortgage that represents that it covers many thousand acres of land, although, in fact, the company owned but a few hundred acres of land, a purchaser of such bonds may maintain a bill in equity in behalf of himself and other bondholders to hold the directors liable for false representations, and the corporation itself is not a necessary party defendant, a request to the trustee of the mortgage having first

debts of a company is the substitution of a single long time debt for short time debts. *Twin State, etc. Co. v. Knickerbocker T. Co.*, 135 N. Y. App. Div. 467 (1909). Under the terms of a second mortgage setting aside a part of the bonds to be delivered to the mortgagor upon the mortgagor delivering in exchange prior bonds, the trustee of a mortgage must issue new bonds to the mortgagor upon the latter paying the underlying bonds on maturity and canceling them and delivering them to the trustee. All the underlying bonds being so delivered, it is unnecessary for the trustee to keep the bonds alive, as would be the case if only part were delivered. *Charleston, etc. Co. v. Knickerbocker T. Co.*, 138 N. Y. App. Div. 107 (1910); *aff'd*, 203 N. Y. 529. A provision in a mortgage that certain bonds shall be reserved for refunding does not allow the directors to use them for other purposes, even though another provision allows the directors to dispose of such bonds as in their opinion are not required for refunding. *St. Louis, etc. R. R. v. Guaranty T. Co.*, 144 N. Y. App. Div. 440 (1911); *aff'd*, 205 N. Y. 609.

<sup>1</sup> *Orrick v. Fidelity, etc. Co.*, 113 Md. 239 (1910). See § 765, *supra*. The

holder of bonds, issued by a corporation, which is afterwards consolidated with another corporation, cannot claim the right to exchange his bonds for bonds of the consolidated company, even though the mortgage of the consolidated company provides for such exchange, especially where the party has delayed for nine years in claiming the right. *New York, etc. Trust Co. v. Louisville, etc. R. R.*, 97 Fed. Rep. 226 (1899). A mortgage covering stock in a terminal company and providing for a further issue of bonds upon the acquisition of additional mileage does not authorize such additional bonds on the consolidation of the terminal company with the main company. *Lehigh, etc. R. v. Central Trust Co.*, 133 N. Y. App. Div. 304 (1909); *aff'd*, 199 N. Y. 599. Where a company has issued \$112,000 of \$200,000 mortgage bonds and then sells its property, the vendee assuming the mortgage cannot issue the remaining bonds and make them equal in right to the \$112,000 of bonds. *Security, etc. Co. v. St. Louis etc. Co.*, 137 N. W. Rep. 807 (Mich. 1912).

<sup>2</sup> *Morse v. Chicago, etc. R. R.*, 84 N. Y. App. Div. 406 (1903).

<sup>3</sup> *Pennsylvania Steel Co. v. New York City Ry.*, 189 Fed. Rep. 661 (1911).



been made to bring suit. A provision in the mortgage against individual bondholders maintaining a suit before offering indemnity to the trustee is no bar to such a suit, that provision being applicable to remedies under the mortgage only. The suit may be maintained in the United States circuit court in New York, even though the corporation was organized in Missouri, it appearing that the directors' residence is in New York.<sup>1</sup> Even though certain directors are a building committee and sign certificates for the issue of bonds purporting to repay money which has gone into construction in accordance with the mortgage, and it turns out that the money was misapplied, they are not personally liable, being guilty of only ordinary negligence, but if one of them knew the facts he is personally liable.<sup>2</sup> Bonds payable to bearer are negotiable, even though they are subject to redemption by annual drawings.<sup>3</sup> Where a mortgaged water-works plant is taken over by the state as allowed by its original contract with the water-works company, and the bonds secured by the mortgage have to be paid first, they may be paid at the redemption price specified in the mortgage, but cannot be called in merely at par and accrued interest.<sup>4</sup> Doubtful phrases in a mortgage deed of trust are construed in favor of the bondholders, and a clause that the bond shall become due upon any sale of the property refers to a sale in behalf of the bondholders and not to a sale by the corporation itself.<sup>5</sup> A provision in an English debenture that a majority of the holders of debentures might "sanction any modification or compromise of the rights of the debenture-holders against the company or against the property" is valid, and such a compromise is binding on the minority.<sup>6</sup> Where a mortgage deed of trust securing debentures au-

<sup>1</sup> Slater T. Co. v. Randolph, etc. Co., 166 Fed. Rep. 171 (1908).

<sup>2</sup> Carrington v. Basshor Co., 84 Atl. Rep. 746 (Md. 1912).

<sup>3</sup> Dickerman v. Northern T. Co., 176 U. S. 181 (1900). See also § 767, *supra*.

<sup>4</sup> Harnickell v. Omaha Water Co., 146 N. Y. App. Div. 693 (1911). Even though a city has a right to take over water-works at their appraised value, and an appraisal is had, the company cannot claim the award unless it gives complete title free from mortgages. City of Omaha v. Omaha Water Co., 192 Fed. Rep. 246 (1911). See also Slocum v. City of North Platte, 192 Fed. Rep. 252 (1911).

<sup>5</sup> Lisman v. Michigan, etc. Co., 50 N. Y. App. Div. 311 (1900).

<sup>6</sup> Sneath v. Valley Gold, [1893] 1 Ch. 477. Where by the mortgage a

majority of the debenture holders may bind all by a vote to modify or compromise, the majority may compel all to turn in their debentures to a reorganized company and take stock therefor. Mercantile Inv., etc. v. River Plate Trust, etc. Co., [1894] 1 Ch. 578. Cf. § 801, *supra*, and the case of Hackettstown Nat. Bank v. Yuengling Brewing Co., 74 Fed. Rep. 110 (1896). Where a committee is authorized to modify a reorganization plan it may change the plan so that on default of the new second mortgage the stock of the corporation shall belong to the bondholders and the second mortgage shall be discharged. At least such a change is binding on a bondholder who held his bonds four years without objection, and until after the default had taken place and the stock absorbed and the mortgage dis-



thorizes a majority in interest of the debenture-holders to bind all by an agreement to accept other securities in lieu of the debentures, a court of equity will not interfere unless there is unfairness or oppression, and the fact that some of the debenture holders are personally interested in making such change does not constitute unfairness justifying interference by the court.<sup>1</sup> Where in connection with the giving of a corporate mortgage a majority of the stock is placed in the hands of a trustee with the right to the trustee to vote the stock as he deems best if the parties could not agree, and subsequently the corporation refuses to allow the trustee to vote the stock, the mortgagee may treat this as a default on the mortgage and then foreclose, and it is immaterial that the trustee was interested in the mortgage.<sup>2</sup>

#### C. AUTHORIZING, EXECUTING AND RECORDING MORTGAGES.

§ 808. *The board of directors authorize the execution of mortgages — A stockholders' meeting is not necessary — Statutes requiring stockholders' consent — Waiver of such consent or ratification without formal consent — Estoppel, by recitations in mortgage, as to formalities of authorization.* — It is now the established rule that the board of directors, without any action whatsoever by the stockholders, has the power to authorize the execution of a mortgage on the corporate property. Formerly it was supposed that a vote of the stockholders was necessary, and it is still customary to have a stockholders' meeting as well as a directors' meeting authorize the mortgage. But the latter only is necessary.<sup>3</sup> And the directors' meeting which authorizes the

charged. *Lyman v. Kansas City, etc.* R. R., 101 Fed. Rep. 636 (1900). Even though a majority of debenture holders have the power to modify the agreement they have no power to direct that the mortgaged property be sold and the proceeds applied to a purchase of such of the debentures as are offered at the cheapest price. *Re N. Y. Taxicab Co.*, 107 L. T. Rep. 813 (1912).

<sup>1</sup> *Goodfellow v. Nelson Line Ltd.*, [1912] 2 Ch. 324. See also *Northern, etc. Co., Ltd. v. Farnham, etc., Ltd.*, [1912] 2 Ch. 125.

<sup>2</sup> *Thompson-Starrett Co. v. Ellis Granite Co.*, 84 Atl. Rep. 1017 (Vt. 1912).

<sup>3</sup> The stockholders have no power to authorize a mortgage. Only the board of directors can do so. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). The directors may authorize

a mortgage without a vote of the stockholders. *Phinizz v. Augusta, etc.* R. R., 62 Fed. Rep. 678 (1894). The directors and not the stockholders authorize a mortgage. See dictum in *Louisville Trust Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896). Aside from statute a purchase-money mortgage may be given by a corporation without the vote of its stockholders. *Farmers' L. & T. Co. v. Equity Gas Light Co.*, 84 Hun, 373 (1895). The directors may authorize the execution of bonds and a mortgage to secure them. The action of the stockholders is not necessary. *Thompson v. Natchez, etc. Co.*, 68 Miss. 423 (1891). A mortgage and bonds secured thereby may be authorized by the board of directors, and no action or authorization by the stockholders is necessary. *Hodder v. Kentucky, etc. Ry.*,



mortgage may be held out of the state in which the corporation is incorporated.<sup>1</sup>

Sometimes mortgages by corporations are prohibited by statute, except where a specified proportion of the stockholders assent to the giving of the mortgage. Such a provision is regarded as intended for the protection and security of the stockholders, and, in the absence of fraud and objection upon their part, defects in the proceedings by which the assent is given cannot be held to invalidate the mortgage, unless they are of such a substantial character that the giving of the assent cannot be inferred.<sup>2</sup> A provision that corporate debts shall

7 Fed. Rep. 793 (1881). That the directors and not the stockholders are the proper authority to authorize a mortgage, see also *Thomas v. Citizens' Horse Ry.*, 104 Ill. 462 (1882); *Hendee v. Pinkerton*, 96 Mass. 381 (1867); *Wood v. Whelen*, 93 Ill. 153 (1879); *McCurdy's Appeal*, 65 Pa. St. 290 (1870); *General Auction, etc. Co. v. Smith*, [1891] 3 Ch. 432. The directors are the proper authority to pledge corporate property. There is no reason why the rule should be different as to mortgages. See also § 712, *supra*. The ratification by the stockholders of an invalid mortgage made by the directors does not validate such mortgage. *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). Where no record is kept of directors' resolutions authorizing a mortgage they may be proved by parol. *Murray v. Beal*, 23 Utah, 548 (1901). A mortgage authorized at a stockholders' meeting, at which all the directors were present, is legally authorized. *Crossette v. Jordan*, 132 Mich. 78 (1902). A stockholders' vote is not necessary to the validity of a mortgage. *Copper, etc. Co. v. Costello*, 11 Ariz. 334 (1908). As to the power of the president or other officers to execute a mortgage, see §§ 716, 717, *supra*.

<sup>1</sup> *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888); *Arms v. Conant*, 36 Vt. 744 (1864); *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879); *Ohio, etc. R. R. v. McPherson*, 35 Mo. 13 (1864); *Bassett v. Monte Christo, etc. Co.*, 15 Nev. 293 (1880); *Wright v. Bundy*, 11 Ind. 398 (1858); *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870); *Butler v. Rahm*, 46 Md. 541 (1877). The

president's acknowledgment of a mortgage may be taken out of the state. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). Under the Illinois statute a mortgage authorized by a directors' meeting held outside of the state is illegal unless such meeting was authorized or its acts ratified by a vote of two thirds of the directors at a regular meeting in the state in accordance with the statute. *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897). Creditors of a Delaware corporation cannot defeat its mortgage on the ground that it held its organization meetings outside of the state. *Hasbrouck v. Rich.*, 113 Mo. App. 389 (1905). See also § 713a, *supra*.

<sup>2</sup> A statutory provision that no bonds shall be issued except upon the consent of two thirds of the stockholders and a certificate filed, is not a defense to the bonds where the company received the money on them. *McKee v. Title Ins., etc. Co.*, 159 Cal. 206 (1911). A constitutional provision that the bonded debt shall not be "increased" except on a certain vote of the stockholders does not apply to the first issue of bonds. *Merced River, etc. Co. v. Curry*, 157 Cal. 727 (1910). A constitutional requirement that no increase of bonds should be made except at a meeting called on sixty days' notice, does not apply to an original issue of corporate bonds. *McKee v. Title Ins., etc. Co.*, 159 Cal. 206 (1911). A statute requiring the consent of two thirds of the stockholders does not apply to a mortgage given for the original construction of a railroad, such mortgage being provided for in the



not be increased except on a vote of the stockholders, etc., does not apply

contract of construction. Moreover, twenty years' delay in objecting is fatal. *Baltimore, etc. R. R. v. Berkeley, etc. R. R.*, 168 Fed. Rep. 770 (1909). In a suit to foreclose a mortgage on mining property it is no defense to a defendant holding another mortgage that the plaintiff's mortgage was not ratified by the stockholders, as required by statute, the defendant not alleging its mortgage was so ratified. *Bennett v. Red Cloud, etc. Co.*, 14 Cal. App. 728 (1911). The consent of the stockholders to one company buying the property of another company as required by statute, is presumed, where the transaction had been completed for twenty years, and even if the statute is not complied with as to the stockholders of the vendor, the purchaser cannot avoid the liabilities imposed under the statute. *Whiting v. Malden, etc. R. R.*, 202 Mass. 298 (1909). A purchase money chattel mortgage containing a covenant to renew from year to year does not need to be approved by two thirds of the stockholders under the New York statute. *Black v. Ellis*, 197 N. Y. 402 (1910). A receiver of an insolvent corporation cannot maintain a suit to set aside its mortgage on the ground that the consent of the stockholders thereto was not in writing filed in the county clerk's office, as required by the New York statute, it being shown that the stockholders had orally consented to the mortgage. *Black v. Ellis*, 129 N. Y. App. Div. 140 (1908). A corporation may defend against a mortgage on the ground that it was not executed by a vote of the stockholders as required by the statute, especially where no consideration for the mortgage is proved. *London Realty Co. v. Coleman, etc. Co.*, 140 N. Y. App. Div. 495 (1910). Where the statute requires that a mortgage of a mining company must be ratified by the stockholders, a mortgage given without such ratification is void at the instance of the corporation itself or its stockholders, but the ratification may be by the stockholders of record given in any unequivocal way, as, for instance,

where the director executing the mortgage owned over two thirds of the stock. *Royal, etc. Mining Co. v. Royal Consol. Mines*, 157 Cal. 737 (1910). A trustee in bankruptcy of a corporation cannot object to its mortgage on the ground that it was not authorized by the stockholders as required by statute. *Re V. & M. Lumber Co.*, 182 Fed. Rep. 231 (1910). After a mortgage has been given and foreclosed the company cannot claim that the mortgage was invalid because not authorized by the stockholders. *West, etc. Ass'n v. Pere Marquette R. R.*, 137 N. W. Rep. 799 (Mich. 1912). A stockholder who has taken part in an informal organization of the company cannot attack a mortgage which has been informally authorized, he having taken part in that also. *Peyton v. Minong, etc. Co.*, 149 Wis. 66 (1912). Although the statute requires the assent of two thirds of the stockholders at a meeting duly called, etc., before a mortgage is given, yet if all the stockholders except one are directors, and he assents to the mortgage, and the directors, at a directors' meeting, authorize it, the mortgage is good. The provision is for the protection of stockholders and not of the public. *Thomas v. Citizens', etc. Ry.*, 104 Ill. 462 (1882); *Greenpoint Sugar Co. v. Whiting*, 69 N. Y. 328 (1877); *Beecher v. Marquette, etc. Co.*, 45 Mich. 103 (1881). See also § 725, *supra*. The assent may be given subsequently so as to validate a mortgage if there are no intervening rights. And a person purchasing from the corporation with actual notice is bound by the irregular mortgage. The corporation cannot raise the objection. *Rochester Sav. Bank v. Averell*, 96 N. Y. 467 (1884). Stock owned by the corporation is not to be voted. *Vail v. Hamilton*, 85 N. Y. 453 (1881). Other corporate creditors cannot raise this objection to the mortgage. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). *Cf.* in general, *Astor v. Westchester, etc. Co.*, 33 Hun, 333 (1884). Concerning the New York act requiring the assent



to ordinary debts in the usual course of business ; neither does it prevent

of stockholders, see also *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890); *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890); *Star Co. v. Andrews*, 58 N. Y. Super. Ct. 188 (1890); *McComb v. Barcelona, etc. Assoc.*, 10 N. Y. Supp. 546 (1890); *aff'd*, 134 N. Y. 598. No consent of the stockholders is necessary to a purchase-money mortgage in New York. *In re Beaver Knitting Mills*, 154 Fed. Rep. 320 (1907). See 202 Fed. Rep. 599.

Where the stockholders have not authorized the issue of bonds as required by statute, the statutory liability of the stockholders cannot be enforced to pay such bonds. *Boyd v. Heron*, 125 Cal. 453 (1899). Under a statute requiring the consent of stockholders to borrow money and give a mortgage, a vote of the stockholders so to do, in order to pay off an existing loan, sustains a mortgage given to secure such existing loan, without a new loan being obtained. The statute is for the protection of the stockholders, and if not followed merely makes the mortgage voidable, but not at the instance of creditors. *Citizens' State Bank v. McGraft, etc. Co.*, 122 Mich. 573 (1900). A constitutional and statutory requirement that bonded debt shall only be incurred when voted at a meeting called on sixty days' notice does not prevent a waiver of such notice by all the stockholders either by express waiver or by attendance without such notice. *Riesterer v. Horton, etc. Co.*, 160 Mo. 141 (1901). Stockholders cannot object to a mortgage on the ground that it was not authorized by three fourths of the stockholders as required by statute, where the minutes of a special meeting of the stockholders authorizing the mortgage was read and approved at the next annual meeting, and where there was no bad faith, and where for a year and a half the mortgage had been in existence and interest paid thereon. *Bishop v. Kent, etc. Co.*, 20 R. I. 680 (1898). The Montana statute requiring the consent of two thirds in interest of the stock of a corporation to a deed of its prop-

erty does not render the deed void if such consent is not obtained, and a stranger to the title cannot raise this objection. *Boston, etc. Co. v. Montana, etc. Co.*, 89 Fed. Rep. 529 (1898). A judgment creditor under the decisions in California may attack the validity of a prior mortgage on the ground that it was not authorized by the stockholders as required by statute. *Williams v. Gold Hill, etc. Co.*, 96 Fed. Rep. 454 (1899); *aff'd*, 186 U. S. 157. A New York statute requiring the consent of two thirds of the stockholders to a mortgage is satisfied where the president who executes the mortgage and another stockholder who indorses his assent thereon own over two thirds of the stock. *G. V. B. Min. Co. v. First Nat. Bank, etc.*, 95 Fed. Rep. 23 (1899). The New York statute requiring the consent of stockholders to the execution of a mortgage is for the protection of the stockholders, and only the stockholders can object to the mortgage on that ground. *In re New York, etc. Co.*, 110 Fed. Rep. 514 (1901). A corporation cannot defend against a mortgage on the ground that the consent of the stockholders was not obtained, as required by statute. *Atlantic T. Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539 (1902). Where a company takes over the property of another company and the president delivers goods in payment of debts of the latter with the knowledge and consent of the officers and directors of the purchasing company, such payments are legal, and the statutes of Pennsylvania where such corporation existed, requiring stockholders' consent to the incurring of debts, do not apply. *Curtis v. Natalie, etc. Co.*, 89 N. Y. App. Div. 61 (1903); *aff'd*, 181 N. Y. 543. A creditor of a corporation cannot attack a mortgage on the ground that the notice of the stockholders' meeting authorizing the same was not in accordance with the statute, it being shown that a majority of the stock voted in favor of the mortgage. *Anderson v. Bullock, etc. Bank*, 122 Ala. 275 (1899). Even though a mortgage is executed by a



the giving of a mortgage in the ordinary course of business.<sup>1</sup> The directors may authorize a five-year lease, even though the by-laws require all conveyances to be approved by the stockholders.<sup>2</sup>

corporation without the consent of the stockholders, as required by statute, yet the corporation cannot maintain a bill in equity to cancel the mortgage, unless it restores to the mortgagee what he has paid thereon. *Southern, etc. Assoc. v. Casa, etc. Co.*, 128 Ala. 624 (1901). Even though a statute requires a certain notice to be given for the increase of stock, and another statute has a similar provision as to bonds, yet both notices may be combined in one notice. *Paliser v. Home Tel. Co.*, 152 Ala. 440 (1907).

A creditor who is also a stockholder may vote his stock in favor of a mortgage to himself. *Rittenhouse v. Winch*, 11 N. Y. Supp. 122 (1890). A stockholders' vote need not be proved where the company acquiesced in the mortgage. *Augusta, etc. R. R. v. Kittel*, 52 Fed. Rep. 63 (1892). An actual meeting of the stockholders is not necessary if all consent, even though the statutes require a meeting. A subsequent creditor cannot complain. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). A statutory provision that stock may be issued for property only where the stockholders have authorized the issue at a meeting called for that purpose, is satisfied by the incorporators accepting a subscription payable in property. *Southern, etc. Co. v. Yeatman*, 134 Fed. Rep. 810 (1905). Although the statutes require two thirds of the stockholders' assent to a mortgage, yet corporate creditors cannot raise that objection where the corporation does not. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). Where the charter of a turnpike company requires the assent of two thirds of the stockholders to any mortgage, a mortgage without that assent is not ratified by the payment of subscriptions for the purpose of paying the debt secured by the mortgage. *Forbes*

*v. San Rafael, etc. Co.*, 50 Cal. 340 (1875). A contract to make a mortgage and issue bonds may be enforced where the company has received the consideration therefor, even though the statute requires the assent of two thirds of the stockholders, and such assent was not obtained. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). Although the statutes of Montana require that a mortgage may be given only after a stockholders' meeting, convened by publication of notice, etc., has voted it, yet all the stockholders by voting therefor waive the required notice and no one can complain. The mortgage is valid. *Campbell v. Argenta, etc. Co.*, 51 Fed. Rep. 1 (1892). Concerning such a waiver see also ch. XXXVI, *supra*. A chattel mortgage authorized by *de facto* stockholders is good as to third persons. As against a receiver of the corporation it is valid, although the affidavit is defective and the mortgage is not recorded. *Kane v. Lodor*, 56 N. J. Eq. 268 (1897). Where a mortgage must be authorized by a vote of two thirds in value of the stockholders, this means a stock vote, irrespective of the fact that some of the stock is only partly paid up. *Purdum v. Ontario, etc. Deb. Co.*, 22 Ont. Rep. (Can.) 597 (1892). A corporation cannot retain the benefits of a mortgage and at the same time claim that it is illegal because not authorized by two thirds of its stockholders, and because it exceeded two thirds of the value of the corporate property. Junior judgment creditors have no greater rights than the corporation in this respect. *Hamilton T. Co. v. Clemes*, 17 N. Y. App. Div. 152 (1897); *aff'd*, 163 N. Y. 423. In California, by statute, the vote or consent of the stockholders is necessary to the issue of bonds. *Smith v. Ferries, etc. Ry.*, 51 Pac. Rep. 710 (Cal. 1897). A mortgage not author-

<sup>1</sup> *West & Co. v. Dyson*, 230 Pa. St. 619 (1911). See 141 N. W. Rep. 396.

<sup>2</sup> *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621 (1911).



Where the statutes of a state provide that a mortgage shall not be given by a domestic mining corporation on its mines, except by the consent of two thirds of the capital stock, and the statutes also provide that foreign corporations shall not be allowed to do business within the state on more favorable terms than domestic corporations, a mortgage by a foreign corporation on a mine within the state without the consent of the stockholders is void.<sup>1</sup> A mortgage given by a New

ized by a majority in interest of the stockholders as required by statute is void. *Carlsbad, etc. Co. v. New*, 33 Colo. 389 (1905). A statute requiring consent of stockholders to a pledge of corporate property is for the benefit of the stockholders, and creditors cannot object that such consent was not given. *Barrett v. Pollak Co.*, 108 Ala. 390 (1895). A provision in a charter that property should not be mortgaged or pledged except with consent of the stockholders is for their benefit, and cannot be set up by one creditor as against another creditor. *Alabama, etc. Co. v. McKeever*, 112 Ala. 134 (1896). Where a mortgage covers one ship and two not yet built, and subsequently, and before they are built, a statute is passed requiring the assent of the stockholders to a mortgage, such mortgage covers such ships without the stockholders' consent. *The Vigilancia*, 68 Fed. Rep. 781 (1895). Although the stockholders authorize a mortgage at a special meeting instead of a "regular general meeting," as required by statute, yet a corporate creditor cannot attack it on that ground. *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143 (1894). Although the New York statute requires the written assent of two thirds of the stockholders in interest to the execution of a mortgage, yet neither the company nor its officers executing the mortgage, nor the party purchasing the equity expressly subject to the mortgage, can raise the objection. *Beebe v. Richmond Light, etc. Co.*, 3 N. Y. App. Div. 334 (1896). Where a corporation can mortgage its property only by a vote of the stockholders, the president cannot give a mortgage by depositing the title deeds. *Parker v. Carolina, etc. Bank*, 53 S. C. 583 (1898). A statute requiring leases

by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. *Coal, etc. Co. v. Tennessee, etc. R. R.*, 106 Tenn. 651 (1901). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to an assignment for the benefit of creditors, *Goetz v. Knie*, 103 Wis. 366 (1899). A statutory requirement that the stockholders should authorize a mortgage is for their protection, and if it has received the money without such approval neither it nor its creditors nor stockholders can defeat the mortgage after they have acquiesced therein. *Eastman v. Parkinson*, 131 Wis. 375 (1907). A statute requiring the consent of stockholders to a mortgage does not apply to a mortgage given to obtain an extension of time on an existing mechanic's lien. *Galveston, etc. Ry. v. Fontaine*, 23 Tex. Civ. App. 519 (1900).

<sup>1</sup> *Williams v. Gold Hill, etc. Co.*, 96 Fed. Rep. 454 (1899), the court refusing to follow *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888). A West Virginia corporation owning land in California must, in giving a mortgage on such land, comply with the California statutes requiring a two thirds vote of the capital stock in favor of such mortgage, otherwise such mortgage is void. *Williams v. Gaylord*, 186 U. S. 157 (1901), the court following the decision of the supreme court of California. Under the Illinois statute which prohibits the directors from holding their meetings outside of the



York corporation on property in Idaho is valid although the written consent of two thirds of the stockholders in interest, which is required by the statute of New York, is not recorded as required by such statute.<sup>1</sup> And a mortgage by a New Jersey corporation on property in New York need not have the consent of the stockholders, as required by the New York statute applicable to New York corporations.<sup>2</sup> Even though the constitution and statutes require that the capital stock shall not be increased, except upon a majority vote of the stockholders at a meeting called for the purpose, on sixty days' public notice, yet the stockholders may unanimously waive such notice and the expiration of such time.<sup>3</sup> Although a deed by a mining company has not been ratified by two thirds in interest of the stockholders, as required by statute, yet only a stockholder or some one connected with the title of the corporation can raise this objection.<sup>4</sup>

state unless authorized or ratified by a vote of two thirds of the directors at a regular meeting, a mortgage on land in Missouri authorized at a meeting held in Missouri is illegal, and a subsequent ratification thereof at a meeting regularly held in Illinois does not validate such mortgage as against an attachment levied before such ratification. *Union, etc. Bank v. State, etc. Bank*, 155 Mo. 95 (1900). A mortgage on real estate in Kentucky to secure bonds payable elsewhere is of course governed by the laws of Kentucky. *Bramblet v. Commonwealth, etc. Co.*, 83 S. W. Rep. 599 (Ky. 1904).

<sup>1</sup> *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); *aff'd*, 95 Fed. Rep. 23. A mortgage may be executed by authority of the directors of a company, and even though the statutes of New York require the consent of stockholders, yet this objection cannot be raised by the company itself upon a foreclosure, the mortgage land being located in West Virginia. Only a stockholder can raise the objection. *Boyce v. Montauk, etc. Co.*, 37 W. Va. 73 (1892).

<sup>2</sup> A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of stock which was issued to them illegally and with-

out consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899). Where a statute requiring the consent of the stockholders to a mortgage is held by the state court to apply to a mortgage given by a foreign corporation, a federal court will follow such decision. *Williams v. Gaylord*, 102 Fed. Rep. 372 (1900); *aff'd*, 186 U. S. 157. The statute in Massachusetts that a corporation shall not convey or mortgage its real estate, or give a lease thereof for more than a year, "unless authorized by a vote of the stockholders at a meeting called for that purpose," does not apply to foreign corporations, even though the mortgage is authorized in, and is on property in, Massachusetts. *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888).

<sup>3</sup> *State v. Cook*, 178 Mo. 189 (1903). A constitutional provision that the bonded debt shall not be "increased" except on a certain vote of the stockholders does not apply to the first issue of bonds. *Merced River, etc. Co. v. Curry*, 157 Cal. 727 (1910).

<sup>4</sup> *Galbraith v. Shasta, etc. Co.*, 143 Cal. 94 (1904).



A mortgagee is not bound to inquire into the observance of the rules and regulations of the company relative to the call of meetings.<sup>1</sup> But where no notice at all of the directors' meeting was given and some of the directors are not present the rule may be different.<sup>2</sup> Where the

<sup>1</sup> *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896). Where a mortgage is approved by all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement as required by statute. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). Even though every stockholder is not notified of a meeting to authorize a mortgage, yet if the majority authorize it and it is executed, it is valid. *Drewry v. Columbia*, etc. Co., 87 S. C. 445 (1911). A corporation cannot defend against a mortgage and bonds where it received the consideration and its seal was attached and the mortgage and bonds were apparently signed by its president and secretary with the authority of the board of directors, the mortgagee having no notice of any defects. *Clearwater*, etc. Bank *v. Bagley*, etc. Tel. Co., 116 Minn. 4 (1911). Even though the statutory notice of a stockholders' meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. *Atlantic*, etc. Co. *v. The Vigilancia*, 73 Fed. Rep. 452 (1896). Although the statutes require three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no notice of these facts, is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), rev'g *Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). See also § 725, *supra*.

<sup>2</sup> A mortgage authorized at a meeting of the board of directors of which no notice was given and some of the directors were absent is not valid, and the declarations of a joint mortgagor that the corporation had authorized the mortgage are inadmissi-

ble. *Relley v. Campbell*, 134 Cal. 175 (1901). A mortgage authorized at a special meeting of directors, no notice of which had been given to two directors who were not present, is not enforceable, the minutes not having been approved at any subsequent meeting. *Curtin v. Salmon*, etc. Co., 130 Cal. 345 (1900). A chattel mortgage authorized at a directors' meeting at which only half of the directors were present and notice of which had not been given to directors who were not present, is illegal. *Broughton v. Jones*, 120 Mich. 462 (1889). The purchaser at foreclosure sale under a second mortgage cannot attack the first mortgage on the ground that the directors who authorized it were illegally elected by reason of a married woman's stock being voted when she was not present. *Florida Clay Co. v. Vause*, 57 Fla. 407 (1909). Even though directors are not residents as required by statute, a mortgage authorized by them is legal. *Copper*, etc. Co. *v. Costello*, 12 Ariz. 318 (1909). Where a corporate mortgage is executed by two of the directors, one as president and the other as secretary, and the remaining director knew of it and did not object, the mortgage is good. *Denver*, etc. Inv. Co. *v. Rudolph*, 47 Colo. 380 (1910). A mortgage may be valid, even though the directors' meeting which authorized it was without notice to one director, it appearing that he was merely a nominal stockholder and director. *Stiell v. Webb*, etc. Co., 79 Ark. 45 (1906). An irregular meeting of the board of directors authorizing the borrowing of money and the giving of a mortgage may be made legal by the company subsequently accepting and using the money. *Murray v. Beal*, 23 Utah, 548 (1901). The separate assent of directors to the president executing a mortgage in the name of the corporation may be equivalent to acquiescence on the part of the direc-



seal of the company has been affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized.<sup>1</sup>

tors in his assuming such authority and may bind the corporation. *National, etc. Bank v. Sandford, etc. Co.*, 157 Ind. 10 (1901). Where a mortgage is executed by order of directors assenting apart and not in a meeting, and is executed by a president and secretary who were elected by the stockholders at a meeting not properly called, the stockholders having no power to elect such officers in any case, the mortgage is not good. *Re St. Helen Mill Co.*, 3 Sawy. 88 (1874); s. c., 21 Fed. Cas. 161. Where the entire business is turned over to executive officers and the stockholders and the directors hold no meetings, a mortgage made by the officers is valid. *Cunningham v. German, etc. Bank*, 101 Fed. Rep. 977 (1900). Where the charter provides that the business shall be managed by three executive officers they may execute a mortgage, it appearing that no directors have ever been elected. *Bell, etc. Co. v. Kentucky, etc. Co.*, 50 S. W. Rep. 2 (Ky. 1899). Where the president has been allowed by the board of directors to carry on all the business as though it was his own, a mortgage in the name of the corporation executed by him on the corporate property is valid. *National, etc. Bank v. Sandford, etc. Co.*, 157 Ind. 10 (1901). See also §§ 716-719, *supra*. Where the board of directors have power to borrow money and issue debentures, and the debenture is issued in due form on its face, a *bona fide* holder thereof is protected, although the company had not been fully organized and no directors had been appointed and no resolutions passed by them. *Duck v. Tower, etc. Co.*, [1901] 2 K. B. 314. A creditor of a corporation cannot attack a mortgage on the ground that the notice of the stockholders' meeting authorizing the same was not in accordance with the statute, it being

shown that a majority of the stock voted in favor of the mortgage. *Anderson v. Bullock, etc. Bank*, 122 Ala. 275 (1899). Resolutions of the board of directors and of the stockholders authorizing a mortgage to secure money borrowed is an implied authorization for the issue of bonds secured by such mortgage. Moreover, the company having received the money on the bonds and paid interest thereon for many years cannot then repudiate it. *Pomeroy v. New York, etc. Co.*, 48 Atl. Rep. 395 (N. J. 1901). See also § 725, *supra*.

<sup>1</sup> *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. See also *Sioux City, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899); also §§ 712, 725, *supra*. A mortgagee is chargeable with knowledge of the fact that the statute required three directors, and that the company had only two directors when the mortgage was authorized. *Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced. *Savage v. Miller*, 56 N. J. Eq. 432 (1898). A mortgagee need not inquire whether a resolution of the directors authorizing a mortgage, and recited therein, has been actually passed by them. *Manhattan Hardware Co. v. Roland*, 128 Pa. St. 119 (1889). Where the statute requires directors to be stockholders and two of the directors are not stockholders, but a directors' meeting is regularly called, a mortgage authorized at such a meeting is legal, even though one of the directors who held stock and was qualified was not present, especially where he had agreed to the mortgage and the mortgagee took possession and held it for thirteen months and the corporation did not



The supreme court of the United States clearly lays down the rule that "one who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."<sup>1</sup>

§ 809. *Ratification of an unauthorized mortgage* — *The resolutions authorizing the mortgage*. — The terms of the resolution author-

object. *Silsby v. Strong*, 38 Oreg. 36 (1900). A receiver of a corporation cannot defeat a mortgage on the ground that the directors have not expressly authorized it, where the corporation itself could not defeat it. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). As to requirements by charter or by-laws that contracts shall be made by certain officers or with certain formalities, and as to the right of one contracting with a corporation to rely on the corporate action, see § 725, *supra*. A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent where the statute prohibits assignments after insolvency. *Bennett v. Keen*, 59 N. J. Eq. 634 (1899). Where the corporate seal is not attached to a mortgage the authority of the president to execute it must be shown. *American, etc. Assoc. v. Smith*, 122 Ala. 502 (1899). Under the Negotiable Instruments Act a corporate note and mortgage, regular on its face, apparently issued in accordance with a resolution of the directors, cannot be defeated on the ground that the directors had not authorized it. *Wolf v. Zachary, etc. R. R.*, 128 La. 1092 (1911). The trustee of a mortgage is not liable to bond purchasers, even though it delivered the bonds and received the money, and it turned out that the mortgage actually executed was a modification of the mortgage originally contemplated, it appearing, however, that the bondholders were

not aware of the first draft of the mortgage. *Elliott v. Guardian T. Co.*, 145 N. Y. App. Div. 166 (1911), modified in 204 N. Y. 212. Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. *Holcomb v. Bridge Co.*, 9 N. J. Eq. 457 (1853). See also § 713a, *supra*, 141 N. W. Rep. 396.

<sup>1</sup> *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record. In this case the court held that even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, but a purchaser with notice cannot enforce such guaranty, the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established and has been constantly recognized by this court." A holder of



izing the mortgage should be as broad as the terms of the mortgage itself. The better plan is to have the resolution embody the mortgage as a part of the resolution itself. Otherwise there may be a controversy as to whether all the terms of the mortgage were authorized by the board of directors.<sup>1</sup> Where a mortgage recites that it was

corporate bonds issued without authority may nevertheless be protected in equity. *Roberts v. Hughes Co.*, 83 Atl. Rep. 807 (Vt. 1912).

<sup>1</sup> A resolution authorizing a mortgage to contain the usual terms authorizes a provision for the principal becoming due upon a default in interest. *Farmers' L. & T. Co. v. Iowa Water Co.*, 78 Fed. Rep. 881 (1897). The trustee of a mortgage cannot maintain a suit to reform the same so as to include certain provisions which the board of directors authorized but which the mortgage did not contain, there being no proof of mutual mistake or actual fraud. *Trust Co. v. Universal, etc. Co.*, 90 N. Y. App. Div. 207 (1904). If the stockholders authorize a mortgage in such form and on such terms as the directors may approve, the directors may insert in it an after-acquired property clause. *Cummings v. Consolidated, etc. Co.*, 27 R. I. 195 (1905). Where the mortgage covers after-acquired property "connected with, or issuing from, or relating to" the existing property, it does not cover a railroad subsequently acquired, and it is immaterial that the directors' resolution authorizing the mortgage provided for its covering all subsequently acquired property. *Murray v. Farmville, etc. R. R.*, 101 Va. 262 (1903). Where the president is authorized to execute a mortgage the usual mortgage is understood. The fact that a mortgage and the bonds secured thereby are for a larger amount than authorized by the stockholders does not enable a subsequent creditor to attack such mortgage. *Anderson v. Bullock, etc. Bank*, 122 Ala. 275 (1899). Where the draft of a mortgage, approved by the board of directors, contains a provision for the payment of attorney's fees, such provision is enforceable even though the

resolution of the board of directors did not expressly cover that point. *Hubbard v. University Bank, etc.*, 125 Cal. 684 (1899). Where a committee is authorized to modify a reorganization plan it may change the plan so that on default of the new second mortgage the stock of the corporation shall belong to the bondholders and the second mortgage shall be discharged. At least such a change is binding on a bondholder who held his bonds four years without objection, and until after the default had taken place and the stock absorbed and the mortgage discharged. *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900). A resolution authorizing the president to execute a chattel mortgage does not authorize him to give a chattel mortgage which can be foreclosed on ten days' notice and which gives other executory powers to the mortgagee. *Monroe, etc. Co. v. Arnold*, 108 Ga. 449 (1889). A provision that upon default in interest the bondholder might declare the principal due is unusual, and hence is void, but the rest of the mortgage will be sustained. *Jesup v. City Bank*, 14 Wis. 331 (1861). Since the date of the foregoing decision, however, such mortgages have become usual. A resolution authorizing a mortgage on the road and property sustains the mortgage on the franchises also. *Bardstown, etc. R. R. v. Metcalfe*, 4 Met. (Ky.) 199 (1862). Where the directors authorize a chattel mortgage in certain terms, but the officers execute it in materially different terms, the mortgage is void. *Kendall v. Bishop*, 76 Mich. 634 (1889). Although the resolution authorizing a mortgage does not specify many provisions which are in it, yet if these provisions are the usual ones the whole mortgage is valid. *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555



duly executed by authority of the corporation, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed.<sup>1</sup> Resolutions of the board of directors and of the stockholders authorizing a mortgage to secure money borrowed is an implied authorization for the issue of bonds secured by such mortgage. Moreover, the company having received the money on the bonds and paid interest thereon for many years cannot then repudiate it.<sup>2</sup>

Even though a mortgage has been made without authority it may be confirmed by acquiescence or accepting the benefits thereof, or may be expressly ratified by subsequent resolutions of the proper corporate authorities.<sup>3</sup> Thus a note given by a corporation may be

(1878). Under a general resolution authorizing a mortgage, a provision may be inserted in the mortgage that the principal shall become due upon default in the payment of interest. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879). A vote authorizing a mortgage on the road and appurtenances is broad enough to sustain a mortgage on the railroad itself and all that belonged to it as a railroad; in other words, all the property, real and personal. *Kennebec, etc. R. R. v. Portland, etc. R. R.*, 59 Me. 9, 22 (1871). A directors' resolution authorizing a mortgage on "all the real and personal property now or hereafter belonging to the company," is sufficient, and covers earnings, income, and profits. *Kelly v. Alabama, etc. R. R.*, 58 Ala. 489 (1877). Even though the resolutions authorizing a mortgage were oral, and no written record was made, yet they may be proved to sustain the mortgage. *Boggs v. Lakeport, etc. Assoc.*, 111 Cal. 354 (1896). The authorization by the directors need not specify the usual provisions which are inserted in such mortgages. *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566 (1894). The terms of a mortgage cannot be modified by the president. See § 716, *supra*.

<sup>1</sup> *Sioux City, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899). See also §§ 712, 725, 808, *supra*.

<sup>2</sup> *Pomeroy v. New York, etc. Co.*, 48 Atl. Rep. 395 (N. J. 1901).

<sup>3</sup> *Shaver v. Hardin*, 82 Iowa, 378 (1891). Even though the director's minutes do not show authorization of a corporate mortgage it may be shown in other ways. *Miller v. Bellamore, etc. Co.*, 86 Atl. Rep. 13 (Conn. 1913). A mortgage executed by the president is legal, even though not authorized by the board of directors, it appearing that all the officers and stockholders knew of it and accepted the benefit of it. *Fourth Nat. Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905). A corporation cannot set up that the mortgage was not authorized by the stockholders where it has received the benefits of the same. *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904). If all the stockholders are present informalities in voting for a mortgage cannot be set up by general creditors to impeach the mortgage. *William Firth Co. v. South Carolina, etc. Co.*, 122 Fed. Rep. 569 (1903). A ratification by the stockholders of an issue of bonds is the same as an original authorization of such issue. *McAlpin v. Universal, etc. Co.*, 57 Atl. Rep. 802 (N. J. 1904). Even though a mortgage deed of trust is executed by the president without authority, yet, if the corporation afterwards obtains a release of some of the property from the mortgage, it ratifies the same. *Clark v. Elmen-dorf*, 78 S. W. Rep. 538 (Tex. 1904). A vote of the directors ratifying an informally executed mortgage does not necessarily ratify a special provision in it relative to attorney's fees,



enforced against it, where it received and kept the money, even though

where such provision is not specially called to the board's attention. *Pacific, etc. Mill v. Dayton, etc. Ry.*, 5 Fed. Rep. 852 (1881). The ratification of an unauthorized mortgage may be by express resolutions. *Purser v. Eagle Lake, etc. Co.*, 111 Cal. 139 (1896). Variances in the mortgage executed, from the mortgage authorized, are cured by the directors issuing the bonds and by resolution referring to the mortgage. *First Nat. Bank v. Sioux City, etc. Co.*, 69 Fed. Rep. 441 (1895). Even though the directors have not especially authorized a mortgage, yet, if the person who owns practically all the stock takes part in the transaction, and the corporation receives the benefit of it, the mortgage is good. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). A purchase-money mortgage given by a corporation is binding, even though not authorized by the board of directors, where the company used the property for two years. *Blood v. La Serena, etc. Co.*, 134 Cal. 361 (1901). Even though a mortgage is not authorized at a formal meeting of the directors, nevertheless if the directors knew and approved of the same and the corporation accepted the benefits, the mortgage will be enforced, it having been signed by the president and secretary and the corporate seal having been attached. *Nevada, etc. Syndicate v. National, etc. Co.*, 96 Fed. Rep. 133 (1899). Even though the officers in executing a deed in behalf of the corporation omit a covenant that the grantee assumes a mortgage on the property, as required by the resolutions of the board of directors authorizing such deed, yet if the corporation accepts a consideration for the deed other corporate creditors cannot object thereto. *White v. Shepard*, 41 N. Y. App. Div. 113 (1899). Even though the mortgage differs from the one authorized by the board of directors, yet if the company has used the money the mortgage is valid. *Beach v. Wakefield*, 107 Iowa, 567 (1898). A mortgage made by four directors when the statute required

five, there being one vacancy, is legal if the mortgage is ratified by the full board, and such ratification may be by recognition of the mortgage in a second mortgage. *Porter v. Lassen County, etc. Co.*, 127 Cal. 261 (1899). A mortgage need not recite in full the proceedings of the stockholders and directors authorizing it. *Turner v. Kingston, etc. Co.*, 106 Tenn. 1 (1900); s. c., 59 S. W. Rep. 410 (Tenn. 1900). A stockholder's suit to vacate a foreclosure decree seven years after it was entered and three years after a decision that he was entitled to make the application, the property in the meantime having passed into *bona fide* hands, is too late, his claim being that he was a stockholder in a company that was consolidated with another company, and that the property of his corporation was sold on the foreclosure of a mortgage of the latter, which mortgage was executed prior to the consolidation. *Atlantic Trust Co. v. New York, etc. Co.*, 75 N. Y. App. Div. 354 (1902). A change in a mortgage as authorized may be ratified by a resolution subsequently passed. *Prentiss Tool, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). A mechanic's lien accruing after a mortgage was executed, but before its execution was authorized or ratified, has priority. *National Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006 (1895). A statutory provision that the bonds shall not exceed the stock does not invalidate a resolution for a bonded debt greater than the capital stock, inasmuch as the capital stock may be increased before the bonds are issued. *Merced River, etc. Co. v. Curry*, 157 Cal. 727 (1910).

The ratification of an unauthorized mortgage need not necessarily be by express resolutions. Such ratification may be by the acts of the corporation in accepting the benefits of the mortgage with knowledge of its existence. The law does not allow a corporation to treat a mortgage as legally existing, and then long subsequently to repudiate it on the ground that it was not properly authorized. Instances of



the mortgage securing the note was void for want of the consent of the stockholders as required by statute.<sup>1</sup>

the application of this rule are given in the notes below. *McCurdy's Appeal*, 65 Pa. St. 290 (1870), where there was no actual delivery of the mortgage to the trustee; *Wood v. Whelen*, 93 Ill. 153 (1879), where the mortgage was authorized by the promoters instead of the directors; *Harrison v. Annapolis, etc. R. R.*, 50 Md. 490 (1878), where it was alleged that the board was not legally constituted; *Singer v. St. Louis, etc. R. R.*, 6 Mo. App. 427 (1879), where the bonds were issued for what was alleged to be an *ultra vires* lease; *Elwell v. Grand, etc. R. R.*, 67 Barb. 83 (1874), where the terms of the mortgage differed from those authorized; *aff'd*, 67 Barb. 83 and 85; *Aurora, etc. Soc. v. Paddock*, 80 Ill. 263 (1875), where it was claimed that the stockholders as well as the directors must authorize a mortgage; *Ottawa, etc. Co. v. Murray*, 15 Ill. 336 (1854), where the officer signed his own instead of the company's name to the bonds. See also many cases in ch. XLIII, *supra*, sustaining the authority of officials who have been allowed to assume powers for a long time; also ch. XLIV, *supra*, concerning ratification, etc., of *ultra vires* and other acts; *Lewis v. Hartford Mfg. Co.*, 56 Conn. 25 (1888), where the mortgage was made by an agent without a vote of the directors; *Thomas v. Citizens' Horse Ry.*, 104 Ill. 462 (1882), where a stockholders' vote was not taken, although required by statute. See also §§ 723-725, *supra*. *Samuel v. Holladay*, 1 Woolw. 400 (1869); s. c., 21 Fed. Cas. 306, where there was a ratification of the mortgage. A railway mortgage on all real and personal property may be valid, though not in conformity with the general chattel mortgage act in respect to acknowledgment. *Cooper v. Corbin*, 105 Ill. 224 (1883). Although mortgage bonds are issued by corporate officers without authority, yet, if for several years they are used as

a pledge to secure corporate debts, and in the meantime directors and stockholders know of their issue, they are valid. *Stainback v. Junk, etc. Co.*, 98 Tenn. 306 (1897). An unauthorized mortgage is ratified if for several months after the mortgagee takes possession the directors do not object or offer to refund the borrowed money. *Currie v. Bowman*, 25 Oreg. 364 (1894). An unauthorized alteration in a mortgage may be ratified by the subsequent acts of the parties. *Woodbury v. Allegheny, etc. R. R.*, 72 Fed. Rep. 371 (1895). A mortgage executed by the president and secretary of a corporation, instead of by its trustees, and without any formal authorization, is valid where there were only three trustees and two of them were the president and secretary, and the money secured by the mortgage was received by the corporation and used for its benefit. *Dexter v. Long*, 2 Wash. St. 435 (1891). Although the president executes a mortgage for a shorter term and more frequent payments of interest than the board authorized, yet where the company accepts the money and pays the interest for a time, the mortgage is valid. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67 (1893). A chattel mortgage given by the president and treasurer without previous authority from the directors may be validated by the corporation accepting the benefit of the same. *Edelhoff v. Horner, etc. Co.*, 86 Md. 595 (1898). Where a mortgage recites that it was duly executed by authority of the corporation, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed. *Sioux, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899). Although mortgage bonds are issued by corporate officers without authority, yet if for several years they are used as a pledge to secure corporate

<sup>1</sup> *Curtin v. Salmon River, etc. Co.*, 141 Cal. 308 (1903).



§ 810. *Signing, sealing, acknowledging, and delivering the mortgage.* — A corporation mortgage should be signed, sealed, and acknowledged in substantially the same way as a corporate deed.<sup>1</sup> Immaterial errors in respect to these matters are not fatal to the mortgage.<sup>2</sup>

debts, and in the meantime directors and stockholders know of their issue, they are valid. *Stainback v. Junk*, etc. Co., 98 Tenn. 306 (1897). An unauthorized mortgage is not ratified nor is it made valid by estoppel *in pais*, except in a manner in writing sufficient to authorize the mortgage. *Blood v. La Serena*, etc. Co., 113 Cal. 221 (1896). A mortgage of the corporate property in California without a prior resolution authorizing it is void, although such resolution is recited in the mortgage, and the president, secretary, and two thirds of the stockholders sign it, and the corporate seal is attached. Separate assent of the directors is not enough. A subsequent assessment by the directors to pay the mortgage is not a ratification. *Alta*, etc. Co. v. *Alta*, etc. Co., 78 Cal. 629 (1889). The fact that the proceeds of a mortgage are applied to the business of the company does not, as against other creditors, validate the mortgage which has been made without authorization by the board of directors. The absence of the corporate seal prevents any *prima facie* validity. *Duke v. Markham*, 105 N. C. 131 (1890). Where the stockholders build the road with their own money and take the mortgage bonds of the company as security without formal action of the corporation authorizing it, the bonds are not good in their hands, and an execution sale of the property comes in ahead of the mortgage. *McKee v. Grand Rapids*, etc. Ry., 41 Mich. 274 (1879). See also, on this subject, §§ 712, 716, 782, *supra*, and § 810, *infra*. Corporate creditors' rights by attachments which are obtained between the time of the execution of an illegal mortgage and the ratification of the same have priority over the mortgage. *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897).

<sup>1</sup> See § 722, *supra*. As to the mode of proving the execution, see *Coe v.*

*New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879). A mortgage to a corporation is legal, even though the witnesses and the notary public who took the acknowledgment are stockholders of such corporation. *Read v. Toledo Loan Co.*, 68 Ohio St. 280 (1903). Even though the name of a corporation is abbreviated as signed to its mortgage and bonds, yet they are legal. *William Firth Co. v. South Carolina*, etc. Co., 122 Fed. Rep. 569 (1903). In Missouri a corporate mortgage has to be acknowledged to be a mortgage. *Barrie v. United Rys.*, 138 Mo. App. 557 (1909). Neither corporate creditors nor stockholders who had notice of the execution of a mortgage can attack it on the ground that the acknowledgment was not in accordance with the statute. *Larkin v. Hagan*, 126 Pac. Rep. 268 (Ariz. 1912).

<sup>2</sup> See § 722, *supra*. Although the mortgage is irregular in the mode in which the corporate name is signed thereto, yet it may be good as an equitable mortgage, and notice to the trustees of subsequent mortgages is sufficient. *Miller v. Rutland*, etc. R. R., 36 Vt. 452 (1863). An attestation clause in the mortgage, followed by the corporate seal and the signature of the president as president, is not the usual mode of execution, but is sufficient. *Canandaigua Academy v. McKechnie*, 90 N. Y. 618 (1882). A mortgage given under the seal of the corporation is legally executed; and it is immaterial that the president and treasurer signed it instead of the president and secretary as specified in the resolution authorizing it. *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875). A corporate mortgage may be made by an attorney of the corporation, in the name of the corporation, but under his own hand and seal, where his power of attorney was under the seal of the corporation. *First Nat. Bank v. Salem*, etc. Co.,



The bonds and mortgage may be executed outside of the state which incorporated the company.<sup>1</sup>

"The omission to attach the corporate seal to the mortgages is not fatal to their validity in equity." Although they may not be good as legal mortgages, yet the court will allow an allegation to be added for their enforcement as equitable liens.<sup>2</sup> A contract of a corporation

39 Fed. Rep. 89 (1889). An equitable mortgage or a specific lien on property intended to be mortgaged arises from an agreement to give a mortgage or from a defectively executed mortgage or from any imperfect attempt to mortgage or appropriate specific property in payment of a particular debt. Hence where one railroad in 1887 agreed to and did construct another railroad in consideration of twenty-year mortgage bonds of the latter to be issued and in further consideration of a ten-year contract of operation, the former railroad may maintain a suit to have the mortgage executed and the bonds issued, even though the twenty years have nearly expired. *Baltimore, etc. R. R. v. Berkeley, etc. R. R.*, 168 Fed. Rep. 770 (1909). A mortgage executed by the president and secretary of a corporation instead of by its trustees, and without any formal authorization, is valid where there were only three trustees, and two of them were the president and secretary, and the money secured by the mortgage was received by the corporation and used for its benefit. *Dexter v. Long*, 2 Wash. St. 435 (1891). The fact that the corporate officer who executes a mortgage for the corporation has himself a prior mortgage on the property does not invalidate his lien. *Traders' Nat. Bank v. Mfg. Co.*, 100 N. C. 345 (1888). When not otherwise provided by statute, a mortgage signed and acknowledged by a majority of the board of directors, and sealed with the corporate seal, is sufficiently executed. *Gordon v. Preston*, 1 Watts (Pa.), 385 (1833). A corporate mortgage deed of trust is good as an equitable mortgage and precedes attachments, even though unwitnessed and without the secretary's acknowledgment. *Frank v. Hicks*, 4 Wyo. 502 (1894). Even though the

signature of a mortgagor corporation to the mortgage and to the bonds leaves off a part of the name, yet this does not invalidate the mortgage and bonds. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569. A mortgage is not enforceable against a corporation where it is drawn as a personal obligation and signed by an individual "as president." *Clark v. Hodge*, 116 N. C. 761 (1895). Even though a mortgage is signed "Mary L. Byrd, President of the Kingston Lumber & Mfg. Co.," it is a valid mortgage. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); *aff'd*, 106 Tenn. 1. The signature to a corporate mortgage omitting one word of the name is nevertheless good, and although signed "Chas. P. Law, President of the Santa," etc., is sufficient, where the corporate seal is affixed. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892).

<sup>1</sup> *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884); *Wright v. Bundy*, 11 Ind. 398 (1858). A mortgage on the Kentucky property of a Kentucky railroad corporation may be acknowledged by the president in Ohio. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). See also § 713a, *supra*.

<sup>2</sup> *Allis v. Jones*, 45 Fed. Rep. 148 (1891). See also § 721, *supra*. Where the mortgage is not sealed, and in order to cure the defect another mortgage is executed, no debts having been incurred in the meantime, both mortgages may be foreclosed as one. *Robinson v. Piedmont Marble Co.*, 75 Fed. Rep. 91 (1896). Even though a corporation does not attach its seal to a mortgage, yet the mortgage is valid, unless it is shown that the corporation had a seal and that the board of directors did not authorize its omis-



to give a mortgage on its property is a lien in equity superior to other creditors of the corporation, where such contract has been performed by the party entitled to the mortgage, and especially where an attempted execution of the mortgage has been made.<sup>1</sup> A mortgage deed of trust not delivered to the trustee but assigned to a corporate creditor as security, may be foreclosed by him, the bonds secured thereby never having been issued.<sup>2</sup>

In Montana and some other states the statutes require a deed of trust by a corporation to be accompanied by an affidavit that the same has been made in good faith and without any design to hinder or delay creditors.<sup>3</sup>

The bonds should be of the same date as the mortgage, but a variance in their dates may be explained by parol evidence.<sup>4</sup> Where the

sion. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); aff'd, 106 Tenn. 1. Where a mortgage purports to be by a corporation, but is signed by the president, treasurer, and secretary personally, with their official titles following their names, and is acknowledged the same as they would acknowledge a personal mortgage, and the corporate seal is not attached, the mortgage is at most only an equitable mortgage, and in order to be foreclosed must be alleged to be such. *Brown v. Farmers' Supply Co.*, 23 Oreg. 541 (1893). A mortgage may be valid although the corporate seal is not attached thereto. *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); aff'd, 95 Fed. Rep. 23. A mortgage need not be under seal in Arkansas, a seal not being necessary to a mortgage by an individual. *Fourth National Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905). A mortgage cannot be defeated for want of a corporate seal in a state where no seal is required from an individual in giving a mortgage. *Re Farmers' Supply Co.* 170 Fed. Rep. 502 (1909). A mortgage reciting the authorization and sealing and signed by the president and secretary and sealed with "(L. S.)" following their signatures, is presumed to be a corporate mortgage. *Jones v. Ezell & Co.*, 134 Ga. 553 (1910). Neither corporate creditors nor stockholders who had notice of the execution of a mortgage can attack it on the ground that

the corporate seal had not been affixed, it appearing that the mortgage recited the affixing of the seal. *Larkin v. Hagan*, 126 Pac. Rep. 268 (Ariz. 1912).

<sup>1</sup> *Hamilton T. Co. v. Clemes*, 163 N. Y. 423 (1900).

<sup>2</sup> *Kurtz v. Ogden, etc. Co.*, 37 Utah, 313 (1910).

<sup>3</sup> *Teitig v. Boesman*, 12 Mont. 404 (1892). Where by the statutes of a state, a mortgage on personal property must be accompanied by an affidavit of good faith, a mortgage covering the railway property of a street railway is not good as to the personal property unless it contains such affidavit, and a judgment creditor may have precedence as to such personalty. *Illinois T. & S. Bank v. Seattle El. Ry.*, 82 Fed. Rep. 936 (1897). A chattel mortgage authorized by *de facto* stockholders is good as to third persons. 'As against a receiver of the corporation it is valid, although the affidavit is defective and the mortgage is not recorded. *Kane v. Lodor*, 56 N. J. Eq. 268 (1897).

<sup>4</sup> Although the bonds are dated October 1, 1871, while the mortgage is dated October 25, 1871, yet parol evidence may show that these are the bonds which are secured by the mortgage. *Butler v. Rahm*, 46 Md. 541 (1877). The date of the mortgage is presumed to be the date when it was acknowledged and not the date of the mortgage itself. *Guaranty, etc. Co. v. Galveston, etc. R. R.*, 107 Fed. Rep.



mortgage is given a date prior to the actual date when it is authorized and executed, it is a mortgage from the first-named date as between mortgagor and mortgagee and will cover property acquired in the meantime if it contains the after-acquired property clause.<sup>1</sup>

It is not necessary that there be a manual delivery of the mortgage to the trustee in order to constitute a delivery.<sup>2</sup> Delivery of a mortgage may be informal and where the same man is president of both mortgagor and mortgagee and makes delivery to himself, this is sufficient.<sup>3</sup>

§ 811. *Recording of a mortgage — Release and discharge of mortgage — Decree canceling mortgage.* — A railroad mortgage should be recorded. The railroad being real estate, the mortgage should be recorded as a real-estate mortgage in every county into which the railroad runs, unless the statutes of the state provide otherwise.<sup>4</sup> The federal courts hold that a railroad mortgage need not be recorded as a chattel mortgage, under the chattel-mortgage statute, unless the highest court in the state has held that that statute applies to railroad mortgages,<sup>5</sup> and that the chattel-mortgage act does not apply to railroads where the statutes expressly authorize railroad mortgages.<sup>6</sup>

In states where rolling-stock is held to be personalty, it is customary and safer to record the mortgage as a chattel mortgage as well as a real-estate mortgage. The supreme court of the United States has held, however, that even if the rolling-stock be personalty, yet the mortgage need not be recorded as a chattel mortgage.<sup>7</sup>

311 (1901). A mortgage is a first lien ahead of a lease, even though they were executed at the same time, it being shown that the mortgage became due ten years before the lease was to expire and that the lease provided for the execution of the mortgage. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899).

<sup>1</sup> *Guaranty T. Co. v. Atlantic, etc. R. R.*, 138 Fed. Rep. 517 (1905).

<sup>2</sup> *McCurdy's Appeal*, 65 Pa. St. 290 (1870). Where the attorney for the mortgagor delivers the mortgage to the trustee and the trustee returns it to him to be recorded, this is sufficient delivery. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569.

<sup>3</sup> *Re Jackson, etc. Co.*, 189 Fed. Rep. 636 (1911).

<sup>4</sup> Record may be made by leaving for record a copy of the mortgage, which copy the clerk has compared

with the original and found to be correct. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1874). It has been held that a mortgage to the state, made in pursuance of a public statute, need not be recorded. *Memphis, etc. R. R. v. State*, 37 Ark. 632 (1881). A statutory mortgage not otherwise recorded was involved in *South Dakota v. North Carolina*, 192 U. S. 286 (1904). See also § 794, *supra*. A mortgage recorded, but not properly executed for record, is good as against a subsequent mortgage which refers to it and recognizes it as an existing lien. *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372 (1859). See also ch. L., *infra*.

<sup>5</sup> *Farmers' L. & T. Co. v. Detroit, etc. R. R.*, 71 Fed. Rep. 29 (1895).

<sup>6</sup> *Southern California, etc. Co. v. Union L. & T. Co.*, 64 Fed. Rep. 450 (1894).

<sup>7</sup> *Hammock v. Farmers' L. & T. Co.*;



Even if the rule were otherwise, the peculiar character of rolling-stock would not make the mortgage void under the chattel-mortgage act, by reason of the mortgagor being left in possession.<sup>1</sup> Moreover, until creditors obtain a specific lien on the rolling-stock, the unrecorded mortgage is a valid lien.<sup>2</sup>

105 U. S. 77 (1881). Rolling-stock is realty to the extent that a mortgage upon the railroad and rolling-stock need not be recorded as a chattel mortgage in order to cover the rolling-stock. If recorded as a real-estate mortgage this is sufficient. The rule is different in regard to coal oil, etc. *Farmers' L. & T. Co. v. St. Joseph, etc. Ry.*, 3 Dill. 412 (1875); s. c., 8 Fed. Cas. 1053. To same effect as regards recording as a chattel mortgage, *Cooper v. Corbin*, 105 Ill. 224 (1883). In Illinois, prior to the constitutional provision to the contrary, rolling-stock was held to be real estate and hence covered and protected against attachment creditors by recording the mortgage as a real-estate mortgage only. *Michigan, etc. R. R. v. Chicago, etc. R. R.*, 1 Bradw. (Ill.) 399 (1878). A mortgage on the rolling-stock is good though not recorded as a chattel mortgage. After the trustee takes possession, creditors cannot levy upon it by attachment. The mortgage covers not only the broad-gauge rolling-stock in use, but also the narrow-gauge rolling-stock which is being gathered together for use upon a change in the gauge. *Hamlin v. Jerrard*, 72 Me. 62 (1881). There are decisions, however, to the contrary. In *Vilas v. Page*, 106 N. Y. 439 (1887), it was stated that an execution sale of rolling-stock in 1854 had been adjudged to have been good as against the mortgage, the mortgage not having been recorded as a chattel mortgage. Where the rolling-stock is held to be personalty, a mortgage covering it as well as the railroad must be filed as a chattel mortgage in all the towns and cities through which the road runs. If not so filed the rolling-stock may be sold on execution. *Hoyle v. Plattsburgh, etc. R. R.*, 54 N. Y. 314 (1873). On this question see also *Jones, Corp. Bonds*,

§ 142, etc. It may be sold for taxes. *Randall v. Elwell*, 52 N. Y. 521 (1873). If the mortgage covers rolling-stock it must be recorded as a chattel mortgage; otherwise executions will come in ahead of it. *Williamson v. New Jersey Southern R. R.*, 29 N. J. Eq. 311 (1878), rev'g 28 N. J. Eq. 277 (1877). Cf. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879). In California by statute a mortgage covering rolling-stock must be recorded as a chattel mortgage. If not, an attachment may be levied on it as though the mortgage did not exist. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). Where rolling-stock is held to be personalty, a mortgage covering it must be recorded as a chattel mortgage. *Radebaugh v. Tacoma, etc. R. R.*, 8 Wash. 570 (1894).

<sup>1</sup> A mortgage of a railroad and its rolling-stock is legal although the mortgagor retains possession. "The purpose of a railroad, the nature of its property, the necessity of possession to accomplish its purpose, and the powers conferred in its charter, leave no reason to doubt the validity of a mortgage, without delivery of possession, of those chattels which are necessary to carry out the object of incorporation. Though the body is private the object is public, and it is clothed with a portion of the sovereign power to accomplish this." *Covey v. Pittsburg, etc. R. R.*, 3 Phila. 173 (1858). See also *Hunt v. Bullock*, 23 Ill. 320 (1860).

<sup>2</sup> An unrecorded chattel mortgage is not void under the statute as regards general creditors who have not obtained a specific claim upon the property by attachment, execution, or other lien. *Lane v. Lutz*, 1 Keyes (N. Y.), 203 (1864). Even though a mortgage, by reason of not being recorded as a chattel mortgage, does not cover personal property, cash, and



Where, however, an ordinary corporate mortgage covers personal property also, as it generally does, it should be recorded as a chattel mortgage, in addition to its record as a real-estate mortgage.<sup>1</sup> An

accounts receivable, yet if the receivers take possession of all these, and a decree of foreclosure is entered and a sale had, it is too late for general creditors to then intervene. *State Trust Co. v. Kansas City, etc. R. R.*, 120 Fed. Rep. 398 (1903).

<sup>1</sup> A mortgage in New Jersey, other than that of a railroad corporation, must be recorded as a chattel mortgage if it is to cover chattels, otherwise it is void as against creditors. *Knickerbocker T. Co. v. Penn.*, etc. Co., 66 N. J. Eq. 305 (1904). A corporate mortgage may cover after acquired personal property, but applies only when the property comes into existence or has actually been taken possession of by the mortgagee, but that provision will not be enforced when the rights of other creditors would be affected, especially where the mortgage has not been filed and refiled as a chattel mortgage. *MacDonnell v. Buffalo, etc. Co.*, 193 N. Y. 92 (1908). Under the New Jersey statutes a mortgage by a railroad covering all personal and real property need not be recorded as a chattel mortgage. The court said: "This act was doubtless passed to put to rest in New Jersey the question which divided many of the federal and state courts: whether a mortgage embracing the franchises, rolling-stock, and chattels of a railroad corporation should be treated as a real-estate mortgage only, or also as a chattel mortgage." *Metropolitan T. Co. v. Pennsylvania, etc. R. R.*, 25 Fed. Rep. 760 (1885). If the mortgage covers personal as well as real property, it must be acknowledged and recorded as a chattel mortgage also in order to cut off subsequent liens. *Palmer v. Forbes*, 23 Ill. 301 (1860). Where the chattel mortgage recording act requires that in the affidavit the consideration be stated, it is sufficient to state that the consideration is the full amount of the bonds covered by the mortgage, although such bonds are not yet issued. *Camden, etc. Co.*

*v. Burlington, etc. Co.*, 33 Atl. Rep. 479 (N. J. 1895). A chattel mortgage by a corporation, not filed in any public office, is invalid as against its receiver, or the claims of creditors, after the appointment of the receiver, where possession of none of the property was taken or delivered in virtue of the mortgage. *Hebbard v. Southwestern, etc. Co.*, 55 N. J. Eq. 18 (1896). As to the execution and recording of a chattel mortgage in Connecticut, see *American, etc. Co. v. Worcester, etc. Co.*, 100 Fed. Rep. 40 (1900). A railroad mortgage in California on real and personal property must be recorded as personal property in order to be a lien thereon. *Bishop v. McKillican*, 124 Cal. 321 (1899). A combined real estate and personal property mortgage was held to be defective as to the personal property, by reason of not being recorded as such, in the case *Knickerbocker T. Co. v. Penn.*, etc. Co., 62 N. J. Eq. 624 (1901). A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state. *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78 (1900). In Nebraska a mortgage, though filed as a chattel mortgage, is not effectual as such where the mortgagor retains possession and there is no evidence of good faith. *Marsh v. Burley*, 13 Neb. 261 (1882). The New York statute, to the effect that corporations need not file or refile chattel mortgages, was amended by Laws 1897, ch. 418. A mortgage upon a leasehold is a mortgage upon a chattel real. *State Trust Co. v. Casino Co.*, 19 N. Y. App. Div. 344 (1897); *State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 381 (1896), holding also that a warehouseman might obtain a lien on personal prop-



unrecorded mortgage or lien is good as against subsequent incumbrances where those who take the latter take them with knowledge or notice of the mortgage.<sup>1</sup> An unrecorded mortgage may not be good as against a subsequent recorded mortgage where the first mortgagee took part in issuing the second mortgage as a first mortgage.<sup>2</sup> A mortgage deed of trust is a lien from the date of its record, even though the bonds are not issued until after other liens have attached.<sup>3</sup> A debenture which is a mortgage on everything, but which expressly allows the com-

erty in preference to a chattel mortgage securing bonds where the chattel mortgage was not properly filed for record. The recording may be by leaving a copy of the mortgage which has been compared by the register with the original. *Central T. Co. v. Georgia Pac. Ry.*, 83 Fed. Rep. 386 (1896). A mortgage on real estate and personal property covers the latter if recorded in the real-estate record, especially where the personal property consists of machinery and it was the intent that it should become a part of the real estate. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569. A receiver of an insolvent corporation represents the creditors as well as the corporation itself, and may set up that a conditional sale of property by the corporation has not been recorded as required by statute. *Re Wilcox, etc. Co.*, 70 Conn. 220 (1898). A mortgage on coal lands and personal property must be recorded as a chattel mortgage. *Manhattan T. Co. v. Seattle, etc. Co.*, 16 Wash. 499 (1897); *s. c.*, 19 Wash. 493. Where a railroad mortgage by its terms covers after-acquired property, it covers after-acquired personal property, and under the New York statutes, need not be recorded as a chattel mortgage. *Platt v. New York, etc. Ry.*, 9 N. Y. App. Div. 87 (1896); *aff'd*, 153 N. Y. 670. If the mortgage is not recorded as a chattel mortgage, then there arise the old and complicated questions of whether, the mortgagor remaining in possession and continuing to use the property, the mortgage is not void so far as other creditors are concerned. See *Bank of Leavenworth v. Hunt*, 11 Wall. 391 (1870), and a multitude of decisions on this subject as regards the ordinary chattel mortgage.

<sup>1</sup> A bondholder's rights are superior to those of a judgment creditor who had knowledge of the unrecorded mortgage before he obtained his judgment. *Butler v. Rahm*, 46 Md. 541 (1877). A purchaser who took with knowledge of an equitable lien takes subject to that lien. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). Where the parties for whose benefit a mortgage is given are directors, they are chargeable with notice of an existing unrecorded chattel mortgage. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105, 124 (1879). It may be added that under the recording acts of many of the states an unrecorded mortgage has priority over an attachment or judgment of a general creditor, whether the latter had notice of the mortgage or not. Where a mortgage of a corporation has not been recorded it is not good as against a receiver of the property of the corporation. *Cheney v. Maumee, etc. Co.*, 64 Ohio St. 205 (1901). A receiver appointed at the instance of general creditors may attack a chattel mortgage on the ground that it had not been properly recorded. *Bayne v. Brewer Pottery Co.*, 90 Fed. Rep. 754 (1898). Where a new mortgage is executed to secure bonds to be issued in exchange for old mortgage bonds, and an attachment is levied on the property before the recording of the new mortgage, the court will preserve the lien of the preëxisting mortgage as against such attachment. *Griffin v. International T. Co.*, 161 Fed. Rep. 48 (1908).

<sup>2</sup> *Roberts v. Hughes Co.*, 83 Atl. Rep. 807 (Vt. 1912).

<sup>3</sup> *Central Trust Co. v. Bartlett*, 57 N. J. L. 206 (1894). See also § 764, *supra*.



pany to sell any part until the mortgagee should take possession, may be void as to other creditors.<sup>1</sup>

Where a mortgagee at the request of the mortgagor corporation withholds the mortgage from the record to deceive the public until the mortgagor becomes insolvent, the mortgage may be set aside for fraud.<sup>2</sup> Although the failure to renew a mortgage may render it void as against creditors, yet this refers only to creditors who are in a position to seize the property under a lien or legal process.<sup>3</sup>

The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a party defendant and resides in the same state as the complaining corporation. The trustee in such a suit is merely a formal party.<sup>4</sup>

A decree at the instance of a corporation declaring void a trust agreement is not a bar to a holder of one of the bonds, secured thereby, collecting his bond.<sup>5</sup>

Where a corporation buys its unmatured bonds and causes the mortgage securing them to be canceled, but neglects to cancel the bonds, a *bona fide* pledgee of such bonds from the treasurer, who fraudulently abstracted them, is protected.<sup>6</sup>

<sup>1</sup> *Orman v. English, etc. Inv. Trust*, 61 Fed. Rep. 38 (1894). See also § 798, *supra*.

<sup>2</sup> *Curtis v. Lewis*, 74 Conn. 367 (1902). A mortgage securing bonds is not fraudulent by reason of the fact that it was agreed that it should not be recorded in order that the credit of the company might not be impaired. *Am. Trust & Savings Bank, etc. v. McGettigan*, 152 Ind. 582 (1899). Cf. §§ 691, 692, *supra*.

<sup>3</sup> *In re New York, etc. Co.*, 110 Fed. Rep. 514 (1901). In Missouri an unrecorded deed is good as against the grantor's creditors, if recorded before an execution sale under a judgment. *Sturdivant Bank v. Schade*, 195 Fed. Rep. 188 (1912).

<sup>4</sup> *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900). As to discharge in general, see § 765, *supra*. Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant, and serves them by publication, and, two of the trus-

tees having died, causes successors to be appointed by the court and obtains decree against the corporation and the trustees of the mortgage, canceling their title to the land, the decree is effective, and even though the mortgage is afterwards foreclosed the purchaser at such sale takes no title to such land, he having waited thirty years before attacking such decree. *Bump v. Butler County*, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality, whereby it conveyed land to a corporation, the court will not grant it any relief. *Rummel v. Butler County*, 93 Fed. Rep. 304 (1899).

<sup>5</sup> *National Salt Co. v. Ingraham*, 143 Fed. Rep. 805 (1906). See also § 762, *supra*. An agreement to pay dividends, whether earned or not, is illegal, and hence certificates of indebtedness issued in advance of such dividends cannot be enforced. *Strickland v. National Salt Co.*, 79 N. J. Eq. 182 (1911).

<sup>6</sup> *Rockville, etc. Bank v. Citizens'*



A railroad-mortgage trustee, who certifies on the bonds that they are secured by a mortgage executed and delivered to him, is liable to a holder of the bonds for loss of value occasioned by his neglect to record the mortgage, whereby a subsequent, duly-recorded mortgage obtains priority; but the claim is barred by a delay of over twenty years after the second mortgage was recorded.<sup>1</sup>

The subject of discharge of a mortgage is considered elsewhere.<sup>2</sup>

etc. Co., 72 Conn. 576 (1900). Even though a corporate mortgage is illegal, yet, if the amount due has been paid, the corporation may file a bill to have the mortgage canceled. *Portneuf, etc. v. Western Loan, etc. Co.*, 6 Idaho, 673 (1899). Even though a railroad mortgage is being foreclosed in the federal court on the supposition that a prior mortgage had been fully paid, yet a *bona fide* purchaser of bonds secured by such prior mortgage may bring a foreclosure suit thereon in the state court after the foreclosure suit in the federal court has been completed, even though such purchaser purchased during the foreclosure of the subsequent mortgage and was

aware of the default on such second mortgage. *Pittsburg, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896). Same case aff'd *sub nom.* *Pittsburg, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). As to whether a state statute requiring the production and cancellation of notes upon the discharge of a mortgage applies to a railroad mortgage, see *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900). See also § 765, *supra*, and § 816, *infra*.

<sup>1</sup> *Miles v. Vivian*, 79 Fed. Rep. 848 (1897), rev'g *Miles v. Roberts*, 76 Fed. Rep. 919 (1896). See also § 814, *infra*.

<sup>2</sup> See § 816, *infra*.







































